



Administrative improvements to the
Affordable Care Act
and state options for health care reform

BY Nevada Policy Research Institute Visiting Scholar

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January 2018



States can take control of health care reform

In 2017, freedom-loving Nevadans learned they should not rely solely on Congress to improve the nation's costly and underperforming health care system.

Congressional attempts throughout that year to reform the national status quo — namely, to “repeal and replace” the Affordable Care Act (aka Obamacare) — repeatedly fell short. By year's end, free-market advocates and lawmakers had little to show for their efforts.

True, certain administrative tweaks to the ACA — the termination of cost-sharing reduction payments (which subsidized insurers' Obamacare losses) as well as the repeal of the individual mandate — produced minor policy victories.

But such tweaks were far from revolutionary and, unfortunately, the prospect for substantive reform at the federal level during 2018 looks equally grim.

Thankfully, as the following study outlines, there are steps that Nevada policymakers can take to improve the state's health care delivery system without waiting for the feds to act first.

To start, they should consider modest reforms to Medicaid.

Medicaid was originally meant to serve as a safety net for the nation's most indigent — meaning children of low-income households, the elderly and the disabled. However, thanks to ACA-directed Medicaid expansion, the program now caters to more than 600,000 Nevadans at an annual per-capita cost of about \$5,700. Such costs are unsustainable over the long-run without dramatic tax increases.

To curb costs and restore accountability to the state's Medicaid program, Nevada can apply for a Medicaid 1115A waiver for the purpose of implementing work requirements for all able-bodied Medicaid enrollees.

The need for imposing fiscal restraint and accountability is made clear by the fact that upwards of 60 percent of Medicaid expansion enrollees did not work at all during 2015, according to the Foundation for Government Accountability.

The Trump Administration recently signaled its willingness to approve such applications on an expedited basis, and Nevada's leaders shouldn't delay.

That said, Medicaid waivers are only one of many administrative actions which state officials can consider. They'd be wise to review all possible state-based avenues of reform.

We hope the following study acts as a meaningful resource to guide and inform such future efforts.

Sincerely,

Daniel Honchariw

Policy Analyst

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Federal administrative improvements to the Affordable Care Act and state options for health care reform

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January 2018**

Key Findings

1. The Affordable Care Act (ACA), also known as Obamacare, has not come close to reaching its supporter's promises of providing universal health insurance coverage and decreasing ever-rising health care costs.
2. Because legal specifics were not defined in the normal Conference Committee process, the law gives the Administration and the Secretary of the Department of Health and Human Services (HHS) sweeping control over the implementation and the oversight of the ACA. The law states vaguely that the "Secretary shall..." over 1,400 times.
3. The U.S. House passed a health care reform bill in May 2017. Leadership stated this was the first of three phases.
4. Phase two is to be administrative changes to the ACA that the HHS Secretary can unilaterally accomplish. Phase three would hopefully be bipartisan, long-term solutions for the country's health care system problems that Congress would pass.
5. The ACA contains two broad areas that are open to administrative improvements. These are Section 1332 state waivers and Section 1115A Medicaid waivers.
6. The Administration also has the ability to withdraw the cost-reduction subsidies in the health insurance exchanges, expand the use of "hardship" cases to allow more people an opt-out of the individual mandate, increase the time period of short-term limited-duration insurance, and potentially increase the use of catastrophic health insurance plans.
7. If Congress is unwilling to reform the health care system, the executive branch should step up and use the administrative authority provided by Congress to achieve meaningful reform.
8. In addition to administrative changes to the ACA, states can enact their own health care reform, regardless of federal actions.



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“We have to pass the bill so you can find out what is in it.”

-Nancy Pelosi (D-CA) Former Speaker of the House of Representatives ¹

“I’ve got a pen and a phone – and I can use that pen to sign executive orders and take executive actions [without Congress].”

