Section 1332 Waivers: NCSL Information and Toolkit

prepared for the Idaho State Legislature
(State-Run Health Exchanges)

by Richard Cauchi, NCSL Program Director (Health Insurance, Costs and Pharmaceuticals)

October 2016

Table of Contents

The Forum for America's Ideas

SECTION 1332 INNOVATION WAIVERS: THE ROLE OF STATES

For the Idaho Legislature
By Richard Cauchi, NCSL Health Program
OCTOBER 24, 2016

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"1332" Innovation Waivers:

An Opportunity for States to Pursue Own Brand of Health Reform

- Beginning Jan. 1, 2017, section 1332 of the ACA invites states to find alternative ways to meet the coverage goals of the law while staying within its fiscal constraints.
- States have option to request waivers, submitted jointly to HHS and the Treasury Department, of certain specified provisions in the ACA.
- Recent federal guidance (Dec. 2015) explains what states should consider as they explore ACA innovation waiver options.
- States considering an ACA innovation waiver for 2017.

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What May Be Waived?

States may propose alternatives to four "pillars" of the ACA

- **Benefits and Subsidies.** States may modify the rules governing covered benefits, as well as the subsidies that are available through the marketplaces.
- **Marketplaces and Qualified Health Plans.** States may replace their marketplaces or supplant the plan certification process with alternative ways to provide health plan choice, determine eligibility for subsidies, and enroll consumers in coverage.
- **The Individual Mandate.** States may modify or eliminate the requirement.
- **The Employer Mandate.** States may modify or eliminate the requirement.

Waiver "Guardrails" or Requirements

State 1332 Innovation Waivers must satisfy four criteria:

- **Comprehensive Coverage.** States must provide coverage that is "at least as comprehensive" as coverage absent the waiver.
- **Affordable Coverage**. States must provide "coverage and cost-sharing protections against excessive out-of-pocket spending that are at least as affordable" as coverage absent the waiver.
- **Scope of Coverage.** States must provide coverage to "at least a comparable number of residents" as would have been covered without the waiver.
- **Federal Deficit.** The waiver must not increase the federal deficit.

(Table 1, attached)

Overview: Limits of 1332 waivers

- States **cannot** waive non-discrimination provisions prohibiting carriers from denying coverage: Guaranteed issue and related rating rules increasing premiums based on medical history.
- States **cannot** waive provisions that guarantee equal access at fair prices for all enrollees.
- 1332 waivers are **not** Medicaid waivers, but a state may develop a companion Medicaid waiver (typically an 1115 waiver) along side a 1332 waiver to achieve policy goals.
- -Federal regulations; adopted from presentation to NCSL, by Manatt staff, 8/4/2016 – see full presentation available online

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1332 Basics: Balancing What Can Be Waived with Guardrails

While a number of ACA provisions may be waived, states must follow federal guardrails.

Example: A state may wish to use a 1332 waiver to offer higher tax subsidies to make coverage more affordable

But one of the "guardrails" is that the waiver must not increase the federal deficit

Manatt - Adopted by NCSL

Coordinating 1332 and 1115 Waivers

Depending on the policy goals, states may leverage and coordinate 1115 and 1332 waivers to make changes to test innovative approaches in Medicaid (1115) or individual or small group insurance markets (1332)

- **Smoothing the Cost Continuum:** Improving premium and cost-sharing alignment across insurance affordability programs
- **Purchasing Alignment:** Creating a Medicaid premium assistance program, BHP-like program, or premium subsidy program
- **Eligibility & Enrollment Alignment:** More fully aligning eligibility and enrollment rules and processes across insurance affordability programs

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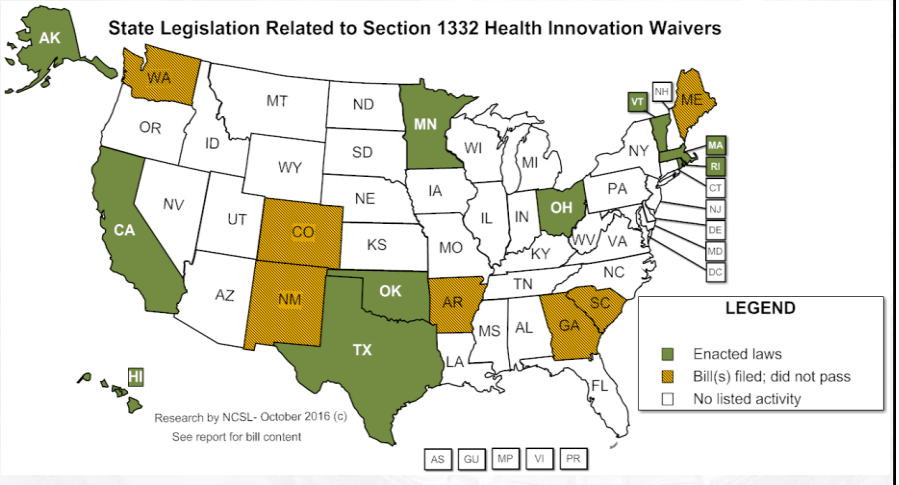
1332 State actions so far. . .



