PERSPECTIVE

State Governments and Judges May Moderate the Impact of the Trump Administration's Promotion of Medicaid Work Requirements

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In January 2018, the Center for Medicare and Medicaid Services (CMS) released guidance that encouraged states to submit Section 1115 waivers that impose work requirements on some Medicaid beneficiaries. To evaluate the potential impact of a policy, we need to accurately predict both how far a policy will spread and how durable it will prove over time. This commentary draws upon recent political science scholarship to describe potential constraints that changes in state-level partisan control can impose on CMS's current waiver strategy, as well as how state-level constraints might interact with judicial review to further limit the policy's spread.

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Since Republican legislative efforts to repeal the Affordable Care Act (ACA) and drastically cut Medicaid eligibility and funding stalled in 2017, the Trump administration has employed a variety of executive strategies to retrench Medicaid. One notable example is encouraging states to apply for waivers from the Center for Medicare and Medicaid Services (CMS) that would allow the imposition of more stringent eligibility criteria on adults using Medicaid. The most controversial of these are "community engagement" standards which would require certain classes of adults to engage a certain number of hours of work-related activities a month to qualify for Medicaid. Considerable insightful commentary and research has discussed the legality of the proposed work waivers,[1, 2] their potential effects on coverage if they were widely adopted,[3] and on how physicians and public health experts might be able to counteract potential negative effects.[4] However, little discussion has focused on how widespread waiver-supported work requirements might become.

Although turning to the states allows the Trump administration to bypass the need for Congressional action, the strategy's effectiveness faces two new sets of constitutional constraints: federalism and the judiciary. Here, we use recent political science research into the effects of waivers to demonstrate how changing partisan control of state governments and the slow process of lawsuits in the courts can influence the number of states that successfully seek waivers imposing work requirements, which in turn drastically influences how many Medicaid recipients will be subject to work requirements.

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SECTION 1115 WAIVERS, WORK REQUIREMENTS, AND THE ACA

Section 1115 of the Social Security Act grants the Secretary of the Department of Health and Human Services (HHS) latitude to waive federal statutory and regulatory requirements for state Medicaid programs. This allows states to pursue demonstrations that may better tailor Medicaid to the needs of an individual state or provide data on how to improve the program. As of November 2018, 37 states had 45 waivers in place.[5]

Although Section 1115 mandates waivers are supposed to further the underlying goals of Medicaid, the executive branch retains considerable discretion over the types of waivers that it might encourage and approve.[6] In January 2018, CMS issued new guidance to state Medicaid directors announcing significant shifts in the types of projects that would be allowed. The guidance de-emphasized coverage expansion and encouraged states to submit plans that would require some adults to prove that they were employed or engaging in job-related activities (like education or job searching) or community engagement (like volunteering) to access benefits.[7]

CMS argued that states should have the opportunity to test community requirements because research has shown that there is a negative association between unemployment and health. The letter also cites one study noting a positive effect of employment on mental health and two studies finding positive links between volunteerism and mental health.

However, a literature review on the ACA's Medicaid expansion conducted by the Henry J. Kaiser Family Foundation

incorporating nearly 400 research studies or reports strongly suggests that reducing Medicaid coverage will have negative consequences for both health providers and patients.[8] According to the review, coverage gains driven by the expansion are associated with reductions in unmet medical need, better access to care, and reductions in patient medical spending and medical debt, as well as improvements in self-reported health.

For providers, increased coverage has resulted in reductions of uncompensated care, improved financial performance, and reductions in the likelihood of hospital closure. These effects are especially concentrated among systems in rural and underserved areas.[8] Perhaps ironically, given the stated intent of implementing work requirements, at least one investigation has found that Medicaid enrollment has a positive association with finding employment.[8]

The debate over linking social welfare benefits to work in the USA transcends the recent passage of the Affordable Care Act. For example, many recipients of Temporary Assistance to Needy Families (TANF) benefits have been subjected to work requirements since 1995. However, linking Medicaid benefits to work requirements for able-bodied adults primarily functions to undermine coverage expansions of the ACA more subtly than simply canceling existing a state's ACA's Medicaid expansion, which is extremely popular across all states.[9] Several Republican governors, most notably Kentucky's Matt Bevin, initially campaigned on eliminating the Medicaid expansion outright, but later embraced work requirements and other ways to trim Medicaid rolls as a fallback position when he recognized broad opposition to ending the expansion.[10]

Of the initial 12 states that had formally applied for a federal waiver as of August 2018, according to the Kaiser Foundation, seven targeted the group receiving coverage under a current or proposed Medicaid expansion, and five (AR, AZ, NH, OH, and UT) solely targeted expansion groups. Additionally, Wisconsin's waiver application only targets childless able-bodied adults on Medicaid, which would be an expansion population in any other state.[11]

Finally, approving waivers that permit states to implement restrictions like work requirements would partially reverse ACA coverage gains regardless of whether a state expanded Medicaid. The ACA incorporated numerous Medicaid reforms beyond the expansion that took effect across all states. These reforms streamlined the Medicaid application process, making it easier for already-eligible people to apply to the program by cutting application length and by requiring that applicants be allowed to apply online, over the phone, or in person. In contrast, work requirements force recipients to document their employment to state authorities both to apply and to maintain eligibility for Medicaid, adding bureaucratic hurdles that burden applicants. More paperwork also increases potential for administrative error or delay, raising risks of eligible enrollees losing coverage.[12] Estimates suggest that between 1.5 million and 4 million Medicaid recipients would lose health insurance coverage if all states adopted community engagement standards.[3]