-Former President Barack Obama ²

Introduction

The controversial Affordable Care Act (ACA), also known as Obamacare, has helped some people. The tragedy is that it has not come close to reaching its supporter’s promised goal of providing universal health insurance coverage and decreasing ever-rising health care costs. The complex law has not improved health care quality and has not provided patients with more health care choices. It has, unfortunately, forced millions of people to lose coverage they liked, and to seek new health insurance while imposing a huge financial and regulatory burden on the vast majority of Americans.³

The ACA has only insured 20 million of the 50 million people who were without health insurance when it became law. Nationally, half of these newly insured were forced into the substandard Medicaid entitlement program. In Washington state, for example, 80 percent of the newly insured found themselves pushed into Medicaid.

Obamacare has raised insurance premiums for virtually everyone in the country outside of the free Medicaid entitlement. Health care spending was 17 percent of the economy when the ACA became law. By 2021, with the ACA in place, estimates show that the country will spend 21 percent of the annual economy on health care.

The ACA has limited patients’ insurance options, has generated over 20,000 pages of new federal regulations, has not improved health quality, and has not decreased waste, fraud, and abuse in the medical system.

1 March 9, 2010, National Association of Counties meeting, Washington, D.C., at <https://www.youtube.com/watch?v=hV-05TLiiLU>.

2 January 14, 2014, White House press conference, Washington, D.C., at https://www.youtube.com/watch?v=N_skPgxH178.

3 “Update on the status of the Affordable Care Act,” by Roger Stark, MD, Policy Brief, Washington Policy Center, December, 2016, at <http://www.washingtonpolicy.org/library/doclib/PB-Affordable-Care-Act.pdf>.

“Lack of transparency is a huge political advantage. And basically, call it the stupidity of the American voter or whatever, but basically that was really, really critical to get the thing [ACA] passed...”

- Jonathan Gruber, Architect of the Affordable Care Act ⁴

Background

In 2009, the United States was recovering from the worst recession since the Great Depression. The American public was overwhelmingly concerned about jobs and the economy.⁵ However, the Democratic Congress and the newly-elected Democratic president forced through health care reform legislation with the U.S. House passing its bill that summer and the U.S. Senate taking an 11th hour vote on its bill on Christmas Eve. No Republican voted for either bill.

In a normal legislative process, both bills (which were considerably different) would have gone to a special Conference Committee. Members of both houses would then have negotiated a single piece of compromise legislation that would go back to both houses for approval and, if passed, be sent to the president.

Instead, in early 2010, Massachusetts held a special election to fill the seat of Senator Ted Kennedy (D-MA) who had recently died. Voters elected Scott Brown (R-MA) and the Democrats lost their super-majority of 60 votes in the U.S. Senate. A Conference Committee health care bill would then not pass in the Senate. Consequently, the U.S. House simply adopted the Senate health care reform bill and the country was stuck with the deeply flawed Patient Protection and Affordable Care Act (ACA).⁶

The ACA as signed into law was therefore never intended to be the definitive health care reform legislation. It is a very complex, 2,700 page law that in many places is vague and non-specific. Never in the history of the United States has such a broad piece of social legislation become law with only one party's support.

Because legal specifics were not defined in the normal Conference Committee process, the law gives the Administration and the Secretary of the Department of Health and Human Services (HHS) sweeping control over the implementation and the oversight of the ACA. The law states vaguely that the “Secretary shall...” over 1,400 times.⁷

4 October, 2013, Health care panel discussion, University of Pennsylvania, at <https://www.youtube.com/watch?v=G790p0LcgbI>.

5 “Economy, jobs trump all other policy priorities in 2009,” Pew Research Center, January 22, 2009, at <http://www.people-press.org/2009/01/22/economy-jobs-trump-all-other-policy-priorities-in-2009/>.

6 “The Patient Protection and Affordable Care Act,” Public Law 111-148, 111th Congress, March 23, 2010, at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

7 “Here’s what the White House can do to dismantle Obamacare even if Congress doesn’t go along,” by Bertha Coombs, CNBC, March 17, 2017, at <https://www.cnbc.com/2017/03/17/heres-what-hhss-tom-price-can-do-to-dismantle-obamacare.html?view=story&%24DEVICE%24=native-android-mobile>.

