



Potential for Major Health Policy Changes in 2021

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Presidential Elections and Texas v. California Implications

This next year could see profound changes in how health care is provided in the United States. Two upcoming events stand out as key determinants for how profound the changes could be.

The first event that could have significant effects on the US health care system is the pending case on the constitutionality of the Affordable Care Act (California v. Texas). The Supreme Court of the United States (SCOTUS) will hear oral arguments in November and render a decision in the spring of 2021 about whether the Affordable Care Act (ACA) is constitutional or if parts or even all of the law are invalid. Given the importance the ACA has on coverage and the regulatory structure of health insurance in the US, the implications could be significant and far reaching.

The second event is the 2020 United States Presidential election. Presidential elections

typically have a substantial effect on federal health policy. This brief examines the two major Presidential nominees' positions and health policy goals. The Democratic nominee, Joe Biden, and the Republican nominee, Donald Trump, have put forth divergent views. Among the sharpest contrasts for the two candidates is their position on the ACA.

This brief will outline the potential changes that could be in store for health care in the United States in 2021 and beyond, based on the SCOTUS decision and election results.¹ The opinions and estimates included in this report are those of the authors and may not represent those of others at Wakely. Given the uncertainty and lack of details available at this time, this paper is not meant to predict specific outcomes. It is only meant to support robust discussion and debate. The discussion in this paper will likely

¹ While this brief lays out potential outcomes, it does not lay out the probability of the outcomes.

become out of date very shortly as the politics of the day continue to change and evolve.

The Supreme Court and the ACA

The Affordable Care Act will be on trial again during the Supreme Court case - California v. Texas. The case is scheduled to be argued on November 10, 2020 with a ruling expected around June 2021. A ruling against the ACA could have seismic implications.

Explaining California v. Texas

In February of 2018, Texas and 20 other states sued the federal government, seeking to have the entire ACA ruled unconstitutional. Texas argued that when the Tax Cuts and Jobs Act (TCJA) of 2017 set the individual mandate penalty to \$0, the individual mandate is no longer constitutional as a tax. They argue further that without the individual mandate, the rest of the ACA should be ruled unconstitutional. The Federal government under the Trump Administration agreed with the Texas position, although has argued that only ACA provisions that harm the plaintiffs should be struck down.² Since the Trump Administration decided against defending the ACA, 17 states (led by California) have defended the ACA in court.

Possible Outcomes

The possible outcomes of the SCOTUS ruling can be categorized broadly as follows:

- Status Quo/Minor Changes

- Major Changes to Certain ACA Provisions
- Entire ACA Ruled Unconstitutional

Status Quo/Minor Changes

The current status quo of the ACA is that the mandate exists but has no financial penalty. If the Supreme Court were to rule in favor of California (i.e., the ACA), then the current status quo would continue. Furthermore, if the Supreme Court rules that the mandate is unconstitutional, but the rest of the ACA is constitutional, the effect would be minimal as the mandate is currently not being enforced.

Major Changes to Certain ACA Provisions

SCOTUS could rule that not only is the mandate unconstitutional, but other related provisions would also be invalidated. The exact provisions that would be eliminated would depend on which provisions SCOTUS (or other Federal courts) considers non-severable. Some of the provisions that are considered most likely to be eliminated if one or more were eliminated include:

- Market reform rules in the individual market (i.e., guaranteed issue)
- Subsidies for the individual market
- Medicaid eligibility expansion

Such changes could have far reaching implications as there are currently at least 17

² <https://affordablecareactlitigation.files.wordpress.com/2019/05/5c-us-brief.pdf>

million Medicaid expansion and at least 9 million subsidized individual market enrollees.³

Entire ACA Ruled Unconstitutional

This outcome would have far-reaching implications for the health system as a whole. This outcome could occur if the Supreme Court ruled that the mandate was unconstitutional and the rest of the ACA was non-severable. Kaiser Family Foundation has comprehensive listings of all implications;⁴ however, in this memo, we will discuss a few of the major potential changes to the individual market, group markets, Medicaid, and Medicare.

Each of these markets could experience large changes if the ACA were eliminated.

Individual Market

- Protections against underwriting, limitations on ratings, cost-sharing and benefit requirements, and the existence of subsidies would all end. Unless states take specific actions, the individual market will revert to its pre-ACA status with leaner benefits and less healthy individuals excluded from the market, and with lower premium products. States would need to consider sweeping changes to state based laws and regulation to recreate a viable market.

