SECTION 1332 OF THE AFFORDABLE CARE ACT

STATE INNOVATION WAIVERS FACT SHEET

INFORMED ON REFORM

Overview

Under Section 1332 of the Affordable Care Act (ACA), states can receive permission to waive key provisions of the law in order to implement innovative, alternate health coverage rules or programs while retaining basic consumer protections. Beginning in 2017, states can apply for the five-year waivers through the Department of Health and Human Services (HHS).

What can and cannot be waived

In the application, states can request to waive or modify any or all of the following ACA provisions.

- Individual and/or employer mandate penalties*
- Essential Health Benefits (EHBs) and cost-sharing requirements
- Premium tax credits and cost-sharing reductions
- Marketplaces (including the rules/certification for Qualified Health Plans offered on the Marketplace and using the Marketplace to determine subsidy eligibility)
- Maintaining a single risk pool in the Marketplace
- "Plan categories" (or metal levels) on Marketplaces

Note: Waiver applications to-date have frequently requested waiver of the single risk pool requirement to implement reinsurance programs; however, some states have requested waiver of the other eligible provisions.

Waivers cannot be used to modify or eliminate other patient protections, such as guaranteeing that health plans accept an applicant regardless of their health status, prohibiting charging an individual with a preexisting condition more for coverage, prohibiting annual or lifetime limits, and offering coverage for adults as dependents up to age 26.

* On Dec. 22, 2017, the Tax Cuts and Jobs Act was signed into law, which includes permanent effective repeal of the individual mandate by zeroing out the penalty beginning in 2019.

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Potential employer impacts

While the majority of provisions that can be waived or modified affect the individual market, 1332 waivers can potentially affect the employer market.

- The employer mandate penalty can be waived or modified.
- For small groups, states can expand the employer size allowed to participate in Small Business Health Options Program (SHOP) or discontinue the program; however, other market rules (including ratings) cannot be modified.
- Employers could be indirectly affected by other waiver proposals, including changes to EHBs and cost-sharing.

Other rules applicable to small, large and self-funded groups cannot be altered through a 1332 waiver.

Waiver guardrails

The ACA includes "guardrails," limiting how 1332 waivers can be used by states. To receive consideration and approval for a waiver, a state must demonstrate that its innovation plan will meet the following criteria.

- **Comprehensiveness.** The coverage must be as comprehensive as coverage available on the public Marketplaces.
- **Affordability.** The coverage must provide protections against excessive out-of-pocket spending and be as affordable as coverage offered through the public Marketplaces.
  - Out-of-pocket spending includes premium contributions, cost-sharing and spending on non-covered services.
- **Scope of coverage.** Coverage must be accessible to at least as many people as the ACA would cover without the waiver.
- **Deficit neutral.** The coverage must not increase the federal deficit.

2015 guidance from the Centers for Medicare & Medicaid Services (CMS) specified that coverage and affordability guardrails would be measured both annually and over the five-year period as a whole. Evaluating comprehensiveness must include coverage under all 10 EHB categories and under any one EHB category.

Overall, the guidance also explains that the state must assess how each guardrail is addressed for the residents as a whole, and specifically how it could affect "vulnerable populations" (i.e., low-income individuals, the elderly and those with serious health conditions or health risks) to ensure they would not be adversely affected.

Federal funding for waivers

Depending on the waiver design, states can receive federal pass-through funding to assist with cost of the proposal. The pass-through provides the state with funds equal to the total premium tax credits, cost-sharing reductions (CSRs) and small business credits that residents would otherwise have received from the ACA-regulated Marketplace. The amount of pass-through funding will be determined annually by the HHS or Treasury Secretary, as appropriate.

Because of the requirement that a waiver be deficit neutral to the federal budget, expenses above and beyond what can be covered using pass-through funding must be provided for at the state level. While some states may use general revenue funds to cover the difference in cost, others are considering new assessments on all health insurer's fully-insured plans and on self-funded employers.

State activity

To date, 1332 waiver activity has been somewhat limited, but interest from states is increasing. Since Section 1332 became effective in 2017, the following state waivers have been approved.

- **Alaska** (effective 2018 – 2022): Waives the single risk pool requirement so that it can implement the Alaska Reinsurance Program (ARP). The ARP is a state-operated program that covers claims in the individual market for individuals with one or more of 33 identified high-cost conditions to help stabilize premiums. Alaska will receive pass-through funding equal to what the federal government will save on premium tax credits.

- **Hawaii** (effective 2017 – 2021): Under its approved waiver, Hawaii is not required to operate a SHOP program, as well as related provisions. Hawaii stated that "some of the [ACA] insurance exchange requirements of the federal act have confused or conflicted" with Hawaii's long-standing law that requires "virtually all employers" to offer coverage and provides premium assistance to small employers. The funding associated with ACA small business tax credits that would otherwise be paid to Hawaii small employers is being provided as pass-through funding to the state to support its program.

- **Maine** (effective 2019 – 2023): Waives the single risk pool requirement to implement the Maine Guaranteed Access Reinsurance Association program. Maine will receive pass-through funding equal to what the federal government will save on premium tax credits.

- **Maryland** (effective 2019 – 2023): Waives the single risk pool requirement so that it can implement the Maryland State Reinsurance Program. Maryland will receive pass-through funding equal to what the federal government will save on premium tax credits.

- **Minnesota** (effective 2018 – 2022): Waives the single risk pool requirement in order to implement the Minnesota Premium Security Plan (MPSP) reinsurance program. The state will receive pass-through funding equal to what the federal government will save on premium tax credits.

- **New Jersey** (effective 2019 – 2023): Waives the single risk pool requirement so that it can implement the New Jersey Health Insurance Premium Security Plan. New Jersey will receive pass-through funding equal to what the federal government will save on premium tax credits.

- **Oregon** (effective 2018 – 2022): Waives the single risk pool requirement so that it can implement the Oregon Reinsurance Program beginning in 2018 and will receive pass-through funding equal to what the federal government will save on premium tax credits.

- **Wisconsin** (effective 2019 – 2023): Waives the single risk pool requirement so that it can implement the Wisconsin Healthcare Stability Plan beginning in 2019. Wisconsin will receive pass-through funding equal to what the federal government will save on premium tax credits.

Other innovations possible under 1332 waivers

In addition to maintaining current state programs or introducing reinsurance programs as previously described, other options for states through the waiver program include:

Eliminate the employer mandate penalty

States can modify or eliminate the penalty on large employers who do not offer affordable, minimum value coverage to their full-time employees. The state could choose to enforce new or existing state laws that would ensure employees retain access to coverage. Similar to eliminating an individual mandate penalty, states that wish to remove this penalty must find ways to ensure the waiver request remains budget neutral.

Introduce subsidy alternatives

A state could also use a 1332 waiver to modify the ACA subsidies offered to lower income individuals who purchase coverage through the Marketplace. These modifications could include offering subsidies to a larger range of income limits and having individuals pay a fixed percentage of premiums (with the state covering the rest). Any expansions would need to remain budget neutral to the federal government.