Voters change party control of Congress and the Presidency

In 2016, in part due to the unpopularity of the ACA, voters gave Republicans control of the presidency and both houses of Congress. The U.S. House passed a partial repeal of the ACA and a health care reform bill in May, 2017.⁸ Leadership stated this was the first of three phases.⁹ Phase two is to be executive-order changes to the ACA that the Trump Administration can make on their own. Phase three would hopefully be bipartisan, long-term solutions for the country's health care system problems.

Phase two involves changes in the ACA according to the 1,400 "Secretary shall..." provisions and potential Administrative alterations that Democrats wrote into the original law. With Congress being slow to pass its own health care reform legislation, Phase Two takes on more importance.

This Policy Brief analyses those potential administrative changes and recommends patient-oriented solutions that are possible within the context of the existing law. It also outlines changes that state officials can make on their own, without federal input.

The 1,400 "Secretary shall" provisions

The specific measures directing the Secretary to take administrative action can be grouped a number of different ways. Many of them deal with the implementation of the ACA and were taken between 2010 when the bill became law and 2014 when the actual benefits began. These measures were handled by Secretary Sebelius and Secretary Burwell, both appointed by President Obama. Because of the vagueness of the wording of the law, these Secretaries and HHS federal career staff shouldered a great deal of the responsibility for the implementation of the ACA.

The current Secretary of HHS, appointed by President Trump, now has responsibility for the oversight of the ACA. The law contains hundreds of Secretary-directives that require the Secretary to insure the smooth running of the ACA. The overwhelming majority of these measures are very specific and allow virtually no leeway in changing the law.

The ACA does contain two broad areas that are open to Administrative interpretation. These are Section 1332 state waivers and Section 1115A Medicaid waivers. Under these two sections, the current Administration can make significant changes in the implementation of the ACA without action by Congress.

⁸ "H.R. 1628 – American Health Care Act of 2017," 115th Congress, CONGRESS.GOV, at <https://www.congress.gov/bill/115th-congress/house-bill/1628>.

⁹ "The three phases of repeal and replace," Speaker Paul Ryan press release, March 7, 2017, at <https://www.speaker.gov/general/three-phases-repeal-and-replace>.

Section 1332 state waivers ¹⁰

The current administration has encouraged states to apply for 1332 waivers.¹¹ It believes these waivers can relieve states of the most harmful effects of the ACA, including the onerous premium price increases and the regulatory burden. The law states that “the Secretary shall determine the scope of a waiver...” within the limits of “the authority of the Secretary.”

States can file for a 1332 waiver after January 1, 2017 and HHS has six months in which to approve or disapprove them. Waivers last for five years, but can be renewed. Waiver requirements for state plans are that they must:

- Remain cost neutral overall.
- Not add to the federal deficit.
- Provide for public input.
- Offer health insurance at least as comprehensive as the exchanges.
- Offer plans that cost the same as exchange plans.
- Provide health insurance for the same number of people as the ACA.
- A state legislature must pass a law to request the waiver.

According to the ACA, the “Secretary shall determine” the amount of money each state receives based on the amount the state would have received in federal subsidies through the health insurance exchange. States have the ability to opt-out of the waiver even after the waiver is approved.

As of July 31, 2017, 22 states have considered 1332 waiver legislation.¹² Alaska and Hawaii have had waivers approved by the HHS Secretary. Four other states have completed the 1332 waiver application process to date.¹³ Minnesota and Iowa have plans under review. California withdrew its application and Vermont’s application is currently on hold.

Hawaii’s waiver was approved during the Obama Administration. It aligns the ACA with a 1974 state law that requires employers to offer more generous health insurance than required in the federal law. Alaska’s waiver

10 “The Patient Protection and Affordable Care Act,” Public Law 111-148, 111th Congress, pages 85-86, March 23, 2010, at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

11 “Secretary Price statement on release of state innovation waiver checklist,” U.S. Department of Health and Human Services Press Office, HHS.gov, May 16, 2017, at <https://www.hhs.gov/about/news/2017/05/16/state-innovation-waiver-checklist-release.html>.

