



Medicaid Work Requirements: An End to the Litigation?

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UPDATE: After this Sidebar was published on March 4, 2021, the Supreme Court [removed](#) the Medicaid work requirement litigation from its oral argument calendar. The Court has not yet ruled on the Biden Administration’s motion to vacate the U.S. Court of Appeals for the D.C. Circuit’s decisions. The original post is below.

As part of [Medicaid](#) program reform efforts, a debate continues over “community engagement” activities—so-called “work requirements”—which require certain nondisabled adults to work, volunteer, attend school, or participate in other qualifying activities as a condition of program eligibility or coverage. While [proponents](#) of these requirements assert such policies may improve the health of Medicaid beneficiaries and help shift these individuals to private-sector health coverage (thereby promoting “[fiscal sustainability](#)” in the program), [critics claim](#) they do not increase employment levels and trigger substantial health [coverage losses](#) for vulnerable populations. During the Trump Administration, at least 19 states [sought approval](#) to implement work requirements through Medicaid program demonstration projects (i.e., so-called “waivers”), and the Secretary of Health and Human Services (HHS) approved several states’ waiver applications. Approved state work requirement waivers have been the subject of high-profile litigation, and [legal challenges](#) to waivers are currently pending before the Supreme Court.

Following the recent presidential transition, the future of work requirement waivers and related litigation is uncertain. In mid-February 2021, following issuance of a health care-related [executive order](#), Biden Administration HHS officials [notified](#) states with approved work requirement waivers that the agency was beginning a process of determining whether to withdraw the waivers (or parts of waivers relating to work requirements). The Biden Administration has also taken recent [action](#) to end the pending litigation. This Legal Sidebar provides background on Medicaid work requirement waivers and the litigation over these policies. It then discusses the HHS Secretary’s recent administrative actions and the possible impact on Supreme Court review. The Sidebar concludes with selected legal considerations for Congress.

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Background

Medicaid Program and Section 1115 Waivers

The [Medicaid program](#) is a collaborative effort between the federal government and states to provide medical assistance for a diverse group of low-income and [medically needy](#) individuals. To participate in the Medicaid program and receive federal funding, a state must have a [plan](#) for medical assistance approved by the HHS Secretary; this plan must comply with a wide array of federal standards. Among these standards, states must [cover](#) specified groups of individuals (known as “mandatory eligibility groups”) and provide particular types of health benefits to these groups. The program also allows states to [opt](#) to cover certain additional populations and/or benefits, subject to federal conditions. Failure to meet federal requirements [places](#) federal Medicaid funds received by the state in jeopardy of being withheld. HHS has [delegated](#) authority to administer the Medicaid program to the Centers for Medicare and Medicaid Services (CMS).

The Medicaid statute itself does not expressly allow states to impose work requirements on beneficiaries. Accordingly, the vehicle for implementing work requirements has been waivers granted to states under [Section 1115](#) of the Social Security Act. According to [legislative history](#) accompanying Section 1115, statutory requirements “often stand in the way of experimental projects designed to test out new ideas and ways of dealing with the problems of public welfare recipients.” To this end, Section 1115 authorizes the HHS Secretary to waive compliance with otherwise applicable Medicaid state plan requirements for an “experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives” of Medicaid. Over the past few decades, the Secretary has approved a [broad range](#) of Section 1115 demonstrations that permit states to test potential [innovations](#) in the provision of Medicaid coverage.

In previous years, some [states](#) proposed mandatory work incentives as part of Section 1115 waivers, but the Obama Administration [rejected these proposals](#) as beyond the scope of the HHS Secretary’s Section 1115 authority. However, the Trump Administration adopted a different stance. In March 2017, HHS officials sent a [letter](#) to state governors that announced the Trump Administration’s intent to use Section 1115 demonstration authority to “approve meritorious innovations that build on the human dignity that comes with training, employment and independence.” Subsequently, Trump Administration HHS officials issued [guidance](#) that restated support for work requirements and articulated factors for states’ consideration in crafting these policies. In June 2018, [Kentucky](#) became the first state to receive CMS approval to implement work requirements as part of an approved Medicaid Section 1115 waiver. Other [states](#) followed, and legal challenges were filed.

Work Requirements Litigation

Starting in 2018, Medicaid beneficiaries in states with approved work requirement waivers filed suit against the HHS Secretary, [claiming](#) the waivers were unlawfully approved and “fundamentally alter the design and purpose of Medicaid.” The beneficiaries’ home states [intervened](#) in the litigation and became additional defendants in the cases. Lower courts uniformly sided with the residents and struck down work requirements and related provisions in waivers granted to [Kentucky \(twice\)](#), [New Hampshire](#), and [Arkansas](#). In these cases, the courts concluded that the HHS Secretary’s approval of the waivers violated the Administrative Procedure Act (APA). Under [the APA](#), reviewing courts must set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

In examining the work requirement waivers, lower courts applied similar reasoning in all of the decided cases. To illustrate, in the [Arkansas litigation](#), the U.S. District Court for the District of Columbia first recognized that, pursuant to Section 1115 and the Medicaid Act’s statutory language, the Secretary can only approve waivers that are “likely to assist in promoting the objectives” of the Medicaid program. The

program’s “core” objective, the court declared, is the provision of health coverage to the needy. The court determined that the HHS Secretary’s Section 1115 waiver approval was arbitrary and capricious, as the Secretary failed to appropriately consider the effect of Arkansas’s waiver on this core objective. During the waiver approval process, numerous commenters expressed concerns that the Arkansas waiver would lead to substantial losses of Medicaid coverage, and the court determined that HHS had not adequately addressed those concerns.