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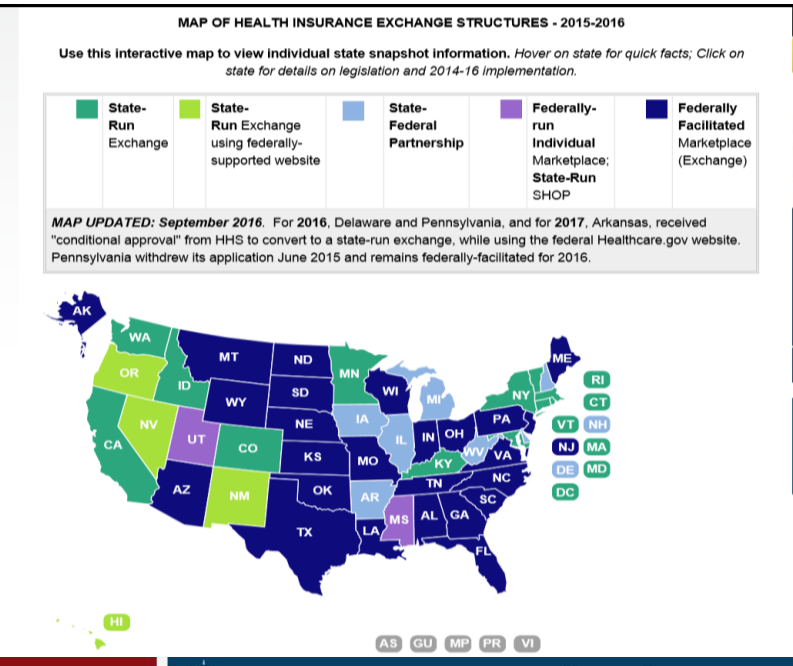
State Examples

- Waiver laws enacted + submitted to HHS /
  - Hawaii, Massachusetts, Vermont – continue state policies
  - California – cover undocumented individuals.
- State laws enacted; not yet submitted
  - Alaska, Minnesota, Ohio, Oklahoma, Rhode Island, Texas,
- Bill examples, not yet enacted
  - Arkansas, Colorado, Georgia, Maine, Minesota, South Carolina



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The Future of Insurance Reform:

Emerging Issues and State Flexibility (Waivers may not be needed…)

- **Essential Health Benefits benchmark framework**
  - How will states adjust benchmark plan for 2017?
- **Adequacy of provider networks**
  - Fewer levers to affect premiums – network design remains
  - State pushback against "narrow" networks?
- **Transparency**
  - Insurer data is critical to assessing consumer experience
    - E.g., EHB, network adequacy
  - Will States move ahead with implementation of transparency requirements?
- **Nondiscrimination**
  - Will States take further steps to limit discriminatory benefit designs?

The Center on Health Insurance Reforms
Georgetown University Health Policy Institute

Source: Kevin Lucia, NCSL Webinar, Apr. 24, 2015

More Information

- Visit www.ncsl.org and search "1332 waivers"
- Our online report on State Legislation and Enacted Laws Related to 1332 Waivers has been updated through today.

http://www.ncsl.org/research/health/state-roles-using-1332-health-waivers.aspx (includes 25+ links)

- Email Dick.Cauchi@ncsl.org Tel: (303) 856-1367

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State Roles Using 1332 Health Waivers