12 “State roles using 1332 waivers,” by Richard Cauchi, National Conference of State Legislatures, July 20, 2017, at <http://www.ncsl.org/research/health/state-roles-using-1332-health-waivers.aspx>.

13 “Section 1332 state innovation waivers: current status and potential changes,” by Jennifer Tolbert and Karen Pollitz, The Kaiser Family Foundation, July 6, 2017, at <http://www.kff.org/health-reform/issue-brief/section-1332-state-innovation-waivers-current-status-and-potential-changes/>. Update: Iowa withdrew its 1332 waiver request on October 23, 2017.

will establish a state reinsurance pool. Minnesota and Iowa are requesting waivers to establish state high-risk pools. In addition, Iowa asked for a change in its health care exchange so it can offer only one basic insurance plan and the state is seeking a change in subsidy consideration so subsidies are based on age as well as income.

California withdrew its request. Its waiver would have allowed undocumented immigrants to purchase health insurance on the exchange without subsidies. Employers in Vermont have been able to offer employee health insurance without using a State Health Option Plan (SHOP) portal as allowed in the ACA. Although it is officially on hold, the Vermont waiver currently allows the state to continue this practice.

Seven states have passed legislation to investigate 1332 waivers. This is not binding legislation and does not mean these states will necessarily apply for a waiver. Nine state legislatures, considered waiver bills, but did not pass legislation.

Because of ever-increasing health insurance premium prices and the decreasing number of participating insurance companies, more states will undoubtedly apply for 1332 waivers. HHS has encouraged innovation and flexibility in waiver requests and the Department says it is prepared to be flexible in the acceptance process.

Potential revisions of the ACA using 1332 waivers include a redefinition of the “essential” health benefits the federal government requires in every insurance plan, expanded access to health savings accounts and high deductible insurance plans, and a greater use of state-based high-risk pools for high-cost patients.

1115A waivers

The Medicaid entitlement program began in 1965 as a government health insurance safety-net for children of low-income families and the disabled. It has grown into one of the largest insurance plans in the world and is one of the largest budget items for the federal and state governments.¹⁴ Last year, total spending on Medicaid was \$545 billion and is projected to increase to \$700 billion by 2020. Although some individuals have successfully accessed health care through Medicaid, independent research shows that, in general, having Medicaid health insurance provides patients with no better medical outcomes than being uninsured.

The federal government has allowed states to obtain Medicaid waivers since the beginning of the program. These waivers must follow strict

¹⁴ “Medicare and Medicaid at fifty,” by Roger Stark, MD, Policy Note, Washington Policy Center, September, 2015, at <http://www.washingtonpolicy.org/library/doclib/Stark-Medicare-and-Medicaid-at-50.pdf>.

guidelines, must be budget neutral, and are subject to federal oversight. In the past 50 years, the federal government has granted over 500 Medicaid waivers nationally.¹⁵

The ACA expanded Medicaid to any able-bodied person 18 years of age to 64 years of age who earns less than 138 percent of the federal poverty level, or about \$16,000 per year. The ACA also expanded the use of 1115 Medicaid waivers by providing billions of federal taxpayer dollars for innovative, pilot projects. In order to be approved, these plans must reduce costs and improve health quality in the Medicaid program for the state making the application.¹⁶

Submission of waivers is an ongoing process, but as of Spring 2017, 33 states have had 41 ACA-Medicaid waivers approved.¹⁷ The waivers have differences, but fall into five broad categories:

- Delivery system changes (most of these go from a fee-for-service model to a managed-care or health maintenance organization model.)
- Modifications of a state's long-term care system.
- Creative ways of expanding Medicaid or reallocating funds.
- Changes in behavioral and mental health funding.
- Other – changes specific to individual aspects of the Medicaid program.

Officials in Washington state submitted a 1115 waiver application to the federal government in 2015. It was approved by HHS in 2016.¹⁸ The waiver allows the state to transform Medicaid from a fee-for-service plan to a managed care program utilizing regional accountable care organizations. It is too early to assess cost savings or quality improvement in the state's Medicaid program under this transformation.