While the HHS Secretary stressed that the work requirements promoted other goals of the Medicaid program, including improvements in the health of program-eligible individuals, the court concluded these other goals are not “objectives of the program” per the text of the Medicaid statute. Therefore, HHS could not justify the potential losses of coverage through advancement of these nonstatutory objectives. Accordingly, the district court vacated the Secretary’s approval of the work requirement waiver and remanded the matter back to HHS. The U.S. Court of Appeals for the D.C. Circuit later [affirmed](#) the district court’s decision on similar grounds, after which the federal government and the State of Arkansas petitioned the Supreme Court for review. In December 2020, the Supreme Court [agreed](#) to hear the lawsuits concerning the Arkansas and New Hampshire waivers, and oral arguments in [Cochran v. Gresham](#) and [Arkansas v. Gresham](#) are scheduled for March 29, 2021.

Possible Revocation of Work Requirement Waivers and Pending Supreme Court Litigation

As noted, the Biden Administration may be preparing to overturn work requirement waivers approved during the previous Administration. Presently, there are at least [10 states](#) with approved (or conditionally approved) waivers that include work requirements. In early February 2021, Biden Administration CMS officials [informed](#) those states that, with respect to work requirements, the agency had “serious concerns about testing policies that create a risk of a substantial loss of health care coverage in the near term,” particularly in light of the detrimental health and economic effects of the Coronavirus Disease 2019 (COVID-19) pandemic. Given these circumstances, CMS stated its “preliminary” determination that implementation of work requirements would not promote the Medicaid program’s objectives, and that the agency had begun to examine whether to revoke the waiver approvals. Under current federal [regulations](#), the HHS Secretary may partially or completely withdraw a Section 1115 waiver “based on a finding that the demonstration project is not likely to achieve the statutory purposes.”

The Biden Administration has also [asked](#) the Supreme Court to end the work requirements litigation by vacating the appellate court judgments in the Medicaid work requirements cases, which would remove the cases from the Supreme Court’s calendar and remand the matters back to HHS. The Administration contends that, in light of its commencement of the waiver examination process, the cases “no longer present a suitable context” to examine the relevant issues. The State of Arkansas filed a [response](#) in opposition, pressing the Court to let the litigation continue. Among other things, the state argues that the Biden Administration’s “[preliminary determination\[s\]](#)” regarding the waivers do not render the cases [inappropriate for review](#) (New Hampshire [took no position](#) on these matters). The Supreme Court does not have a deadline to respond to the litigants, but may do so soon given the looming oral argument date in the cases.

As the Medicaid work requirement waivers issue plays out, any future administrative or judicial developments may not have an immediate practical impact, as no approved work requirement waivers are currently in effect. To provide additional financial support during the COVID-19 pandemic, the [Families First Coronavirus Response Act](#) (FFCRA) offers an increase in federal Medicaid funding to states, generally contingent upon, among other things, states maintaining current Medicaid beneficiaries’ enrollment in the program. All states opted to claim this enhanced funding, so no work requirement waivers are currently operative. However, FFCRA’s Medicaid eligibility requirements are temporary and are scheduled to terminate after the conclusion of the COVID-19 [public health emergency declaration](#).

Legal Considerations for Congress

At the heart of the Medicaid work requirements litigation are fundamental questions about the scope of the HHS Secretary’s Section 1115 authority to examine and approve Medicaid waivers that advance certain policy goals. For example, how should the Secretary consider, and to what degree can the Secretary approve, a Medicaid waiver that is primarily intended to promote better health, or is aimed at reducing program spending? And to what extent might such waivers restrict Medicaid eligibility or benefits in ways not otherwise permitted by statute? While the cases currently before the Court only concern whether the HHS Secretary can approve work requirement waivers under Section 1115, it is possible that the reasoning of a Supreme Court decision could potentially extend to [other waivers](#) that restrict benefit eligibility or lead to fewer covered individuals under the Medicaid program. Should the Court grant the Biden Administration’s motion and decide against review of the work requirements cases, judicial resolution of some or all of these issues may be left for another day.

While Congress may choose to await further judicial or administrative developments regarding work requirement waivers, lawmakers may also amend current law to further specify the legal parameters surrounding Medicaid Section 1115 waivers. Legislation could address factors the Secretary must consider in determining whether a Section 1115 demonstration “promotes the objectives” of the Medicaid program, or delineate types of Medicaid waivers that the HHS Secretary may or may not approve under this section. Such legislation could potentially affect existing approved waivers, as well as waivers granted by future Administrations.

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