

Health Care in Motion

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

September 1, 2017 12:30PM EST

Health Care Returns: What to Watch This Fall

As summer wanes and September begins, our Members of Congress around the country are packing their bags to return to Washington. And as the seasons turn, so too do our thoughts turn back to health policy and the fate of the Affordable Care Act (ACA). It's set to be a busy fall, with significant activity expected in Congress and the Trump Administration.

The Centers for Medicare and Medicaid Services (CMS) issued the latest salvo in the wars of the ACA just last night when it announced that it has [slashed](#) the advertising budget for the upcoming open enrollment period by 90% and canceled the program designed to guide people through the enrollment process. If this is a sign of what is to come, advocates should prepare now for the fights ahead.

Here are the top stories to watch in the upcoming months:

- **Repeal Redux** - Will Congressional Republicans seek to revive the effort to repeal the ACA, either completely or through piece-meal legislation?
- **Marketplace Stability** – Can Bipartisan talks actually lead to successful legislation to fund cost-sharing subsidies and shore-up the Marketplaces?
- **The War from Within** - Will the Trump Administration ramp up its efforts to undermine the ACA and re-write key Obama era regulations?
- **State Waivers** - How much flexibility will states pursue with respect to Medicaid and state insurance standards?

All Eyes on Congress

When the Senate last convened it was for the [late night theatrics](#) of its failed vote to repeal the Affordable Care Act (ACA). In September, both House and Senate return to a heavy load of important must-do items, particularly [raising the debt limit](#) and [disaster relief](#) following Hurricane Harvey. What is unclear is whether either chamber will consider revisiting the effort to repeal and replace the ACA. Since that night, President Trump has had [harsh words](#) for Senate Majority Leader Mitch McConnell (R-KY) and his colleagues. Trump has repeatedly called on Congress to [renew their efforts](#) to pass repeal legislation, but thus far there seems to be [little appetite](#) among lawmakers for such an effort.

Health Care in Motion

Even if they do not return to efforts to repeal and replace the ACA, Congress may revisit health care for the purpose of considering a measure to [stabilize the state health insurance Marketplaces](#). Both Democrats and Republicans have signaled a [willingness](#) to take up such a measure, and there have been [bipartisan discussion](#) in [both Chambers](#). To date, the Trump Administration has [continued to fund](#) the cost-sharing subsidies that are critical to the health of the Marketplaces, but has repeatedly insisted that it might [cut off the funding](#) in the months ahead.

Congress could seek to preempt that risk by making the cost-sharing subsidies mandatory, and [reports indicate](#) they are considering doing just that, along with creating a stabilization fund and a few other proposals. When Congress returns, the Senate Committee on Health, Education, Labor, and Pensions (HELP) is set to hold [a series of bipartisan hearings](#), including one with state insurance commissioners and another with state governors, which are being billed as an effort to stabilize premiums and help consumers in the individual markets. However, this effort may come with trade-offs, as HELP committee chairman Lamar Alexander (R-TN) has [indicated](#) that he would also like to give states additional flexibility related to certain ACA standards.

To further complicate this volatile dynamic, the Children's Health Insurance Program (CHIP) will need to be [reauthorized](#) in the coming months. CHIP is a [federal program](#) that provides matching funds to states to insure millions of low-income children nationwide. Its current authorization is set to expire after September unless Congress acts to renew funding for the program. This legislation provides a potential vehicle for Congress to revisit the repeal effort or enact other policy changes. To Congressional Democrats, CHIP reauthorization is must-pass legislation, so Congressional Republicans know they may have leverage to include policy changes Democrats might otherwise not be willing to accept. Democrats, meanwhile, may look to CHIP reauthorization as a tool to put in place various "fixes" to shore up the ACA in an effort to insulate it from further Republican attack. With so much on the agenda, and tensions between and within the parties running high, advocates may see a volatile fall in Washington DC.

But Don't Lose Sight of the Administration

It is [common knowledge](#) that the Trump Administration's Department of Health and Human Services (HHS) bears no love for the ACA and is likely to do its best to undermine and dismantle Obama era programs from within. Regardless of Congress' failure to repeal the underlying law HHS can attack the ACA by reversing regulations and adopting different interpretations.

Now the only question is how fast and how comprehensive their efforts will be.

Early signs indicate that advocates should expect HHS to act quickly and vehemently, as it did in announcing a 90% reduction to the advertising budget for this year's open enrollment period. This is particularly concerning, as the stability of the Marketplaces depends heavily on how the Administration handles this upcoming open enrollment for the 2018 plan year. This year's enrollment period was already dealt a blow in April when the Administration announced it would be cut in half from three months to only 45 days. On Thursday, August 31, 2017, the Administration [announced](#) that it is cutting both advertising for open enrollment as well as the ACA's Navigator program, which provides critical assistance to individuals signing up for coverage on the Marketplaces. Rolling back these programs will likely mean that fewer younger, healthier individuals sign up for coverage, while those with significant health needs will affirmatively seek out coverage. This will likely lead to further premium increases in the future as insurers' risk pools become increasingly unfavorable.