Employer Group and Self-Insured Markets

- For both Small and Large Group markets, current restrictions against annual/lifetime limits, the requirement of a maximum out of pocket, employer mandate penalty, and requirements on child eligibility until age 26 would end. While states could enact regulatory changes on their fully-insured group markets, given ERISA pre-emption rules they would limited ability to enactment protections for employees covered under self-insured plans.
- In addition, without state action, Small Group market prohibitions on charging higher rates based on medical conditions, the requirement to cover all Essential Health Benefits, and requirement for plans to adhere to the metal tiers would be eliminated.

Medicaid

- Medicaid Expansion population funding, financial eligibility for certain long-term care services and support, and requirements for enrollment simplification would be ended.

Medicare

- Medicare Advantage benchmark formula, Part D coverage gap, demonstration authority, Medicare

³ <https://www.kff.org/health-reform/fact-sheet/potential-impact-of-texas-v-u-s-decision-on-key-provisions-of-the-affordable-care-act/>

⁴ <https://www.kff.org/health-reform/fact-sheet/potential-impact-of-texas-v-u-s-decision-on-key-provisions-of-the-affordable-care-act/>

income-related premium would all need to be altered to their pre-ACA formula. Additionally, since the MACRA (2015) law is linked to ACA provisions, it could also be changed.

Overall if the ACA was repealed and no replacement bill was enacted, the expectation is that the number of uninsured would increase. For example, the Urban Institute estimated a full repeal would increase the number of uninsured by 19 million or 65 percent.⁵

Other Considerations

There are additional considerations to the ruling. The first is on the issue of timing. The ruling could remand some of the key details to a lower court to decide. The ruling could not be effective until a later date. Either outcome would result in the full effect of the ruling to not be until much later (e.g., 2022).

Secondly, the ruling could have different geographic implications. SCOTUS could only apply its ruling to Texas and the other states challenging the ACA. For states that did not join the lawsuit, there may be no impact.

Finally, it should be noted that any major ruling could result in new legislation to replace any overturned provisions. Consequently, who is President (and which party controls Congress) could be more important than usual if the Supreme Court rules against the ACA.

A Second Trump Term

A second Trump term could have considerable implications on health policy based on general policy goals communicated as of the date of this report publication. Of note is that a detailed plan to replace the ACA has not been released by the the Trump Administration. In particular, major changes could include:

- ACA Repeal and Replace
- Greater Transparency
- Reducing Out of Pocket Expenses for Part D Members
- Changing Medicaid Eligibility Rules (Work Requirements)

A full repeal of the ACA would affect nearly every segment of the US health care system

The Trump Administration has sided with Texas in the California v Texas Supreme Court case. They wrote a brief to the court on Thursday, June 25, 2020, arguing that the ACA has been unconstitutional since the individual mandate penalty was set to zero in 2017.⁶ The Trump Administration has promised to push for a replacement plan to the ACA.

⁵ https://www.urban.org/sites/default/files/publication/100000/repeal_of_the_aca_by_state_2.pdf

⁶ <https://khn.org/morning-breakout/trump-administration-asks-supreme-court-to-overturn-health-law-in-midst-of-escalating-pandemic/>

Greater Transparency

The Trump Administration advocates for improving price and quality transparency in the healthcare system. On November 15, 2019, CMS finalized policies regarding transparency entitled “Improving Price and Quality Transparency in American Healthcare to Put Patients First.” This includes requiring hospitals to publicly post standard charge information in a consumer-friendly manner and must include detail such as payer-specific negotiated charges.⁷ The proposed budget builds on efforts to continue enhancing transparency in order to ensure affordability and accessibility for Americans, prioritizing the most vulnerable.⁸

Changes to Drug Prices for Medicare Part D Beneficiaries

The 2021 Trump Administration budget also pushed to reduce prescription drug prices. For example, CMS implemented a Part D Senior Savings Model that allows Medicare beneficiaries to receive access to insulins at a maximum of \$35 copay per month. Other policies aimed at lowering out of pocket drug costs for Medicare beneficiaries could be pushed. For example, the 2021 budget included proposals to include an out-of-pocket maximum for Part D beneficiaries, improving incentives to contain costs, and reducing out-of-pocket expenses for seniors. It also supports lower-cost

generic and biosimilar drugs to achieve the goal of increased competition and lower drug prices.

