

1332 State Innovation Waivers

Deborah Bachrach and Michael Kolber

Manatt Health

- ▶ **Key Elements**
 - Waiver Application Process
 - Possible Waivers
 - Discussion

States may request waivers from HHS and the Treasury Department of certain requirements of the Affordable Care Act (ACA)

- State innovation waivers are the progeny of bipartisan pre-ACA proposals to give states flexibility to be laboratories of health policy.
- Waiver proponents across ideological spectrum view section 1332 as vehicle for diverse system-wide changes.
- While broad reforms are possible, section 1332 can also be used to smooth jagged edges of ACA through narrowly targeted waivers.
- Use of section 1332 will vary, reflecting differing state needs and goals.
- Waivers must preserve coverage and fiscal parameters of ACA.



Timing and Effective Date

1332 waivers cannot take effect before January 1, 2017, but states will need to prepare early in order to implement in 2017.



Federal Funding

States are entitled to the subsidies their residents would have received if state proposes to waive subsidies and use funds for other purposes.

ACA § 1332(a)(3)

States may propose innovations and alternatives to four pillars of the ACA

1 Individual Mandate

States can modify or eliminate the tax penalties that the ACA imposes on individuals who fail to maintain health coverage.

2 Employer Mandate

States can modify or eliminate the penalties that the ACA imposes on large employers who fail to offer affordable coverage to their full-time employees.

3 Benefits and Subsidies

States can modify the rules governing what benefits and subsidies must be provided. If a state waives the subsidy provisions, it may receive and reallocate the subsidy amount.

4 Exchanges and QHPs

States can modify or eliminate QHP certification and the Exchanges as the vehicle for determining eligibility for subsidies and enrolling consumers in coverage.

Four Guardrails for Waiver Approval

A state waiver application must satisfy four criteria to be granted

1 Scope of Coverage

The waiver must provide coverage to at least as many people as the ACA would provide without the waiver.

2 Comprehensive Coverage

The waiver must provide coverage that is at least as “comprehensive” as coverage offered through the Exchange. Whether coverage is as comprehensive as Exchange coverage must be certified by the CMS chief actuary based on data from the state and comparable states.

3 Affordability

The waiver must provide “coverage and cost sharing protections against excessive out-of-pocket” spending that is at least as “affordable” as Exchange coverage.

4 Federal Deficit

The waiver must not increase the federal deficit.

ACA § 1332(b)(1)

Section 1332 waivers can be coordinated with Medicaid and Medicare waivers, which may create opportunities for states to address differences among these federal programs that may impede efforts to pursue multi-payer delivery system reform.

1332 Waiver

ACA requires that HHS and Treasury coordinate their review of section 1332 waivers with existing waiver authority under federal law.

1115 Waiver - Medicaid

HHS may waive Medicaid requirements if doing so is “likely to assist in promoting the objectives” of the Medicaid statute.

Medicare waivers

HHS is permitted to modify Medicare payment to test methods to improve efficiency of the Medicare program.

Key Points

Section 1332 does not expand waiver authority for Medicaid or Medicare.

- State Exchanges can diverge from the federal model even without a waiver.
- Many innovations can be implemented without a waiver!
- Reforms that do not require a waiver:
 - Tie QHP certification to quality targets or payment reform
 - Eliminate bronze or platinum plans
 - Add state subsidies
 - Merge markets (individual, small group, large group)
 - Modify essential health benefits benchmark

1115 waivers must be “budget neutral” while 1332 waivers may not increase the federal deficit. Appears to be the same standard as a practical matter.

For section 1115 waivers, the state must demonstrate that the anticipated Medicaid spending with a waiver will be the same or less as without a waiver.

Budget Neutrality Review

- HHS and the Office of Management and Budget (OMB) must agree the 1115 waiver is budget neutral. HHS will review section 1332 waivers and OMB is likely to review as well.
- It is unclear whether the coordinated HHS review of section 1332 with other waivers means HHS will evaluate budget neutrality jointly for the 1115 and 1332 waivers or whether each waiver must independently demonstrate neutrality.