Richard Cauchi 10/10/2016

Innovation Waivers: State Options and Legislation Related to the ACA Health Law

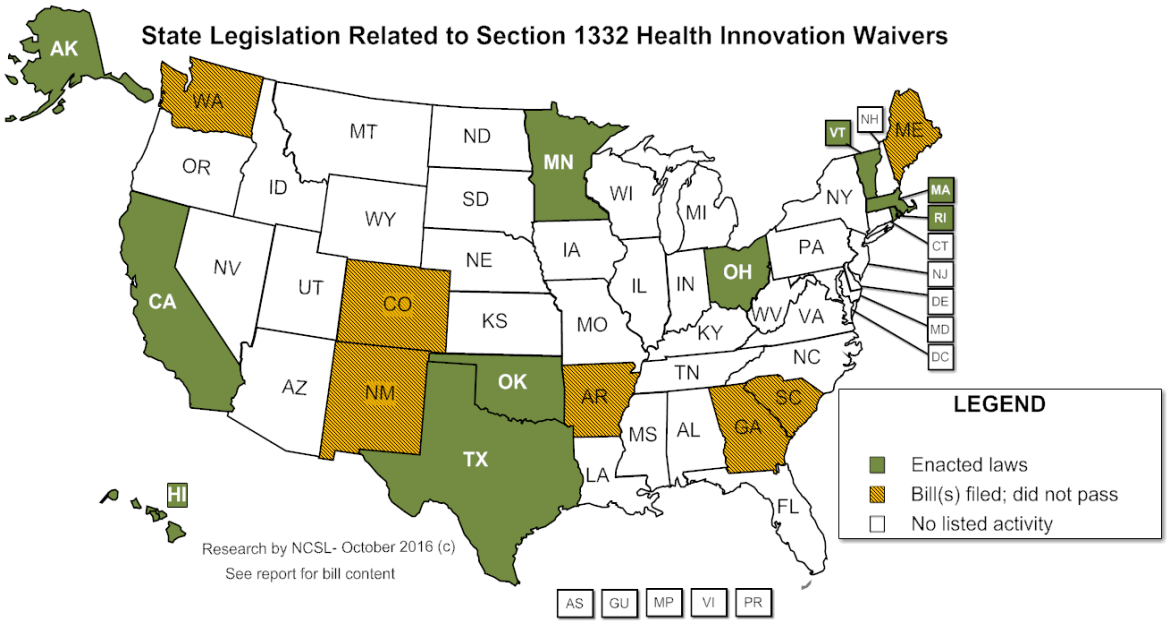
Beginning Jan, 1, 2017, a new state option within the Affordable Care Act (ACA) will take effect, known as **Section 1332 Waivers**. For the first time since the law was signed six years earlier, this new process will allow any state to seek to modify key parts of the health law within its boundaries.[1] These 1332 waiver options offer states an opportunity to fashion a new coverage system customized for local context and preferences while still fulfilling the aims of the ACA. The statute requires interested states to pass authorizing legislation as an early step in order to apply for and ultimately implement waiver-based reforms.[2]

The process is further detailed as authorized by the U.S. Secretary of HHS pursuant to 42 U.S.C. § 18052.

Researchers for the Commonwealth Fund, who work in collaboration with NCSL, published an updated examination of how, when and if, "these waivers may propose broad alternatives or targeted fixes to a number of the ACA's private insurance provisions, so long as they stay true to the law's goals and consumer protections."

The Fund's 1332 Waiver Blog: is titled "Innovation Waivers and the ACA: As Federal Officials Flesh Out Key Requirements for Modifying the Health Law, States Tread Slowly." It was posted Feb. 17, 2016.

As of early fall 2016 at least 17 states have considered legislation to "kick-start" the waiver application process. The content and proposed state changes vary widely, from minor fixes to substantial redirections. Some seek to restrict the use of these federal waivers. Some measures have been defeated or deferred. Recent results are detailed below.



State Legislation and Enacted Laws Related to 1332 Waivers (2015-2016)

The listings below include bill numbers, recent status and brief descriptions of provisions sought by the legislation. Additional measures will be added as they are filed or amended to include a 1332 waiver provision. This list should not be considered the entirety of state activity. The format is based on NCSL's Health Innovations Database, which provides online access to enacted laws.

- **Filed Bills:** For 2015-2016 sessions, bills affecting, examining or authorizing the use of ACA section 1332 waivers were initially filed in at least **17 states**. These include: **Alaska**, **Arkansas, California, Colorado, Georgia, Hawaii, Maine, Massachusetts, Minnesota, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Vermont and Washington.**

- **Enacted Laws:** Nine of these states enacted measures related to 1332 waivers, including: **Alaska**, **California, Hawaii, Massachusetts, Minnesota, Ohio, Oklahoma, Rhode Island, Texas** and **Vermont**. Note that the effect of state laws vary considerably, with some having an advisory or binding but exploratory intent or result.
- **Active Waivers: Hawaii, Massachusetts** and **Vermont**—have active proposed waivers that aim to continue pre-ACA employer coverage mandates and characteristics. **California** seeks to provide unsubsidized health plans to undocumented individuals.