States could potentially use 1115 waivers to prioritize the use of Medicaid dollars to the truly needy and disabled, impose a work requirement where applicable, charge a small premium, require drug tests, and ultimately limit how long a person can be enrolled. Combining 1332 and 1115 waivers would also open up possibilities for broad-based health care reform at the state level.

15 "State waiver list," federal Medicaid entitlement program, Medicaid.gov, August, 2017, at https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/waivers_faceted.html.

16 "The Patient Protection and Affordable Care Act," Public Law 111-148, 111th Congress, pages 271-277, March 23, 2010, at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

17 "3 key questions: Section 1115 Medicaid demonstration waivers," by E. Hinton, R. Rudowitz, and MB Musumeci, The Kaiser Family Foundation, February 15, 2017, at <http://www.kff.org/medicaid/issue-brief/3-key-questions-section-1115-medicaid-demonstration-waivers/>.

18 "Washington state's Medicaid transformation," Healthier Washington, October, 2016, at <https://www.hca.wa.gov/assets/program/waiverfactsheet.pdf>.

Cost-sharing reduction subsidies

The Affordable Care Act has three revenue-neutral provisions for market stabilization in the exchanges.¹⁹ Reinsurance and risk corridors began in 2014, ran for three years, and, by law, ended in 2016. Reinsurance covered high-cost people and was paid for by an excise tax on all insurance premiums. Risk corridors limited losses and gains for insurance companies within the exchanges by having the federal government redistribute money from profitable companies to companies losing money.

Risk adjustment began in 2014 and is set to continue indefinitely. Risk adjustment redistributes funds from insurance plans that have low-risk patients to plans with high-risk patients.

The ACA also provides subsidies for low-income individuals above and beyond the standard exchange subsidies.²⁰ These so called cost-sharing reduction subsidies were never funded by Congress, specifically due to inaction in the U.S. House of Representatives. The Obama Administration then unilaterally instructed the Treasury Department to pay out these funds, which are renewed on a monthly basis.

The U.S. House of Representatives, led by its Republican leadership, sued the Obama Administration and won. Congressional leaders successfully argued that it was illegal for the Obama Administration to pay out money from the U.S. Treasury without authorization from Congress. The Administration appealed and the case now sits in a federal appellate court.

The Trump Administration has discontinued the cost-sharing reduction payments. However, Members of Congress are currently debating restarting the subsidies because of concern, or fear, of totally destabilizing the health care exchanges and individual insurance markets.

However, even with the cost-sharing reduction subsidies in place, the exchanges continue to attract a greater number of older and sicker people and comparatively fewer young and healthy individuals. The exchanges are on a downward path to financial collapse regardless of whether the federal subsidies are in place.

19 "Explaining health care reform: risk adjustment, reinsurance, and risk corridors," by C. Cox, A. Semanskee, G. Claxton, and L. Levitt, The Kaiser Family Foundation, August 17, 2016, at <http://www.kff.org/health-reform/issue-brief/explaining-health-care-reform-risk-adjustment-reinsurance-and-risk-corridors/>.

20 "The Patient Protection and Affordable Care Act," Public Law 111-148, 111th Congress, pages 102-106, March 23, 2010, at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

The individual mandate

The ACA requires that every adult 18 years of age and older must own health insurance or pay a penalty or tax.²¹ This individual mandate has several opt-out clauses, including religious considerations and “hardship” cases. There are many hardship reasons, including recent shut-off of a person’s utilities, recent family death, domestic violence, etc.²²

Estimates of the number of people using the hardship exemption for not having health insurance vary, but run as high as 25 million.²³ Obviously, administratively expanding the definition of “hardship” would allow more Americans out of complying with the individual mandate in Obamacare.

Essential health benefits (EHB)

The ACA states that every health insurance plan must contain ten well-defined essential health benefits.²⁴ These benefits were determined by bureaucrats who do not necessarily understand the needs of any specific patient. For example, an unmarried man does not need an obstetrical coverage “essential benefit,” yet he is forced to pay a higher premium for it.