POTENTIAL ELECTORAL AND JUDICIAL LIMITS OF A WAIVER STRATEGY

Although consequences of the widespread adoption of work requirements on the ACA's coverage expansion could be severe, the breadth and staying power of Trump's Medicaid waiver strategy remain unclear. Political Scientist Elizabeth Mann's research has found that pursuing a waiver strategy is common for presidents when blocked by Congress in several policy arenas, including Medicaid. She notes that a waiver strategy outflanks the "horizontal" constraints imposed by Congress, but runs headlong into the "vertical" constraints of state governments. Governors are particularly important actors because they oversee the administrative agencies that apply, negotiate with federal officials, and implement waivers. Therefore, presidents facing laws they dislike and a Congress unwilling to modify them will only most aggressively use a waiver strategy when members of the president's party control a large proportion of governorships.[13]

As of September 2018, Republicans controlled 35 of 50 governorships, leaving a wide scope for waivers, with Republican governors in Kentucky, Indiana, Arkansas, and New Hampshire already gaining approval for their programs.[11] However, in November 2018, 26 Republican-controlled governorships were up for election. The non-partisan Cook Political Report rated 14 of these races as competitive, including seven states that have submitted waivers.[14] Ultimately, Democrats won seven Republican-held seats, including four states that had applied for waivers. This shift toward Democratic control limits the scope for the administration to put its stamp on state Medicaid programs using a waiver strategy. For example, Maine abandoned its proposed state waiver when Democratic Governor Janet Mills took office in January.[15]

State legislatures also moderate the effectiveness of a waiver strategy. Unlike governors, legislatures do not play a direct role in negotiating Medicaid waivers with the federal government. However, they can pass bills directing governors to apply for waivers and those bills often mandate elements of what a waiver application must include. Although governors can veto these bills, a legislative push does draw attention to and increase pressure for work requirements. Prior to the election, Republicans controlled 67 of 98 partisan state legislative chambers, giving them vast power to push their preferences.[16] Several Republican-controlled legislative chambers have passed legislation requiring that their governors seek waivers imposing work requirements.[17]

But Republicans also faced electoral headwinds in state legislative races. Early estimates suggested that as many as 14 chambers were at risk of flipping from Republican to

Democratic control, including five in states actively considering work-requirement waivers. Democrats flipped six, including those in Maine and New Hampshire, states which have either applied for or won approval of work requirements.

While Republican-controlled legislatures favor legislation that would direct governors to seek a work-requirement waiver, Democratic-controlled ones could pass laws that constrain a Republican governor's ability to negotiate work requirements. They might be blocked by a Republican governor. However, in situations of divided government, the party controlling the legislature forces the governor to bargain over a variety of issues, and can usually achieve some legislative priorities that limit the scope of the governor's authority to implement policy. For example, Democrats won the Michigan House of Representatives in 1996, ending unified Republican control. As a result, they were able to place legislative constraints on GOP Governor John Engler's ability to implement managed care in the state's Medicaid program.[18] In states where Democrats cannot win control of a legislative chamber, narrowing Republican majorities can limit GOP power to pass waiver-related legislation by shifting the balance of power to more moderate members of the Republican caucus.

Finally, despite bypassing Congress with a waiver strategy, the Trump administration also faces a potential horizontal check from the judicial branch of the federal government. HHS allowing states to impose work requirements may run afoul of the underlying legislative intentions of both the ACA and the Social Security Act and multiple groups have sued.[1] On June 29, 2018 judge James Boasberg of the U.S. District Court for the District of Columbia issued a summary judgment that blocked the implementation of Kentucky's proposed work requirements. The ruling itself was narrow, suggesting that CMS did not properly consider potential coverage losses that the state projected work requirements would cause, which simply has resulted in CMS creating an additional period for public comment before reconsidering the application. However, while the judge declined to rule on the underlying legality of work requirements, he stated in his ruling that the primary purpose of Medicaid was to provide health insurance coverage, indicating skepticism that work requirements are an appropriate subject for a section 1115 waiver.[19] Since the initial Kentucky ruling, several Medicaid recipients in Arkansas filed suit against that state's waiver, using similar arguments.[20] In March 2019, Boasberg rejected both the Arkansas program and the revised Kentucky waiver, throwing doubt on the viability of work requirement waivers in effect or proposed in 13 other states.[21]

Judicial checks can interact with state-level checks to further limit waivers' impact. Even if federal courts ultimately allow work requirements, injunctions that temporarily block waivers from going into effect while cases go to trial may stop implementation for years. If elections shift partisan control of state governments before cases are resolved, new Democratic governors can withdraw waiver applications. Alternatively, new Democratic governors or more liberal legislatures may use their increased leverage to negotiate and extract a major liberal policy goal in exchange for work requirements, like enacting a Medicaid expansion, as happened in Virginia.[22]

Waivers last five years, meaning that they would outlast the first term of an incoming governor opposed to work requirements. However, a Democratic governor could relax rules or ease enforcement governing work requirements, eroding their practical effect. After waivers end, states without Republican control would likely not reapply to keep them. Finally, if Trump were to lose the presidency in 2020, a Democratic administration could reverse the policy of allowing new Medicaid work requirements.

Ultimately, the Trump administration's waiver strategy may simply swap Congressional roadblocks for state-level and judicial ones. Recent Republican dominance of state governments has provided fertile ground for the administration's waivers curtailing Medicaid benefits, but long-term viability depends upon election results.

Assuming courts affirm their legality, over the medium-term waiver-driven work requirements will only become entrenched in states with consistent Republican control—generally those in the South, the Great Plains, and parts of the Mountain West. States in the Northeast, Mid-Atlantic, and Pacific Coast regions will likely retain more generous programs. The result would further entrench the divide between healthcare systems in Red and Blue states, but it need not fundamentally remake the nation's healthcare landscape.

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