State Legislation and Enacted Laws Related to 1332 Waivers		
State	**Status**	**Description**
Alaska HB 374 of 2016	**Enacted into law; signed as Ch. 5,** 7/18/2016	Reenacts Sec. 21.96.120. Waiver for state innovation, also referencing reinsurance and state high risk program. "The director may apply to the United States Secretary of Health and Human Services under 42 U.S.C. 18052 for a waiver of applicable provisions of P.L. 111-148 (Patient Protection and Affordable Care Act) with respect to health insurance coverage in the state for a plan year beginning on or after January 1, 2017. The director may implement a state plan meeting the waiver requirements in a manner consistent with state and federal law and as approved by the United States Secretary of Health and Human Services." Effective date: 7/18/2016
Arkansas S 828 of 2015	Engrossed; 3/5/2015; did not pass; adjourned	Creates the Arkansas Health Insurance Innovation Act of 2015. Declares an emergency. The purpose of this measure is to encourage the executive and legislative branches to explore, develop, and facilitate innovative approaches to improving access to, affordability, and quality of comprehensive health insurance coverage and health care.
California S 10 of 2016	Passed Senate & Assembly; **Enacted into law; signed** 6/10/2016 as Chapter 22 of 2016	Allows previously unauthorized immigrants to buy health insurance on the state-based health exchange created under the federal ACA. It authorizes the state to request a Section 1332 waiver from the federal government that is needed to allow a new category of ''individuals who are not eligible to obtain health coverage through the Exchange because of their immigration status'' to purchase unsubsidized insurance through Covered California, (*Established by a 2010 state law, SB 900).* After the waiver has been approved by HHS, the Exchange will require a health insurance issuer to offer a qualified health plan (QHP) to these individuals, effective 2018. Requires that eligible individuals pay the cost of coverage without federal assistance and meet other requirements. The law is the first in the country to offer that category of coverage through an exchange. Prohibits disclosure of application-related information.
California - *not* enacted S 1364 of 2016	Did not pass; adjourned 2016	S 1364: Declares the intent of the Legislature to enact legislation that would create a competitive marketplace for health care coverage consistent with the State Innovation Waiver requirements.
Colorado D 27 of 2016	Filed 10/26/15; failed; Withdrawn from further consideration.	(Bill 2) Concerns a requirement that the commissioner of insurance apply for a waiver of requirements of the federal Patient Protection and Affordable Care Act to allow employers to provide contributions to employees to purchase individual health care coverage in lieu of offering employer-sponsored group health care coverage. Requires an optional program for employers to share health care coverage costs with their employees. Provides for minimum premium amounts.
Georgia H 1160 of 2016	Filed 3/16/16; Did not pass; adjourned	Restricts involvement with health reform and requires legislative notification before the submission of waivers pursuant to Section 1332 of the ACA. Notification must "be by general Act or joint resolution of the General Assembly. Title includes "Relates to medical assistance generally."

State Legislation and Enacted Laws Related to 1332 Waivers		
State	**Status**	**Description**
Hawaii H 576 of 2015 S 1341 *(did not pass; see above)* S 2775 of 2016	Passed House & Senate; **enacted into law; signed** 7/1/15 as Act 184 S 2775 **Enacted into law; signed** 4/24/2016 as Act 13	Provides resources to develop a waiver from provisions of the Patient Protection and Affordable Care Act. Appropriates funds. Relates to a plan for coverage that is at least as comprehensive as required by the federal act, provides coverage and cost-sharing protections that are at least as affordable under the federal act, makes health insurance coverage available to as many residents as under the federal act, is budget-neutral for the federal government and complies with public notice requirements. > S 2775 provides for alignment of the Affordable Care Act with the Hawaii Prepaid Health Care Act's requirements with three provisions as approved Dec. 2015: (1) ''Maintain access to affordable health insurance coverage for individuals via the state-based exchange utilizing the federal platform; (2) Align the Affordable Care Act with the Hawaii Prepaid Health Care Act's requirements for private employers to the extent allowable; and (3) Waive the Affordable Care Act Small Business Health Options Program and its requirements for the small business marketplace, including the employee choice provision.''
Maine S 289 of 2015	Filed 2/15; Did not pass; adjourned	Seeks to establish the "Maine Health Care Plan" a universal, single-payer style plan "to provide security through high-quality, affordable health care for the people of the state and to include federal funds to the maximum extent allowable under federal law and waivers from federal law. The plan becomes effective and binding upon the approval of a state waiver ... pursuant to Section 1332."
Massachusetts H 3829 of 2015 H 3838 (Governor's) H 3837 (Sen. substitute)	**Passed House and Senate; became law** as Chapter 119 of 2015.	Chapter 119 of the Acts of 2015. Authorizes agency to "to make applications to the United States Secretary of HHS to waive any applicable provisions of the (ACA) and to implement the state plans of any such waiver in a manner consistent with applicable state and federal laws. > Separate provision requires the Connector (exchange) Board to submit a report to the Legislature at least 90 days before, and within 10 days after, submitting an application pursuant to Section 1332 of the Patient Protection and Affordable Care Act, to the federal government. The report is to include the intent and purpose of the proposed application and any changes to state law. > Governor Baker vetoed this section 77, and filed an amendment, in H 3838, to reduce the 90 days to 30 days.
Minnesota S 1458 of 2015	**Enacted into law; signed** 5/22/2015	Establishes a Health Care Financing Task Force that will consider "opportunities, including alternatives to MNsure (Medicaid), options under section 1332 of the ACA and options under a section 1115 waiver."
	Filed 2015; Did not pass; adjourned	[See similar H 1181, H 1939, S 813 & S 1275, not enacted]
MN S 2060 & MN S 2089 & MN H 2209 & MN S 2163	Filed 2015; Did not pass; adjourned	Seeks to establish the "Minnesota Health Plan" a universal, single-payer style plan guaranteeing that all necessary health care is available and affordable for every Minnesotan." All federal funding received by Minnesota including the premium subsidies under the ACA as authorized by the section 1332 state innovation waiver, is appropriated to the Plan.
MN H 2405 & H 2491 & S 2541 & S 2564	Filed 3/8/2016; Did not pass; adjourned	The commissioner shall apply for an innovation waiver under section 1332 of the Affordable Care Act, or any other applicable federal waiver to allow persons eligible for MinnesotaCare the option of declining MinnesotaCare coverage and instead accessing advanced premium tax credits and cost-sharing reductions through the purchase of qualified health plans through MNsure
New Mexico SJM 2	Filed 2015; passed Senate; Did not pass; adjourned	Resolution requests the superintendent of insurance to "convene an innovation waiver working group composed of experts in health care delivery, policy and finance as well as related areas; to analyze the potential, under the auspices of a federal innovation waiver, for designing a comprehensive, sustainable health care system that: A.) addresses the effects of the lack of health insurance, unaffordable health coverage, disparities in access to health care and uncompensated care on New Mexicans; B.) provides for the collection of data and the examination of variations in health care utilization; and C. bends the health care cost curve in the state."
Ohio H 64 of 2015	**Enacted into law; signed 6/30/2015**, as Session Law No. 2015-11	Requires the superintendent of insurance to apply to the federal government "for an innovative waiver regarding health insurance coverage in this state as authorized by section 1332." It "shall include in the application a request for waivers of the employer and individual mandates." and shall

