

# Health Care in Motion

Timely, Substantive Updates on Policy Shifts · Actionable Advocacy to Protect Health Care

December 14, 2020

## The Path Forward: Health Policy in 2021

After a grueling month of ballot counts, re-counts, and re-re-counts, every state has certified their results, the Electoral College has voted, and the 2020 Presidential election is finally over. With a Biden Administration set to take the helm in just over one month, we can expect the approach our federal government takes in addressing the deficiencies of our health care system to shift dramatically.

Biden's first step will be filling his Cabinet positions and staffing executive branch agencies with strong leadership that shares his visions for policy. While the rosters for most key health officials within administrative agencies are still being developed, the incoming administration has officially [announced](#) top members of its health team, nominating California Attorney General [Xavier Becerra](#) as Secretary of Health and Human Services (HHS). Longtime Health Care in Motion Readers will be familiar with Becerra as the spearhead of 20 Democratic state attorneys general defending the Affordable Care Act (ACA) from their Republican counterparts' attempts to invalidate the law before the Supreme Court in [California v Texas](#). [Becerra's nomination](#) sets the tone and direction for the incoming Administration when it comes to health policy and signals that building on the ACA will be a priority.

As with every politician, the promises Candidate Biden made and what a Biden Administration will be able to achieve are more than a stone's throw apart. With the balance of power in the Senate uncertain, some of Biden's campaign proposals are far less likely to become reality. The Biden Administration's ability to support ACA Marketplaces by adding a public option, for example, will face an uphill battle. With Congress reticent to cooperate, the Biden Administration will likely turn to administrative action to move policy forward incrementally.

While we can expect Biden's first 100 days to be focused on addressing COVID-19 and the looming economic crisis, health policy advocates are optimistic that we will also see relatively quick unwinding of harmful policies that the Trump Administration enacted using its executive authority. In practice, the lion's share of the incoming administration's immediate task will be focused on carefully restoring regulatory protections in health care to which the previous administration took a proverbial machete.

### Medicaid Waivers

Longtime readers will recall that as far back as [January 2018](#), the Trump Administration invited states to condition Medicaid eligibility on satisfying a work requirement via a waiver. Despite multiple court decisions holding that these waivers violate the Medicaid Act as well as skyrocketing unemployment numbers pointing to the difficulty of maintaining work during a pandemic, the Trump Administration has not slowed down their approval of work requirement waivers, approving Nebraska and Georgia's requests as recently as October.

Even though there are lockdowns across the country, and the nation continues to suffer loss of life due to COVID, HHS insists that not only will work requirements increase mental and physical health, but that going to work is increasingly necessary during a global pandemic. The irresponsible manipulation of studies to support work requirements ignores the real risks of taking health care away from otherwise eligible people during a pandemic.

At a minimum we can expect that the incoming Biden administration will deny [pending requests](#) in seven states to implement work requirement in their Medicaid programs and formally rescind the Trump Administration's [2018 guidance](#). Under new Secretary Becerra (if confirmed by the Senate), HHS will likely also seek to unwind the work requirements that have already been approved by the Trump Administration, but will have to take a more cautious approach to avoid litigation from disgruntled state Medicaid directors and other opponents blocking the path.

Additionally, the Biden administration will be inheriting a line of litigation on work requirements, culminating in review of [Azar v Gresham](#) before the U.S. Supreme Court. In that case, both the Administration and Arkansas asked the Supreme Court to weigh in on the legality of the Trump Administration's approval of work requirements in Arkansas and New Hampshire's Medicaid programs. With both petitions now [granted](#), the case is likely to proceed. While the Biden administration can rescind the waiver approvals that lie at the heart of the case and request a delay in briefing to reflect its changed position, Arkansas remains a party to the case with standing to continue. Thus, it's possible that the Biden administration may find itself arguing against past agency action before the Supreme Court next year.

Looking to the future, the incoming administration's approach to Medicaid waivers will likely be in line with their original purpose: testing out [innovative approaches](#) to getting people comprehensive health care instead of blocking pathways to coverage.

## Nondiscrimination in Health Care

Adding to the pile of regulations a Biden HHS has to address is the Trump Administration's "Rollback Rule" revising HHS' prior interpretation of Section 1557, the ACA's nondiscrimination provision. [As we discussed in June](#), this rollback poses a significant threat to the robust enforcement of health care rights. Section 1557 prohibits health care discrimination on the basis of race, color, national origin, sex, age, or disability. However, it does this by cross-referencing five other civil rights statutes which has led to confused interpretation by federal courts. This has resulted in a split among the courts regarding the meaning of "on the basis of sex," and whether that includes protections for gay, transgender, and gender non-conforming people.

