

House Democrats Take Aim at 'Unlawful' Trump Obamacare Move (1)

By Shira Stein

Posted Feb. 13, 2019, 3:39 PM Updated Feb. 13, 2019, 5:27 PM

- Trump action allows states to use federal funds for some coverage that doesn't cover people with pre-existing conditions
- Democrats exploring legislation, use of Congressional Review Act to overturn Trump policy decision

Democrats and legal scholars are arguing that Trump administration changes to waivers that allow states to forgo certain Obamacare requirements are illegal.

The administration action allows states to use federal funds to pay for plans that don't cover people with pre-existing conditions, including short-term limited-duration plans and association health plans. Association health plans allow groups of small businesses to form health insurance plans for their employees.

The House Democrats' efforts come as they wait to see if they can use a congressional mechanism to overturn that maneuver. States have used these waivers to reduce premiums, but Democrats are concerned the administration's move further undermines the Affordable Care Act's protections.

"The Trump administration's guidance is blatantly unlawful, contrary to the plain reading of the statute, and wholly inconsistent with congressional intent," Rep. Frank Pallone Jr. (D-N.J.) said Feb. 13 at a hearing of a House Energy and Commerce subcommittee. Pallone is chairman of Energy and Commerce.

No states have applied for or been approved for waivers since the guidance was released. However, Katie Keith, a health-care policy research professor at Georgetown University, told lawmakers that any approval of a waiver under the new guidance would likely be challenged in court.

"The guidance itself by allowing or encouraging states to consider options like subsidizing short-term plans, plans that do not cover pre-existing conditions... flies in the face of Section 1332 and what it was designed to allow states to do," Keith said.

Three legal scholars agreed with Keith that litigation would be likely once a waiver is approved. It would be more straightforward to bring a lawsuit challenging this guidance in the context of a waiver's approval, Joel McElvain, a partner at King & Spalding, said in an interview. McElvain was with the Justice Department for over two decades.

A potential way to bring a lawsuit on this guidance before a waiver is approved is to base the lawsuit on the argument that this change needed to be done through a formal rulemaking process, not guidance, Christen Linke Young, a fellow with USC-Brookings Schaeffer Initiative on Health Policy, said in an interview.

Section 1332 of the Affordable Care Act allows states to apply for waivers from the federal government to try different ways to provide health care to their residents, while still retaining the basic protections of the law.

States could have applied for these types of waivers in the past, but this action is a green light from the Trump administration to do so, Keith said in an interview.

Applying for these waivers is a lot of work and time, and the possibility of getting sued over it could be making states hesitant to apply, Keith said. She added that she hasn't heard of any states considering applying for a waiver.

States that would have been interested in these types of waivers got the flexibility they were looking for from short-term limited-duration plans and association health plans, Keith said.

"Section 1332 cannot be used to waive any and all provisions of the Affordable Care Act," Keith told lawmakers. "It cannot be used to waive community rating, guarantee issue, protections for pre-existing conditions.

"If a state were to try to subsidize plans that did do that, I think it would be an end run-around Section 1332 itself and what the law requires."

The House Energy and Commerce health subcommittee was considering a bill (H.R. 986) that would require the Trump administration to rescind the guidance.

Rescinding this guidance in any way would not change waivers that have already been approved, Keith said.

The hearing came as the full committee's staff is also looking at using the Congressional Review Act to upend the Trump administration decision. The act allows Congress to reverse federal regulations shortly after they're enacted.

Consensus from Legal Community

There typically is healthy disagreement in the legal community on issues relating to the ACA, but there is little on this issue, Adam Grogg, senior counsel at legal services and policy research nonprofit Democracy Forward, said in an interview. Grogg was formerly a trial attorney at the Department of Justice.

The administration's guidance is based on different principles, like promoting consumer-drive health care, than what the ACA based on, Tim Jost, a health law professor emeritus at Washington and Lee University, said in an interview.

The original statute allows states to get waivers if their changes provide care that is as comprehensive and as affordable as federal coverage, covers a comparable number of people, and doesn't increase the federal deficit.

This guidance is a misreading of the statute and a "creative effort to reimagine the statute," McElvain said. The Trump administration's guidance is "pretty clearly not what Congress had in mind," Jost said.

The guidance decouples what coverage means for each criteria in the original statute, McElvain said. The statute said states must still provide coverage to at least as many people, but the Trump administration is saying the type of coverage doesn't matter, he added. The Trump administration also said that it doesn't matter if coverage reaches everyone as long as it is available to them.

Rush to Judgement

Republicans on the House panel expressed concern about Democrats' rush to judgment on the new guidance.

"Why not first observe how states react and reform their markets through the new guidance? Perhaps a better use of our time would be spent discussing bipartisan solutions to reform and improve these waivers," Rep. Greg Walden (R-Ore.), the full committee's ranking Republican, said.

Rep. Michael Burgess (R-Texas) said it was concerning that Democrats are "questioning the flexibility they put into their own law."

(Updates with additional reporting throughout.)

To contact the reporter on this story: Shira Stein in Washington at sstein@bloomberglaw.com

To contact the editors responsible for this story: Fawn Johnson at fjohnson@bloomberglaw.com; Brent Bierman at bbierman@bloomberglaw.com

Related Articles

[House Democrats Plot to Overturn Trump Obamacare Maneuver](#) (Feb. 11, 2019, 5:02 PM)

[States Can Pay Health Plans That Don't Check Obamacare Boxes \(1\)](#) (Oct. 22, 2018, 12:46 PM)

© 2019 The Bureau of National Affairs, Inc. All Rights Reserved