State Legislation and Enacted Laws Related to 1332 Waivers		
State	**Status**	**Description**
		provide for the establishment of a system that provides access to affordable health insurance coverage for the residents. (Budget Sec. 3901.052).
Oklahoma S 1386 of 2016	Filed 1/2016; **Enacted into law; signed** 5/16/2016	Relates to health insurance; creates a section 1332 State Innovation Waiver; allows for multiple waiver submissions. Establishes procedures for development. Requires certain entities to submit information for approval. Includes "for the purpose of creating Oklahoma health insurance products that improve health and health care quality while controlling costs." Authorizes the Insurance Department to review health insurance market after waiver implementation; provides for codification; provides an effective date.
Rhode Island RI H 5900 H 7381, and S 2824	**Enacted into law; Signed** 6/30/2015	1332 Waiver authorization. [excerpt of text] 42-157-5. Regional purchasing, efficiencies, and innovation. To take advantage of economies of scale and to lower costs, the exchange is hereby authorized to pursue opportunities to jointly negotiate, procure or otherwise purchase exchange services with or partner with another state or multiple states and to pursue a Federal Affordable Care Act 1332 Waiver. [Also see RI H 7381, and RI S 2824, single-payer proposals; did not pass; adjourned]
South Carolina H 3020	Filed, 12/11/14; did not pass; adjourned	Sought to enact the ACA Anti-Commandeering Act; provides that a public official, officer, or employee of a public body must not participate in the establishment of a health insurance exchange or enforce or aid in the enforcement of the individual and employer health insurance mandates. It also provides, "nor does this act limit the South Carolina Department of Health and Human Services' ability to apply for, request, or otherwise develop innovation waivers as set forth in Section 1332 of the ACA."
Texas SB 200 of 2015	**Enacted into law; signed** 6/17/2015 as Ch. 837	The Texas Health and Human Services Commission "shall develop and implement a comprehensive, coordinated operational plan to ensure a consistent approach across the major quality initiatives of the health and human services system for improving the quality of health care. (b) The operational plan developed under this section must include broad goals for the improvement of the quality of health care in this state, including health care services provided through Medicaid. (c) The operational plan under this section may evaluate: the Delivery System Reform Incentive Payment (DSRIP) program under the Texas Health Care Transformation and Quality Improvement Program waiver issued under Section 1115 of the federal Social Security Act (42 U.S.C. Section 1315), enhancing funding to disproportionate share hospitals in the state, Section 1332 of 42 U.S.C. Section 18052, enhancing uncompensated care pool payments to hospitals in the state under the Texas Health Care Transformation and Quality Improvement Program waiver issued under Section 1115...
Vermont H 524	Filed 1/6/2016; **Enacted into law; signed** Act **67**, 2/29/16	Directs the Commissioner of the State Health Access to seek a Section 1332 federal waiver that would permit state businesses to continuing purchasing State Health Benefit Exchange plans directly from the health insurance carriers.
Vermont H 875 of 2016	**Enacted;** **signed into law** 6/8/16	2017 appropriations bill; includes provision that the Secretary of Administration is required to "analyze the financial implications of expanding Dr. Dynasaur, the State's children's Medicaid and Children's Health Insurance Program, to all Vermont residents up to 26 years of age. The Secretary may contract with other individuals and entities as needed to provide actuarial services, economic modeling, and any other assistance the Secretary requires in carrying out the analysis, using "opportunities and challenges presented by federal law, including the Internal Revenue Code; Section 1332" of the ACA, Medicaid and SCHIP and by State tax law."
Vermont H 88 of 2015	Filed 1/22/15; did not pass; adjourned	Proposes to create a public health care coverage option, called Vermont Care, to be offered through the Vermont Health Benefit Exchange. State premium assistance would be available only for individuals enrolled in Vermont Care. The bill would remove health care from the list of topics on which public employees may bargain collectively and provide health coverage for those individuals through Vermont Care. The bill would enact an individual responsibility requirement to have health care coverage and establish a payroll tax. "On or before Jan. 1, 2016, the secretary of human services shall apply for a Waiver for State Innovation pursuant to Sec. 1332."
Also see: VT S 103 & H 447	Did not pass; adjourned	H 447: Relates to establishing the Vermont Hospital Security Plan and Trust Fund from which a negotiated payment would be made to each hospital for health services provided. S 103: Relates to increasing exchange subsidies up to 400 percent of the federal poverty guideline for cost-sharing assistance and to developing a proposal for universal health care by 2018.
Washington S 6488	**Passed Senate;** did not pass House; adjourned 2016	Directs the health care authority to apply for a 1332 federal innovation waiver to expand an employer-based coverage option with a portable health care account.