Like other types of insurance, health insurance should be designed to mitigate overall risk. Through the use of catastrophic health insurance plans, many, if not all, of these mandated essential health benefits could be covered at potentially a much lower premium price. An interpretation of EHBs by the HHS Secretary and development of plans by insurance companies could make this happen. Coupled with health savings accounts, these plans could satisfy the health insurance needs of many Americans.

Short-term, limited-duration health insurance

In December, 2016 the Obama Administration issued what was thought to be the final definition and regulations regarding short-term, limited-duration health insurance.²⁵ These policies are designed for people between

21 “The Patient Protection and Affordable Care Act,” Public Law 111-148, 111th Congress, pages 124-132, March 23, 2010, at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

22 “Who is exempt from Obamacare?,” Obamacare.net, November 1, 2016, at <https://obamacare.net/who-is-exempt-from-obamacare/>.

23 “Fewer uninsured face fines as health law’s exemptions swell,” by Stephanie Armour, *The Wall Street Journal*, August 6, 2014, at https://www.wsj.com/articles/fewer-uninsured-face-fines-as-health-laws-exemptions-swell-1407378602?mod=rss_US_News.

24 “The Patient Protection and Affordable Care Act,” Public Law 111-148, 111th Congress, pages 45-50, March 23, 2010, at <https://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>.

25 “Regulations regarding short-term limited-duration insurance, excepted benefits, and lifetime/annual limits,” by Danielle Capilla, United Benefit Advisors, December 27, 2016, at <http://blog.ubabenefits.com/regulations-regarding-short-term-limited-duration-insurance-excepted-benefits-and-lifetime/annual-limits>.

jobs or for individuals transitioning from one health insurance plan to another.

The plans do not contain all of the essential health benefits required in the ACA, but could potentially offer affordable major medical or catastrophic coverage. The Obama Administration set the limit for use of a short-term plan at three months.

It is understood that people using these plans will need to pay the individual mandate penalty for not having the government-defined level of health insurance. Even if a short-term plan did not satisfy the EHB requirement, in all likelihood, it would be more cost effective for young and healthy people to buy these plans and pay the ACA individual mandate penalty for not having insurance.

The Trump Administration has extended the three-month coverage limit to one year. The Administration could extend the time duration of short-term plans indefinitely, and thereby give people more choices in the health insurance marketplace.

Navigators, Certified Application Counselors, and advertizing

The ACA provides millions of dollars in grant money to hire government employees who help enrollees find the most appropriate health insurance plan within the exchanges.²⁶ There are several categories of helpers, including navigators and certified application counselors. All of these new government employees essentially duplicate the function of private insurance brokers and compete with them for clients.

Insurance brokers and online services have a long-standing relationship with the American public and offer real benefits to customers. HHS should withdraw the funding for these navigators and counselors, so the government is no longer hiring employees to compete for business against its own citizens.

Like any business, health insurance companies allocate money for advertizing. The ACA supplies additional money for enhanced advertizing. It is always problematic when the government requires citizens to pay taxes, and then uses that money to promote itself. The HHS should discontinue this taxpayer-funded advertizing.

26 "What are the differences between navigators, certified application counselors, and others assisting consumers in making health insurance decisions in the ACA's health insurance marketplaces?," by Michael Meulemans, healthinsurance.org, February 18, 2016, at <https://www.healthinsurance.org/faqs/what-are-the-differences-between-navigators-certified-application-counselors-and-others-assisting-consumers-in-making-health-insurance-decisions-in-the-acas-health-insurance-marketplaces/>.

Specific measures states can implement

In addition to administrative changes the Secretary of Health and Human Services can make to the ACA, states can enact their own health care reform, regardless of federal actions. Here is a list of policy options available to state policymakers under current federal law:

1. Aggressively pursue 1332 and 1115A waivers.

Under these two sections, states can request, and the current Administration can approve, significant changes in the implementation of the ACA without action by Congress.

2. Pass state legislation to limit state taxpayers' contribution to the Medicaid expansion.

The ACA enticed states to expand Medicaid by offering federal taxpayer funds to cover 100 percent of the expansion costs for three years. By 2020, the states are required to pay 10 percent of the costs. The federal government now has a \$20 trillion debt and there is a high likelihood that states will be required to pay more than 10 percent of the Medicaid expansion cost in the future. State legislatures can pass laws that limit the amount of state taxpayer responsibility to 10 percent or to a fixed amount of expansion costs.

