

Health Care in Motion

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

January 18, 2019 10:30AM EST

January Roundup: New Year, New Agendas, Ongoing Litigation

It is only a few weeks into 2019, and the national health policy outlook is at least a little more [optimistic](#) in comparison to this time last year. The majority party switch in the House of Representatives brings with it a fresh energy after a constant slog of attempts to repeal or weaken the Affordable Care Act (ACA). In the coming congressional session, Democrats will be looking to shape the political landscape of the 2020 election with a robust discussion of progressive health reform. Among key priorities for the House majority are securing [protections](#) for people living with pre-existing conditions, [lowering](#) drug prices, [strengthening](#) the ACA's Marketplaces, and [building](#) support for a push towards a yet-to-be-defined single-payer health care system or "Medicare for All" proposal.

These new initiatives—and their stories—will unfold over time, and *Health Care in Motion* will be here to provide you with updates and analysis. In the meantime, however, this issue looks at where matters stand with several ACA-related lawsuits that are ongoing in federal courts across the country. One-party control over the executive *and* legislative branches of the federal government may be gone, for now. But these lawsuits remind us that Congress is but one piece of the policy puzzle.

Appeal Filed of December Decision Invalidating The ACA

You may remember that recent Friday evening in December when Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas released his opinion finding the ACA, in its entirety, to be unconstitutional. (You can read our initial analysis of the opinion [here](#).) As expected, the progressive state Attorneys General who intervened in the lawsuit have filed an appeal and the ruling has been stayed in the meantime. Judge O'Connor's decision has no current impact.

Notably, newly elected Democratic governors in Colorado and several other states have indicated their intention to enter the fray, as has the [House of Representatives](#), which recently filed a motion to intervene and join the defense of the ACA. The litigation is on [hold](#) during the partial government shutdown.

New Exemptions from the Contraceptive Mandate Halted by Courts Nationwide

Among the signature requirements of the ACA is the mandate that insurers provide to their enrollees a wide array of contraceptive methods with no out-of-pocket cost. In November 2018, the Trump Administration issued [final rules](#), severely undermining this contraceptive mandate. The new regulations:

- Vastly expand the types of employer organizations that may claim a religious exemption and, therefore, bypass the requirement that mandate;
- Introduce moral conviction as an entirely new basis for asserting an exemption; and
- Eviscerate the critical safety net that was created through a mandatory accommodation framework. Under the final rules, the requirement that women are nonetheless offered coverage for contraceptives is only optional.

Health Care in Motion

These new rules were immediately challenged by organizations that protect access to reproductive health care. As a result, federal district courts in [California](#) and [Pennsylvania](#) have stopped enforcement of this rule *nationwide*. That both courts issued preliminary injunctions highlight the degree to which HHS has overstepped its regulatory authority, questions about the burden on religious exercise presented by the mandate and the accommodation process, and the seriousness of harms flowing from the regulations. As with the other cases we describe, it can be expected that the litigation will continue—either through an appeals process in a higher court, or with a rewriting of the challenged rules.

Antidiscrimination Litigation Back On After Hold

As previously covered by CHLPI staff in [Health Affairs](#), back in December 2016 (New Year’s Eve, to be precise), Judge O’Connor (yes, the [same Judge O’Connor](#)) issued a preliminary injunction on the enforcement of federal regulations interpreting the key antidiscrimination provision of the ACA (commonly referred to as “Section 1557”). Specifically, the judge blocked the implementation of explicit protections from discrimination on the basis of gender identity and termination of abortion in health programs and activities. Litigation in the case had been stayed given the new Administration’s expressed intentions to review and revise the final rule in a manner that would narrow the scope of protections.

Fast-forward 17 months to December 2018. The Administration still has yet to release their proposed changes. At the request of the parties, Judge O’Connor issued an order to restart proceedings. First up in the coming months, Judge O’Connor will hear arguments on whether the ACLU and River City Gender Alliance can join the lawsuit in defense of current Section 1557 regulations, and whether the court should grant summary judgment to plaintiffs (i.e., whether the court should hold that regulators exceeded their authority in its interpretation of sex discrimination).

While the full enforcement of these regulations hangs in the balance, the Affordable Care Act still prohibits discrimination on the basis of sex—a protected class that [other courts](#) have ruled as prohibiting discrimination on the basis of gender identity. And we will all keep an eye on the Supreme Court, with several different cases now under consideration for review that have the potential to radically alter the face of antidiscrimination law meant to prohibit differential treatment [“on the basis of sex.”](#)

Conclusion

We celebrate the induction of progressive members of Congress, governors, attorneys general, judges, and state legislators. As these cases illustrate, however, the Trump Administration is likely to continue its assault on progressive reforms. (*Reminder: public comments on the [proposed changes](#) to Medicare Part D’s protected classes policy are [due](#) January 25th*). State-level advocacy is still an important policy lever. (*For example, after just seven months of implementing work requirements, Arkansas has removed over [18,000](#) from their Medicaid program—the initiative to apply a work requirement starts in the Governor’s mansion!*) And advocacy will continue to play out in the courts. CHLPI is here to support you and your organization as you develop and roll-out your priorities for 2019.

Health Care in Motion is written by: Robert Greenwald, Faculty Director; Kevin Costello, Litigation Director and Associate Director; Phil Waters, Clinical Fellow; Maryanne Tomazic, Clinical Fellow; and Rachel Landauer, Clinical Fellow. For further questions or inquiries please contact us at chlpi@law.harvard.edu.

Subscribe to all Health Care in Motion Updates