(2 A)

Section 1332: Requirement for a State Statute

From the state legislative perspective, Section 1332 provides an important, first time opportunity to define and set broad ACA-related policy. Because the federal statute requires the filing of state legislation: *[Excerpts]*

> (a) APPLICATION
>
> (1)… Such application shall…
>
> **(B) contain… (i) "a comprehensive description of the State legislation and program to implement a plan meeting the requirements for a waiver…"**

A separate subsection specifies a new state law, or an existing law that is inclusive of all major provisions in a new state waiver application.

> **(2)(D)(b) GRANTING OF WAIVERS**
>
> **(2) REQUIREMENT TO ENACT A LAW ---**
> **(a) IN GENERAL --- A law described in this paragraph is a State law that provides for State actions under a Waiver under this section, including the implementation of the State plan under subsection (a)(1)(B).**

There is no deadline for the initiation or approval of this process.

See accompanying Appendix E from the PCG Arkansas section-by-section analysis

Excerpted from PPACA by NCSL – 7/14/2015

Also see associated federal regulations.

2 B: TABLE: State Waivers of the ACA's Private Health Insurance Rules: Key Requirements
Compiled by Georgetown University Center on Health Insurance Reforms for The Commonwealth Fund

Requirement	What Does It Mean?
1. Enrollment Waiver program must provide coverage to a comparable number of state residents as would receive coverage without it	Waiver program must cover at least as many individuals as the ACA, in every year of the program. Federal officials will consider the impact of the program on all state residents, as well as its effects across different groups of residents. This review will focus on vulnerable populations, including those with low incomes, the elderly, and those with serious health issues.
2. Affordability Waiver program must provide coverage and cost-sharing protections against excessive out-of-pocket spending that are as affordable as would be provided without it	Affordability is measured by reference to residents' net out-of-pocket spending, including premium contributions, cost-sharing, and spending on noncovered services. Federal officials will consider both the average impact of the program and how it affects individuals with large health care spending burdens. Review also will focus on vulnerable populations.
3. Comprehensiveness Waiver program must provide coverage that is as comprehensive as would be provided without it	Waiver program must not decrease the number of individuals with coverage that satisfies the ACA's essential health benefits requirements or the number of individuals with coverage that includes the services covered under the state's Medicaid and CHIP programs. Federal officials will consider the impact of the program on all state residents, as well as its effects across different groups of residents. This review will focus on vulnerable populations.
4. Deficit Neutrality Waiver program must not increase the federal deficit	Waiver program must be federal deficit neutral in each year of the waiver and over a 10-year budget period. This analysis must account for the budget effect of all changes in federal income and spending resulting from the waiver, while holding the state's Medicaid policies constant. That is, any budget effects produced by changes to the state's Medicaid program from a Medicaid section 1115 waiver will not be considered when evaluating the 1332 waiver.

Source: U.S. Department of the Treasury and U.S. Department of Health and Human Services, "Waivers for State Innovation," 80 Fed. Reg. 78131, Dec. 16, 2015. Published in: http://www.commonwealthfund.org/publications/blog/2016/feb/innovation-waivers-and-the-aca

Endnotes.

