

# Health Care in Motion

Timely, Substantive Updates on Policy Shifts · Actionable Advocacy to Protect Health Care

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## Health Care in Motion – Looking Ahead

We want to thank all of you that took the time to respond to our survey, providing invaluable feedback on the value of Health Care in Motion and where we can improve. We have considered all of the disparate voices that replied and come up with a plan to adapt Health Care in Motion to the times we all live in—where health care policy developments are in constant flux, and the sources of such changes arrive from so many different angles. Here's the plan.

Health Care in Motion, first and foremost, will continue to emphasize the advocacy and issue education angles when health care news breaks. We want to listen to the voices telling us that Health Care in Motion is a primary source for actionable information on policy changes. For that reason, you can expect our dispatches to include ideas for where to focus your reaction to the day's development.

These dispatches will be published in one of two ways.

- First, where big, important news breaks, especially on issues that we have previously written about, we will endeavor to get that information circulated in the short term—usually within 24-48 hours of the development. These items will be short, with links either to a primary source (for example a new government bulletin, just released regulation, or direct statement from the actors involved), or a secondary source (like a news article or informed commentator).
- Second, we will publish—on a less frequent basis—in-depth analyses of health care access issues that affect our core constituency—low-income, chronically ill populations. You can expect this type of analysis approximately once per month.

In both cases, we will endeavor to identify actionable advocacy items.

Our biggest takeaway from the survey responses was that Health Care in Motion has been a helpful resource to individuals working on the front lines of both health care access and health care policy across the country. We take the corresponding responsibility very seriously and will continue to fill this role in the ongoing campaign to protect the health care that is—sooner or later—vital to all of us.

Thanks for reading! If you have an idea for a Health Care in Motion topic that you liked to see analyzed, or want to give us other feedback, please let us know at [chlpi@law.harvard.edu](mailto:chlpi@law.harvard.edu). And now, on to some recent health care highlights.

### Health Care Highlights

A great deal has been happening in health care in recent weeks, including many developments on issues discussed in previous Health Care in Motion publications. Some of these issues are now working their way through the courts, with

# Health Care in Motion

limited opportunities for grassroots advocacy. But if you are aware of a story to be told that matches the issues being argued about in court, please let us know at: [chlpi@law.harvard.edu](mailto:chlpi@law.harvard.edu).

There is a brand new legal challenge to the Affordable Care Act. Rub your eyes and it looks a lot like 2014 all over again, where the House of Representatives, under the speakership of John Boehner, [unsuccessfully](#) sought to exploit a drafting oversight in the law to bring the whole Affordable Care Act infrastructure tumbling down. In this new case, 20 red states—led by the Attorney General of Texas—have come together to [sue the federal government](#) in the United States District Court for the Northern District of Texas. The states' claim rests on the new tax law passed at the end of 2017, which reduced the penalty associated with the individual mandate to \$0. The states argue that the only conceivable justification of the individual mandate that lies at the heart of the Affordable Care Act is as a tax, and since that character has now been removed, the entire law is unconstitutional. Observers have labeled the new lawsuit "[risible](#)" (the legal code word for junk), and point out that even [conservative commentators](#) are [not expressing confidence](#) in its success. Cautious advocates will remember that earlier ACA challenges were also dismissed as non-serious. Nevertheless, [ThinkProgress waxes poetic](#): "The sun rises. The sun sets. Young people fall in love. Taxes are paid. People die. And Republicans make newer, dumber attempts to repeal Obamacare."

There have been a couple of new developments on the issue of Medicaid work requirements. We have [written about these requirements before](#). The federal agency responsible for Medicaid has invited states to submit proposals to have regular legal requirements waived in order for state officials to implement work requirements as a condition of receiving Medicaid benefits. Recall that a team of advocates led by the National Health Law Program and the Southern Poverty Law Center have [filed an artfully drafted complaint](#) in federal court in Washington D.C. challenging the federal government's approval of such proposals as an arbitrary act impermissibly undermining the fundamental purpose of the program. Since last we checked in on this important case, three major developments have occurred. First, CMS has continued to approve Medicaid work requirements, with [Seema Verma's](#) home state of Indiana joining Kentucky on the approved list. Kaiser Family Foundation has created an [invaluable resource](#) to track the status of these applications. Second, the federal government has made a motion to transfer the lawsuit to Kentucky, rather than keeping it in Washington D.C. The fate of this motion remains unclear, but its motivation is not—CMS would love to get the case out of the hands [of Judge James Boasberg](#), and into the courtroom of a Kentucky based judge, who might view their arguments more favorably. Last, the Governor of Kentucky, Matt Bevin (R), has weighed in. He has not only [promised to withdraw Kentucky](#) from Medicaid expansion should his work requirement waiver be invalidated by a court—the equivalent of taking your ball and going home—but he has also filed [his own lawsuit](#) in a Kentucky federal court, seeking to bolster the federal government's effort to have the case transferred. Advocates with compelling stories of how work requirements might harm Medicaid enrollees can fight back by contributing to the notice and comment process in states where they are active. More information is [here](#).

Our last update comes on the issue of anti-discrimination law. [We have written publicly](#) about the future of legal protections prohibiting discrimination on the basis of sexual orientation and gender identity. In short, such protections are threatened when the federal government and courts take an unreasonably narrow view of a federal law that prohibits differential treatment "[on the basis of sex.](#)" On February 26, 2018, the United States Court of Appeals for the Second Circuit (based in New York), issued an *en banc* ruling (meaning that it was a special convening of 13 of the court's judges) in the case of [Zarda v. Altitude Express](#). The case began in 2010 as a rather ordinary employment discrimination claim by a skydiving instructor claiming to have been fired because he was gay. After seven years of litigation, during which the Plaintiff himself [passed away](#) in a BASE-jumping accident in Switzerland, the Court of Appeals finally ruled that he had been discriminated against unlawfully. Overruling two prior decisions, the *Zarda* opinion stands for the proposition that sexual orientation

# Health Care in Motion

discrimination can be motivated, at least in part, by sex, and thus constitutes a form of discrimination “because of . . . sex,” in violation of Title VII of the Civil Rights Act. [As we have written](#), the judicial interpretation of this phrase is critically important to defining the scope of anti-discrimination protections enshrined in law for the LGBTQ community. *Zarda* represents a step in the right direction for the future of these protections. But the advocacy community continues to prepare for the Trump administration’s promised rewriting of the [hard-won 2016 regulations](#) outlining what constitutes discrimination in the context of health care. When the threat is made good, you can be sure we will let you know about it on Health Care in Motion and describe for you the most effective advocacy options available to concerned community members.

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