Medicaid Eligibility Changes

The Trump Administration has worked towards implementing work requirements for Medicaid beneficiaries. While the US Court of Appeals rejected Trump’s proposed rule that would allow Arkansas and other states to impose work requirements on those who receive Medicaid benefits, the Trump Administration continues to push for Work Requirement policies.⁹ For example, its 2021 budget included a proposal to increase the applicability of work requirements for Medicaid. Specifically, it would implement requirements that non-disabled, working-age individuals from 18 to 65 years old find employment or individualized work activities for a minimum of 20 hours per week in order to receive welfare benefits (unless exempt).

A Biden Administration

The Democratic Nominee for President, Joe Biden, has outlined very different policy goals than the Trump Administration. Many of his initiatives continue the work he completed as Vice President in the Obama administration. Three of the key proposals¹⁰ include:

- Creation of a Public Option

⁷ For a more detailed description of CMS’ transparency requirements see <https://www.cms.gov/newsroom/fact-sheets/cy-2020-hospital-outpatient-prospective-payment-system-opps-policy-changes-hospital-price>

⁸ For the full Trump Administration 2021 budget see https://www.whitehouse.gov/wp-content/uploads/2020/02/budget_fy21.pdf

⁹ <https://www.nbcnews.com/news/us-news/federal-court-strikes-down-trump-administration-s-medicaid-work-requirements-n1137136>

¹⁰ <https://joebiden.com/healthcare/#>

- Increased Subsidies in the Individual Market
- Expanded Medicare Eligibility/Allow for Prescription Drug Negotiation

Public Option

One of the main proposals of the Biden plan is the development of a public option.¹¹ A public health plan would intersect all product lines and have the most notable impact on Medicaid, group coverage, and the individual market. The plan would be available to all US citizens, including those with healthcare plans provided by their employers. A public health care option includes care coordination efforts, primary care coverage, and higher levels of negotiation with providers.

The public option plan would be available to the Medicaid expansion population at no-cost to them in non-expansion states. All states would have the option of either continuing to run a state-based Medicaid program or combining with the public plan at the same level of funding as before. In the individual market, the public health plan would be available to all citizens with similar benefits and cost-sharing as the current Gold and Silver plans. Even individuals with coverage through their employers could choose the public option instead. The Biden Campaign noted that the public option would be operated by the Center for Medicare. Without details of the exact policy, there is some uncertainty about the implications for individual market enrollment (potential for increases) and Medicaid (potential

for shifting of Medicaid enrollment out of Medicaid to the individual market).

Increasing Subsidies in the Individual Market

The Biden Campaign also seeks to provide larger subsidies to enrollees in the individual market. His plan outlines three ways to increase subsidies by 1) eliminating the 400% income cap on tax credit eligibility, 2) decreasing the maximum limit of the cost of coverage to 8.5%, and 3) basing subsidies on a Gold plan rather than a silver plan.¹² Combined with the public option proposal, this could dramatically increase the amount of subsidies and the number of people eligible for subsidies in the individual market.

Medicare Changes

Biden's campaign also outlined multiple proposed changes to the current Medicare program. The most notable change is decreasing the Medicare age from 65 to 60. This change impacts Medicaid and the individual market, both in terms of increased enrollment and morbidity.

Biden's plan also proposes policies designed to decrease drug prices for Medicare beneficiaries. His plan would repeal the current law that prohibits Medicare from negotiating with drug corporations.¹³ The campaign also proposes to limit drug prices included in the Part D formulary such that prices increase annually by no more than the rate of inflation.

¹¹ ibid

¹² Ibid

¹³ Ibid

Conclusion

2021 could bring dramatic changes to health care policy. One of the central questions, which could be impacted by both the Supreme Court and the 2020 election, is if the ACA will be significantly altered. Both the Trump Administration and several states have pushed for the ACA to be struck down. Conversely, the Biden Campaign is pushing for the ACA not only to continue but to be expanded. Beyond the ACA, while both campaigns have focused on similar problems (for example, high drug costs for Medicare beneficiaries), the campaigns have put forth proposals with very different policy solutions. The composition of Congress post-election, prioritization of other issues (i.e., COVID-19 or the economic recovery), and other factors can and will impact which campaign promises become a reality. However, given the magnitude of potential changes to all lines of business, monitoring both the election and the Supreme Court ruling is imperative in understanding how the health care system may change in 2021.

Please contact Julie Peper at juliep@wakely.com or Adam Rudin at adam.rudin@wakely.com with any questions or to follow up on any of the concepts presented here.

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