1- NCSL Blog, "**Innovation Waivers: Can Your State Change the Health Law?" -** full text, April 1, 2016

2 - Section 1332 Waiver Activity Heating Up In States (Update: New CMS Hub) - Heather Howard and Galen Benshoof. Health Affairs Blog, June 24, 2015

3 - U.S. Department of the Treasury and U.S. Department of Health and Human Services, "**Waivers for State Innovation,**" 80 Fed. Reg. 78131, Dec. 16, 2015.

About the author: *Richard Cauchi is an NCSL health program director covering health insurance, reforms and health finance. Online:* http://www.ncsl.org/research/health/state-roles-using-1332-health-waivers.aspx

Additional Resources

- **"Innovation Waivers:** Can Your State Change the Health Law?" NCSL Blog, April 1, 2016
- The Commonwealth Fund's 1332 Waiver Blog: "**Innovation Waivers and the ACA: As Federal Officials Flesh Out Key Requirements for Modifying the Health Law, States Tread Slowly**." By Kevin Lucia, Justin Giovannelli, Sean Miskell and Ashley Williams; Posted 2/17/2016.
- **Explanation of Federal waivers:** [download presentation] by Cindy Mann (former director of Medicaid at CMS, 2010-2015) to NCSL meeting, 12/8/2015
- GAO:
- **The 1332 "Innovation Waivers"** from **HHS/CMS/The Center for Consumer Information & Insurance Oversight** (CCIIO)

- Regulations and Guidance
- Fact Sheets
- Frequently Asked Questions (FAQs)
- HHS Explanation: (Excerpted Aug. 10, 2016)

SUMMARY: CMS Guidelines

About the 1332 State Innovation Waiver Application Process

States have the option to seek a State Innovation Waiver under Section 1332 of the Affordable Care Act to pursue innovative strategies to provide high quality, affordable health care coverage while retaining the statute's basic protections. The U.S. Department of Health and Human Services (HHS) and the U.S. Department of the Treasury are responsible for reviewing waiver applications.

States may submit State Innovation Waiver applications to stateinnovationwaivers@cms.hhs.gov.

Public Input Process Prior to Submission of an Application

Prior to submitting a State Innovation Waiver application to HHS for review and consideration, a state must provide public notice and a comment period sufficient to ensure a meaningful level of public input on the application. During the public comment period, the state must conduct public hearings regarding the state's application. In addition, a state with one or more federally recognized tribes within its borders must conduct a separate process for meaningful consultation with the tribes as part of the notice and comment process.

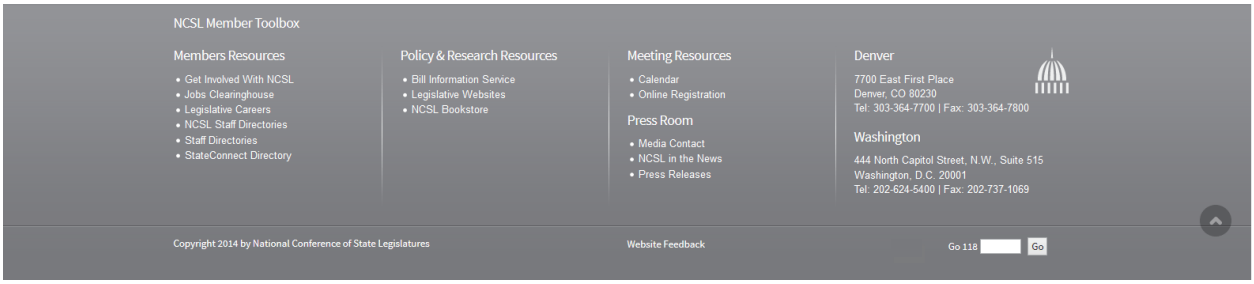
Application Requirements

The final regulations specify what information needs to be included in an application for a State Innovation Waiver. Critical elements of that application include (but are not limited to):

- The list of provisions the state seeks to waive, including the rationale for the specific requests;
- Data, assumptions, targets, and other information sufficient to determine that the proposed waiver will provide coverage that is at least as comprehensive as would be provided absent the waiver, will provide coverage and cost sharing protections that keep care at least as affordable as would be provided absent the waiver, will provide coverage to at least a comparable number of residents as would be provided coverage absent the waiver, and will not increase the Federal deficit;
- Actuarial analyses and actuarial certifications to support State estimates that the waiver will comply with the comprehensive coverage requirement, the affordability requirement, and the scope of coverage requirement;
- A detailed 10-year budget plan that is deficit neutral to the Federal government;
- A detailed analysis of the impact of the waiver on health insurance coverage in the state;
- A description and copy of the enacted state legislation providing the state authority to implement the proposed waiver; and,
- A detailed plan as to how the state will implement the waiver, including a timeline.

