

# Health Care in Motion

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

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## A New Day Dawning: Biden's First Month in Health Policy

It is a vast understatement to say that much has changed since we last [wrote](#) our predictions for health policy in 2021. For starters, the Georgia runoff elections changed the political landscape in a manner many advocates did not expect. Now that there is both a new Congress and Administration energized to reform health policy, advocates are understandably eager to see what changes will come from this new year.

However, while President Biden works with Congress to get parts of his COVID-19 package, the [American Rescue Plan](#), passed through a slim majority using the arcane procedure of [budget reconciliation](#), his Administration has been at work since January 20, taking key first steps to unwind harmful policies that the Trump Administration enacted using executive authority. With just over a month in office, the Biden Administration has been able to start the ball rolling to address many of the health policy issues *Health Care in Motion* has tracked since 2017.

### Restoring the Affordable Care Act

The Affordable Care Act (ACA) Marketplace has been an important source of health insurance for people who are unable to get affordable health care through employment, school, family, or other means. In a marked turn from the previous administration's stance on access to health care, on January 28<sup>th</sup>, President Biden [issued an executive order](#) strengthening Medicaid and the ACA Marketplace. [Executive Orders](#) are generally used to announce a policy vision for a presidential administration, or to issue instructions to government agencies on how to carry out duties within their discretion. The executive order not only set the Administration's general policy of supporting the ACA, but it also detailed specific actions to consider in order to ensure people can realize the full potential of the law. Of note, the executive order has directed the Secretaries of Labor, Treasury and Health and Human Services (HHS) to review agency policies and practices that undermine protections for people living with pre-existing conditions, that reduce coverage or undermine Medicaid or the ACA, that weaken the health insurance market, or that introduce barriers to coverage or make health insurance less affordable. Each department is expected to reform such policies in a manner that increases access to care.

Shortly following the executive order, HHS [announced](#) that Healthcare.gov would reopen for a special enrollment period in light of the COVID-19 pandemic. The enrollment period will run from Feb. 15<sup>th</sup> – May 15<sup>th</sup> and many state-based marketplaces are extending their open enrollment periods as well. The federal government is [investing](#) around \$50 million for outreach for this special enrollment period – five times [the amount the previous administration allocated](#) for last year's Nov. 15<sup>th</sup> – Dec. 15<sup>th</sup> open enrollment period.

Looking forward, President Biden is working with Congress to pass a COVID-19 relief bill that could have some positive implications for the Marketplace. Currently, people making between 100% - 400% of the federal poverty level are eligible for [advanced premium tax credits](#) which make the monthly cost of a Marketplace health care plan lower than a pre-determined sliding-scale capped percentage of their income. If passed, consumers could see significantly reduced caps

on these costs with more people paying [no premium](#) for a Marketplace plan. And in another move to strengthen the ACA, the Biden Administration has filed a [letter](#) in the in *California v. Texas* case now pending in the Supreme Court regarding the constitutionality of the Individual Mandate and severability of that provision from the remainder of the ACA. (*Health Care in Motion* previously covered this case [here](#).) In the letter, Deputy Solicitor General Kneeder informs the Court that the United States has changed its position:

“After reconsideration of the issue, it is now the position of the United States that the amended Section 5000A [Individual Mandate] is constitutional. . . . It is also now the position of the United States that, if this Court nevertheless concludes that Section 5000A(a) is unconstitutional, that provision is severable from the remainder of the ACA.”

The Supreme Court has already heard oral arguments and has been briefed about the questions presented – so this letter (and shift in stance) may not ultimately have much impact on the Court’s decision other than to signal a new era of the executive branch supporting the ACA. Advocates await a decision from the Supreme Court, which is expected by June.

## Unwinding Medicaid Work Requirements

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. The Biden Administration has taken swift action to tackle these illegal waivers and ensure that Medicaid beneficiaries can access their services without being forced to document compliance with a work requirement.

A key first step was included in President Biden’s January 28 Executive Order that directs his Administration to determine if any agency actions or policies are inconsistent with the Administration’s policy to strengthen Medicaid and the Affordable Care Act, including demonstrations and waivers that “may reduce coverage under or otherwise undermine Medicaid.” This clear nod to Medicaid waivers was quickly followed-up by the Centers for Medicare and Medicaid Services (CMS) [notifying](#) all states with work requirements that it is beginning the process of withdrawing prior approvals. Simultaneously, while there was little fanfare about it, the guidance from the previous administration inviting states to apply for work requirements has been [removed](#) from the CMS website.