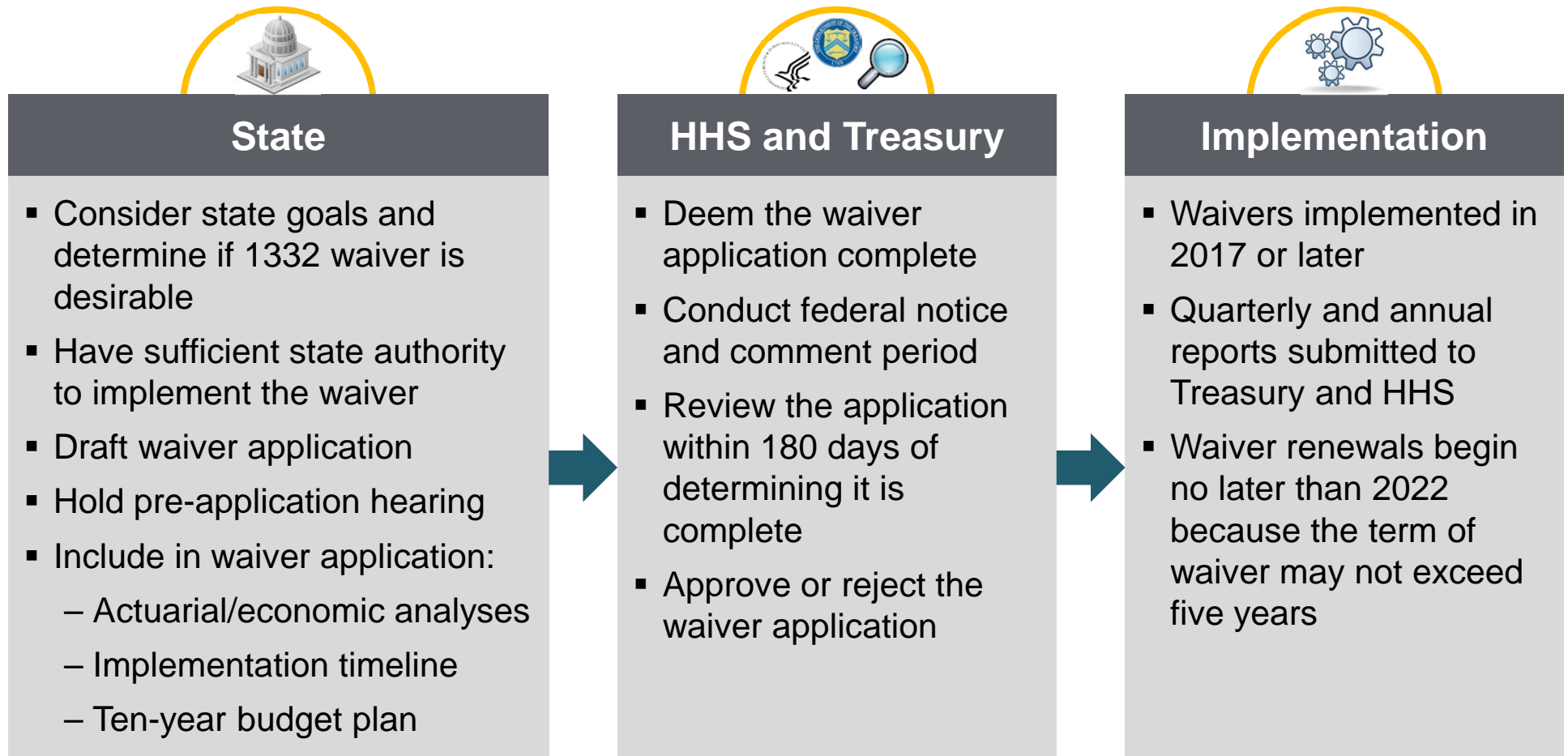
Key Elements

▶ Waiver Application Process

Possible Waivers

Discussion

Steps in Waiver Process



There is no deadline for submitting a waiver application and states may submit prior to 2017



Section 1332 specifically requires that a state have authority under state law to submit a waiver request



States may use preexisting law that grants state authority

The authority must cover application submission and implementation

ACA § 1332(a)(1)(C), (b)(2)(A)

Key Elements

Waiver Application Process

▶ Possible Waivers

Discussion

States can waive or modify the individual mandate, which imposes escalating tax penalties on individuals who fail to purchase qualifying health coverage and do not qualify for an exemption.

Coverage Guardrails

- Absent effective replacement, repeal of individual mandate will reduce number of people covered
- Should not impact cost sharing provisions (but may drive up premiums)
- Should not impact comprehensiveness of coverage

Fiscal Guardrails

- Waiving the mandate, by itself, will reduce costs because fewer people will enroll in coverage.
- But a successful waiver requires that at least as many people be covered, so ultimately fiscal impact will depend on how that is accomplished.

- Revisions to Individual Mandate
 - Expand or narrow exemptions
 - Increase or decrease penalties
- Replacements for Individual Mandate
 - Implement late enrollment penalty (like Medicare)
 - Reduce opportunities for open enrollment
 - Make coverage more affordable (see benefit waivers)



U.S. Code § 5000A

States can waive or modify the employer mandate, which imposes penalties on employers with 50 or more full-time employees that do not provide affordable coverage to full-time employees.