Health Care in Motion

Two other areas where the Administration has already indicated that it will make changes include the contraceptive coverage mandate and the nondiscrimination provision known as Section 1557. While the exact timing is uncertain, it is widely [expected](#) that the Administration's [leaked interim final rule](#) that would significantly weaken the ACA's contraceptive coverage mandate will be finalized and take effect.¹ Should the rule be finalized in a similar form to the leaked draft, it would expand the availability of wholesale exemptions from the ACA's contraceptive coverage mandate. While this exemption is currently only available to churches and houses of worship, the leaked draft of the interim final rule would allow *any* employer who purports to have religious *or* moral objections to providing such coverage to obtain an exemption. As the National Women's Law Center notes, this rule may cause hundreds of thousands of women to [lose access](#) to no-cost contraceptives they currently have under the ACA.

The ACA's provisions prohibiting discrimination in health care programs and activities may also be undercut by the Administration. The law's nondiscrimination provision, called Section 1557, prohibits discrimination based on race, color, national origin, sex, age, or disability in certain health care programs and activities which receive federal funding, including the ACA's Marketplaces and health care providers that accept Medicare and Medicaid funding. When HHS issued [regulations](#) implementing section 1557, discrimination on the basis of sex was interpreted to include discrimination based on both gender identity and prior termination of pregnancy. Religious health care providers challenged this interpretation in [Franciscan Alliance v. Burwell](#),² heard in late 2016, now styled *Franciscan Alliance v. Price* reflecting the name of the new Secretary of HHS, Tom Price. Judge Reed O'Connor of the United States District Court for the Northern District of Texas took the significant step of issuing a [nationwide preliminary injunction](#), prohibiting HHS from enforcing Section 1557 as it relates to gender identity and termination of pregnancy.

Most recently, HHS asked Judge O'Connor to remand the case to HHS, so that it could reconsider the challenged provisions of the regulations. On July 10, Judge O'Connor [granted](#) HHS's request and remanded the case back to the agency. HHS has stated in a status report to Judge O'Connor that it has submitted a draft of the re-written rule to the Justice Department for review, after which it will be submitted to the Office of Management and Budget and subsequently posted for public comment. While removing the protections of Section 1557 for gender identity and prior termination of pregnancy is already concerning, HHS may go above and beyond this remand and seek to further undercut Section 1557's protections. Advocates should watch for this rule and be prepared to provide comments.

The Trump Administration has also empowered states to pull back many of the ACA's protections, having made state flexibility the [central tenant](#) of its health care policy platform. In light of Congress' failure to repeal the ACA, Republican controlled states may instead use this flexibility to opt their states out of various ACA programs and requirements. While waivers could be used in a manner that helps to stabilize Marketplaces while protecting access to care, they must be watched closely, as they can also be used to reduce benefits, restrict access to care, and re-formulate subsidies. The Trump Administration has already signaled a willingness to consider waiver proposals that had been rejected by the Obama Administrations for unduly restraining access to needed care.

¹ For a more in-depth discussion of this rule, please see our previous *Health Care in Motion* piece [here](#).

² For a more in-depth discussion of *Franciscan Alliance*, please see our previous *Health Care in Motion* piece [here](#).

Health Care in Motion

There are two primary categories of waivers that states have at their disposal. One is [1332 waivers](#), which allow states to request a five year exemption from certain ACA insurance protections, most notably the essential health benefits requirements and limits on cost sharing. 1332 waivers also give states flexibility with respect to their Marketplaces and the individual and employer mandates. [Section 1115 waivers](#), meanwhile, give states flexibility in how they design and administer their Medicaid programs. Under a section 1115 waiver, states can potentially enact policies in their Medicaid program that are not otherwise authorized under the law, including capping Medicaid eligibility, introducing cost-sharing measures above statutory limits, and imposing work requirements. For governors who are opposed to the ACA and/or want to make changes in their Medicaid program, these waivers may allow them to enact policies at the state level regardless of any federal level repeal. Many of the Republicans' proposals to repeal and replace the ACA included significant structural changes to the Medicaid program.³ State governors may look to enact some of the proposals, regardless of Congress' inaction, through waiver authority.

³ For a more in-depth discussion of republican proposals, please see our previous *Health Care in Motion* pieces [here](#).

Health Care in Motion is written by:

*Robert Greenwald, Faculty Director at the Center for Health Law and Policy Innovation;
Caitlin McCormick-Brault, Associate Director at the Center for Health Law and Policy Innovation; and
Phil Waters, Clinical Fellow at the Center for Health Law and Policy Innovation.*

For further questions or inquiries please contact Caitlin McCormick-Brault, cmccormickbrault@law.harvard.edu.

Subscribe to all Health Care in Motion Updates