3. Repeal Certificate of Need laws.

Research now shows that state Certificate of Need laws do not decrease health care costs, but that they do limit patient choices by banning investment and construction of new health care facilities.

4. Enact tort reform to reduce wasteful medical expenses.

Legal fees and, more importantly, defensive medicine costs add tremendously to overall health care spending without increasing patient choices or quality of care.

5. Decrease state benefit and provider mandates in health insurance plans.

The ACA requires 10 essential health benefit mandates in every health insurance plan. In many cases, these are in addition to mandates imposed by individual states. Each mandate adds to the cost of health insurance and, while pleasing politically-connected special interest groups, often reduces choices for patients. Legislatures should repeal most of their states' added health insurance mandates.

6. Expand and promote the use of association health plans.

Association health plans allow small groups and individuals to join together to purchase health insurance in the same way large groups do. Large group plans are regulated by the federal ERISA law and therefore avoid many of the worst features of the ACA.

7. Promote telemedicine.

Telemedicine and similar online services can reduce cost and increase patient access to health care, especially for people living in rural areas.

8. Eliminate or decrease waste, fraud, and abuse in the Medicaid program.

A high percent of Medicaid costs do not increase care or access for enrollees. The massive bureaucratic nature of the program makes it a target for cheating and financial crime.

9. Encourage home health care in the Medicaid program.

Costs are less and patient satisfaction is higher with home health care. It reduces government involvement in care and respects the natural family relationships of patients.

10. Cap or freeze Medicaid enrollment.

Medicaid, as originally intended by Congress, should be targeted to help the most vulnerable patients, while encouraging patients with the means to gain access to affordable private health insurance coverage.

11. Review scope of practice and licensing laws.

Most states will face a provider shortage in the near future. States should aggressively relax barriers to medical practice which will increase access to health care for patients.

12. Encourage direct primary care.

For a fixed amount of money per month, patients can access primary care around the clock. Direct primary care can increase access to doctors for all socio-economic groups. Legislatures should protect direct primary care from state regulatory insurance laws.

13. Resist ACA Medicaid expansion if it is not already in place.

Today, states that chose not to join the ACA's expansion of Medicaid enjoy more flexibility in serving their residents. Because they are not locked into expanded Medicaid, policymakers in these states have the discretion and resources to make affordable coverage more available for families.

Policy analysis

In spite of the 20 million “newly” insured, Obamacare has been a clear policy failure. Except for the enrollees in the Medicaid entitlement program, virtually every person with health insurance in the United States has experienced a loss of choice and a significant increase in insurance premiums.

Millions have lost insurance plans they liked, lost access to their doctors, and have seen their deductibles go up. Access to health care is a growing problem, especially in the Medicaid and Medicare entitlement programs. Just having health insurance on paper is no longer a guarantee of getting necessary health care services in a timely fashion.

There is wide agreement that the health care system was dysfunctional before the ACA became law. Going back to the situation as it existed before 2010 is not a solution. Going forward, the country has two choices at this point: 1) impose more government control at an ever-increasing cost to taxpayers or 2) move toward more patient control, affordability, and choice.

Policymakers could increase government control by further expanding Medicaid, allowing non-seniors to buy into Medicare, offering a public, socialized option in the individual market and placing more regulations on the employer-paid market. With these maneuvers, a mandatory single-payer, government-run health care system, like that in Canada, could soon become a reality in the United States.

Alternatively, policymakers could move toward giving patients more control and re-establishing the private relationship between patients and doctors, while reducing government-directed interference. Congress seems unable to pass ACA reform legislation at this time. Former President Obama bypassed Congress and used administrative fiat liberally. The Trump Administration could do the same, but instead move policy in the direction of empowering patients, rather than government regulators.