Coverage Guardrails

- Should have minimal impact on number of people covered
- Will not impact affordability
- Will not impact comprehensiveness of coverage

Fiscal Guardrails

- Waiver of employer mandate, by itself, will reduce penalty revenue to the federal government.
- States will have to find alternative revenue or cost-cutting provisions to achieve budget neutrality

U.S. Code § 36B

■ Revisions to Employer Mandate

- Exempt mid-sized employers (50-200 employees)
- Raise or lower bar for qualifying coverage
- Change definition of covered employees

■ Broader Waivers

- “Play or pay” mandate requiring flat percentage of payroll to be paid in benefits or taxes
- Eliminate employer mandate (requires pay for)



States may waive or modify ACA requirements relating to Essential Health Benefits (EHBs), Premium Tax Credits, and Cost Sharing Reductions (CSRs).

Coverage Guardrails

Benefit and subsidy changes will impact multiple guardrails, potentially requiring offsets to achieve budget neutrality:

- Adding skinnier plans may increase enrollment but will decrease comprehensiveness of coverage
- Enhancing CSRs will increase affordability of coverage and may increase enrollment, but will require offsets
- New benefit mandates will increase comprehensiveness of coverage, but may decrease affordability and will require offsets

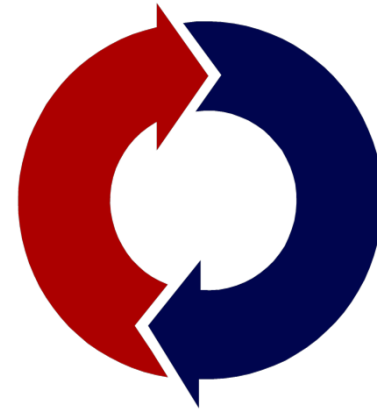
Fiscal Guardrails

Benefit or subsidy changes will often have a negative fiscal impact that must be offset or create a surplus that could be used elsewhere in the waiver package.

U.S. Code § 36B
ACA §§ 1301-1304, 1402

■ Revisions to Benefits and Subsidies

- Smooth out cost sharing cliffs
- Adjust tax credits based on quality metrics
- Add copper plans or ancillary benefits
- Shorten grace periods



■ Broader Waivers

- Smooth differences between Medicaid and Exchange (continuous enrollment in Exchange, premiums in Medicaid through 1115 waiver)
- Expand or contract subsidy eligibility (e.g., eliminate family glitch or cap subsidies at 300% FPL)
- Create alternative benefit and/or subsidy system



How will HHS handle waivers that impact provisions of federal law that are not explicitly waivable under section 1332 (e.g., open enrollment periods outside Exchange)?

States may waive or modify ACA requirements related to QHP certification and Exchanges as the vehicle for ensuring that ACA benefits and subsidies are delivered to consumers.

Coverage Guardrails

- Exchange and QHP waivers may not impact coverage, especially if they are operationally-oriented to enhance efficiency.



Fiscal Guardrails

- Exchange and QHP waivers may be fiscally neutral, especially if they are operationally-oriented to enhance efficiency.



Exchange-related waivers will likely require states to have a state-based exchange, at least in 2017 when the federal exchange is still focused on achieving basic functionality and is not very flexible or adaptable to state variations. The same point applies to a lesser degree to QHP-related waivers.

ACA §§ 1311-1313

- Revisions to Exchange and QHP Requirements
 - Eliminate specific Exchange or QHP requirements
 - Cap small group market at 50 employees
- Broader Waivers
 - Replace QHP certification with state-based regulation
 - Eliminate market outside Exchange for individuals and/or small groups
 - Replace Marketplace with one or more private exchanges
 - Allow all individuals (including subsidy-eligible) to purchase ACA-compliant coverage from any licensed insurer or agent

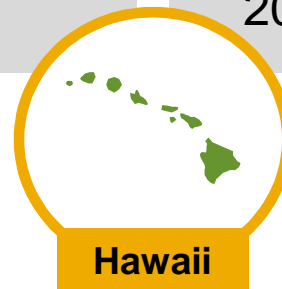


Reasons for Pursuing 1332 Waiver

- Wants to preserve its ERISA-exempt employer mandate that dates back to 1974 and has reduced uninsured rate to less than 10%
- Views waiver as potential means to support improvement of health care system (delivery, payment, wellness), not just coverage
- Role of Exchange is part of debate
- Goal is universal coverage and access

Work to Date

- 2014 legislation established State Innovation Waiver Task Force
- Task force includes state agency heads, insurers, community leaders
- Began public meetings in fall 2014
- Exploring all waivable provisions of ACA through working groups
- Aiming for legislative authorization and funding to pursue 1332 waiver for 2017 or later



Key Elements

Waiver Application Process

Possible Waivers

▶ Discussion

Thank You!

21



Deborah Bachrach
DBachrach@manatt.com



Michael Kolber
MKolber@manatt.com