The Obama administration had interpreted Section 1557's incorporation of Title IX, which prohibits sex-based discrimination, to extend protections against discrimination on the basis of sex stereotyping or gender identity. The Trump Administration's [interpretation](#) of Section 1557 has led to a loss of protections for many people, including those with limited English proficiency, the LGBT community, those seeking reproductive health care, people with disabilities, and people with intersecting marginalized identities. Advocates around the country [filed suit](#) to stop this from taking effect.

While a statutory fix looks unlikely given congressional instability, Biden's HHS will have an opportunity to restore and expand the ACA's non-discrimination protections, reinterpreting Section 1557 with a new implementing regulation, after a period of accepting comments from the public. Looking forward, advocates should keep an eye on who Biden taps to fill the Office of Civil Rights within HHS, as this office is empowered with enforcement authority to investigate and stop discrimination in health care from occurring.

## Reproductive and Sexual Health

There is much work to be done to promote access to quality reproductive and sexual health care services, spanning both initiatives to undo harms wrought by the Trump Administration and those that would facilitate the adoption of innovative care models.

At one end of the spectrum, we expect the Biden Administration to move quickly to unwind the dangerous changes to the Title X family planning funding program that were [finalized in 2019](#). As readers may remember, these changes—primarily the unethical domestic gag rule that demands health care providers withhold information about abortion from patients—forced many family planning providers to reject federal funds. As a consequence, the revised rules have severely [reduced](#) the Title X family planning program’s capacity to support the contraceptive care needs of people who depend on the program. Other priorities when it comes to dismantling Trump-era policies governing sexual and reproductive health include attention to the Administration’s [many efforts](#) to advance discriminatory religious and moral objections to care to the detriment of health and wellbeing.

It will not be enough, however, to focus on undoing the harms of the last four years. More can be done to improve access to reproductive health care. The Biden Administration has an opportunity to support access to medication abortion, for example. Studies such as [Gynuity’s TelAbortion](#) study demonstrate the safety and effectiveness of telemedicine medication abortion, necessitating that the Food and Drug Administration revisit the Risk Evaluation and Mitigation Strategies (REMS) criteria for mifepristone, one of two medications used in medication abortion. Currently, REMS require the in-person dispensing of mifepristone by a registered clinician (but not the supervision of the actual taking of the medication). This erects a barrier to telemedicine medication abortion and other innovative models of care. Similarly, we expect the Biden Administration to invest in developing strong, comprehensive, and high-quality Medicaid programs that support sexual and reproductive health. This must include strategies advance maternal health care—an area in [which opportunity abounds](#) in the face of unacceptable rates of maternal mortality.

For readers interested in a more detailed to-do list for the incoming administration, the [Blueprint for Sexual and Reproductive Health, Rights, and Justice](#) lays out a comprehensive policy agenda.

## ACA Marketplaces

The federal Healthcare.gov Marketplace is open until Dec. 15 for people to enroll in private health insurance plans, often with substantial financial help. (Some state-run Marketplaces have longer open enrollment periods.) The picture is has its [bright spots](#); on average, benchmark plan premiums have decreased and most people will see the same or slightly more options on the Marketplace. The ACA’s Medical Loss Ratio provision (which requires insurers to spend a minimum percentage of premium dollars on actual medical expenses and send members rebates when expenses drop below that threshold) has [required insurers to return](#) substantial rebates to consumers, countering possible overpricing in previous years.

However, the challenges resulting of the Trump Administration’s continued attack against the ACA and other health care policies remain. While Congress was unable to repeal the law, the Trump Administration has used its executive powers to undermine the Marketplace through underfunding, eroded quality standards, and the elimination of measures that make the Marketplace more accessible. For example, navigators, people who are trained to help others understand and enroll into health insurance, saw their funding eviscerated ([from \\$63 million to \\$10 million](#)) and many organizations with longstanding connections to underserved communities were forced to scale back enrollment efforts (resulting in some states having no local navigators to help residents enroll in care). The Marketplace’s open enrollment period was shortened from three months to six weeks, and the Administration rolled back rules limiting certain “skinny plans”. These plans offer low-quality, cheaper coverage (often excluding care for certain pre-existing conditions) and discourage people

from enrolling into substantive coverage on the Marketplace.

With a new Administration on the horizon, we can expect significant change. The Biden-Harris health care platform was centered on strengthening and improving the ACA. Advocates have begun to [identify potential steps](#) for the new administration, ranging from undoing the many Trump-era cuts to funding to implementing new policies (such as suspending advanced premium tax credit repayments during the COVID-19 pandemic). The immediate first steps of the Biden-Harris administration will likely include a [new Marketplace enrollment period](#) for people impacted by COVID-19, increasing access to care needed to manage chronic conditions and mitigating the impact of increased unemployment.

While Biden's victory has rekindled hope of swift health reform, one certainty is that things will move slower than advocates want them to. Taking action to reinstate measures that protect people's access to care will undoubtedly take time to reach full effect. With a long road to recovery ahead of us, January 20, 2021 (and a presidential commitment to the nation's health) simply can't come soon enough.

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