Policy recommendations

Patients are the most important part of the health care system and they should be in charge of their own health care. There is nothing inherently different about health care as a service than any other economic activity. Health care providers should be paid for their work, and to the extent possible prices for health services should be set, not by government, but by economic efficiency and the natural movement of supply and demand in the market.

There are practical steps that would put patients in charge of their health coverage without complete repeal of the ACA:

1. Reform the ACA through Administration and incremental legislative actions.
 - promote greater use by the states of 1332 and 1115 waivers.

- provide patient-centered alternatives, such as health savings accounts and catastrophic health insurance plans, to the essential health benefits in the ACA.
 - extend the use of short-term, limited-duration health insurance plans.
 - allow the purchase of health insurance across state lines.
 - expand the definition of “hardship” cases to blunt the restrictions of the individual mandate.
 - promote state high-risk pools to cover high-cost patients and pre-existing conditions.²⁷
 - allow greater use of association health plans to give small employers and individuals the same insurance price and benefit advantages of large employers.²⁸
 - permanently withdraw the cost-sharing reduction subsidies and allow the exchanges to collapse sooner rather than later. Because of adverse selection, the exchanges are currently in a financial death spiral. More taxpayer money will not improve the long-term outlook of the exchanges.
 - repeal the Obamacare taxes.
2. Promote price transparency, so patients become true consumers of health care and know the real cost of the services they are receiving.
 3. Change the tax code and allow equal treatment for individuals and families, so they can benefit from the same tax deductions that employers now receive for providing employee health benefits.
 4. Enact meaningful reform of Medicaid and Medicare entitlements and make them true, targeted, safety-net programs, as they were originally designed.²⁹

27 “High risk pools work well in covering hard-to-insure patients,” by Roger Stark, MD, Policy Note, Washington Policy Center, March, 2017, at <https://www.washingtonpolicy.org/library/doclib/Stark-High-Risk-Pools-3-22.pdf>

28 “Association health plans and small business health insurance exchanges in the Affordable Care Act,” by Roger Stark, MD, Policy Note, Washington Policy Center, August, 2015, at <https://www.washingtonpolicy.org/library/docLib/Stark-Association-Health-Plans-and-Small-Business-Health-Insurance-Exchanges-in-the-Affordable-Care-Act.pdf>

29 “Medicare and Medicaid at fifty,” by Roger Stark, MD, Policy Note, Washington Policy Center, September, 2015, at <https://www.washingtonpolicy.org/library/doclib/Stark-Medicare-and-Medicaid-at-50.pdf>

Conclusion

In spite of the 20 million “newly” insured, Obamacare has been a clear policy failure. Except for the enrollees in the Medicaid entitlement, virtually every person with health insurance in the U.S. has experienced a significant increase in insurance premiums. Millions have lost insurance plans they liked, lost access to their doctors, and have seen their deductibles go up.

The bright promises made by the Obama Administration to the American people when the ACA passed have not turned out to be true.

Yet Congress has been politically unable to pass meaningful reform of the ACA. The current “fixes” for Obamacare essentially all involve more taxpayer money to “stabilize” the failing health insurance exchanges and the Medicaid expansion, while continuing the government-control of our health care system.

The goal of any reform should be to give patients the greatest control of their own health care, just as citizens control other essential aspects of their lives. Patients, acting as health care consumers, would demand more transparency in pricing and, just as happens in other areas of life, would promote competition, and improve quality and service. As a result, natural competition in a normal-functioning health care market would drive costs down and increase access to quality health care for all Americans.

If Congress does not act to reform and improve the U.S. health care system, the executive branch should act and use the legal administrative authority given to it by Congress to achieve meaningful reform. Similarly, state policymakers should aggressively pursue practical measures that are allowed outside of the ACA that can increase access and health care choices for patients.

Published by Washington Policy Center and Nevada Policy Research Institute

Nothing here should be construed as an attempt to aid or hinder the passage of any legislation before any legislative body.

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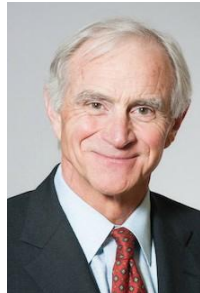
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