Additionally, readers will recall that the Biden Administration inherits a line of litigation from states on work requirements, culminating in review of [Azar v. Gresham](#) before the U.S. Supreme Court. On February 22, the Biden Administration filed a [motion](#) asking the Court to drop the case on the grounds that it will soon be moot. Aside from the obvious implications of the Court reviewing a work requirement policy that is soon to be terminated by the Administration, the motion points out that Arkansas, the state being sued for work requirements here (along with New Hampshire) is not currently implementing its work requirement waiver. That’s because as a [condition](#) of receiving enhanced Medicaid funding to offset increased spending, states can’t take people’s coverage away during the public health emergency. Furthermore, the Administration has [announced](#) that it expects the public health emergency to extend throughout 2021, when Arkansas’ waiver is set to expire with [no plans](#) to seek renewal.

Thus, the Biden Administration’s strategy is to get the Court to put work requirements to bed for the time being. While Arkansas has filed a motion in opposition, New Hampshire has taken no position. The Court now has to decide whether it will proceed with oral arguments that were previously scheduled for March 29. Meanwhile, President Biden is working with Congress to bolster Medicaid funding in the upcoming COVID-19 relief bill.

## Combating Gender Identity and Sexual Orientation Discrimination

[As we have written before](#), the long-term battle to combat discrimination in health care on the basis of sexual orientation and gender identity took a monumental step forward in June 2020, with the United States Supreme Court opinion in [Bostock v. Clayton County](#). Together with a slew of successful [court challenges](#) blocking efforts of the Trump Administration during its final [death rattle](#) to minimize the reach of Section 1557, this ruling means that the stage is set

for the Biden Administration to make sweeping, fundamental changes to how legal challenges to sexual orientation and gender identity discrimination are to be interpreted.

On his very first day in office, President Biden opened the curtain on this next phase of legal progress by signing an [Executive Order](#) that expressly extends the reach of *Bostock* across all areas of the federal government. Executive branch agencies have been given 100 days to review existing policies, and develop a new plan of reform to bring the federal government into compliance with this far broader vision of what constitutes illegal sex discrimination. The Center for Health Law & Policy Innovation, together with its partners, has called upon the U.S. Department of Health & Human Services, as well as its Office of Civil Rights, to seize on this moment to finally stamp out discrimination across the vast landscape of the American health care system. Stay tuned for further analysis on how the Administration can use its statutory authority to ensure that discrimination is stopped in its tracks.

## Reproductive Justice

While the [domestic gag rule and other restrictions](#) imposed on Title X family planning funding has not yet been lifted, President Biden has set the wheels in motion with the [Memorandum on Protecting Women’s Health at Home and Abroad](#) issued on January 28. Directed to act as soon as possible to unwind the undue limits that [forced](#) so many essential providers out of the program, HHS is expected to release proposed regulations shortly.

The global gag rule attaching to foreign assistance has also been revoked. Effectively immediately, conditions of the Mexico City Policy—that foreign nongovernmental organizations receiving US financial aid will not “perform or actively promote abortion as a method of family planning”—have been waived.

Advocates are all too familiar with the swings of this particular policy pendulum. Similar restrictions were imposed on Title X funding in 1988 by the Reagan Administration only to be reversed in 1993 by President Clinton. By [Kaiser Family Foundation](#) counts, the global gag rule has been government policy in nearly two-thirds of the last 36 years. This turbulence is unsustainable, unsound, and itself undermines the development of necessary infrastructure to support access to health care for low-income individuals. While agency action is a necessary near-term fix, our eyes are on Congress to amend the underlying laws and prohibit future reinstatement of these coercive tactics.

## Conclusion

While still in his first 100 days, President Biden and his Administration have much more to do to shape the health policy vision promised by his campaign. As we’ve outlined, many of the first steps directing administrative agencies have been taken. Now, the hurry-up-and-wait phase begins as cabinet positions are [confirmed](#) and regulatory sausage-making commences. As we [wrote](#) about [often](#) in the past administration, there is good reason to take it slow and ensure that the public is given a fair opportunity to provide input. Not only is this good policymaking, but it insulates regulatory action from being undone by the courts. As this process continues, *Health Care in Motion* will continue to update readers on these and other developments, highlighting opportunities to weigh-in as the Administration publishes new rules and regulation.

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