    - The regulations provide more detail about each of the application elements and should be consulted carefully as states develop applications.
    - HHS may also request, or a state may propose, additional information to aid in the review of the application
- **Complex Rules for 1332 Waivers Could Limit Applications.** The Government Accountability Office (GAO) issued a letter [full text, 13 pp] describing that while some states continue to explore tweaking the ACA rules and standards under the so-called Section 1332 waiver process, the way federal rules are written may reduce actual applications to do so. The letter, made public on Aug. 8 and titled "Patient Protection and Affordable Care Act: Information on Approval Process for State Innovation Waivers, GAO-16-637R," said, "Stakeholder groups representing state Medicaid and exchange officials told us that...they believe HHS's and Treasury's application review controls and their operational considerations may considerably limit state waiver proposals."

- The Commonwealth Fund: "Innovation Waivers: An Opportunity for States to Pursue Their Own Brand of Health Reform" | Full report text. | April 2015



(3) CMS.gov

Frequently Asked Questions about 1332 State Innovation Waivers

1. What is a State Innovation Waiver?

Under Section 1332 of the Affordable Care Act (ACA), a state can apply for a State Innovation Waiver, allowing states to implement innovative ways to provide access to quality health care that is at least as comprehensive and affordable as would be provided absent the waiver, provides coverage to a comparable number of residents of the state as would be provided coverage absent a waiver, and does not increase the federal deficit. If approved, these waivers can begin on or after January 1, 2017.

2. What can be waived pursuant to a State Innovation Waiver?

The Secretary of Health and Human Services and the Secretary of the Treasury are authorized to waive a number of provisions under their respective jurisdictions. Specifically, the Secretaries are authorized to waive:

- Part I of Subtitle D of Title I of the Affordable Care Act (relating to establishing qualified health plans (QHPs));
- Part II of Subtitle D of Title I of the ACA (relating to consumer choices and insurance competition through health insurance marketplaces);
- Sections 36B of the Internal Revenue Code and 1402 of the ACA (relating to premium tax credits and cost-sharing reductions for plans offered within the marketplaces);
- Section 4980H of the Internal Revenue Code (relating to employer shared responsibility); and
- Section 5000A of the Internal Revenue Code (relating to individual shared responsibility).

Section 1332 does not change existing waiver authority for provisions in other Federal health programs such as Medicaid or Medicare (including waiver authorities under section 3021 specific to the Center on Medicare and Medicaid Innovation or under section 1115 related to Medicaid and CHIP), although states may apply for such waivers as part of the coordinated application process to be developed by the Secretary.

3. How do states apply?

States should submit their completed application in an electronic format to the Secretary of Health and Human Services at stateinnovationwaivers@cms.hhs.gov.

4. Who can states contact if they are interested in submitting a waiver application and have questions?

States should contact stateinnovationwaivers@cms.hhs.gov.

5. Will states have to apply to each relevant agency separately when submitting a State Innovation Waiver?

No. A state seeking a State Innovation Waiver should apply by submitting a completed application in electronic format to the Secretary of Health and Human Services at stateinnovationwaivers@cms.hhs.gov only. Upon receipt, applications will be transmitted to the Secretary of the Treasury or other relevant agencies for review as appropriate.

6. When must states submit applications for approval? How long will the process take?

Prior to submitting an application, a state must provide a public notice and comment period sufficient to ensure a meaningful level of public input, including consultation with Federally-recognized Indian tribes within state borders. During the public comment period, the state must conduct public hearings to obtain public input regarding the state's application, and must also accept written comments.

The Secretary of Health and Human Services and the Secretary of the Treasury will review an application and make a preliminary determination of whether it is complete within 45 days after it is submitted to stateinnovationwaivers@cms.hhs.gov.

After determining that the application is complete, the application will be made public through the Department of Health and Human Services website, and a federal public comment period will commence while the application is under review. A final decision regarding the waiver will be issued no later than 180 days after the preliminary determination of a complete application.

State Innovation Waivers will not be available with effective dates prior to January 1, 2017.

7. What guidance and regulations exist for State Innovation Waivers?

Regulations governing the application process for State Innovation Waivers can be found here or the Federal Register at 77 Fed. Reg. 11700 (Feb. 27, 2012). Among other things, these regulations provide guidance on how to apply for a waiver and what an application from a state must contain, including actuarial and economic analyses. The regulations detail public notice and comment requirements that a state must comply with before an application is submitted, including holding public hearings, in order to facilitate a meaningful level of public involvement, input, and transparency in the state application process. They also describe the Federal public notice and comment process that will occur after a completed application has been received. The regulations also describe the requirements for post-award reporting and the standards under which post-award monitoring will take place.

As additional questions and issues arise, the Departments of Health and Human Services and Treasury will issue further guidance.

8. What do states have to include with their application?

The final regulations specify what information needs to be included in an application for a State Innovation Waiver. Critical elements of that application include (but are not limited to):

- The list of provisions the state seeks to waive, including the rationale for the specific requests;
- Data, assumptions, targets, and other information sufficient to determine that the proposed waiver will provide coverage that is at least as comprehensive as would be provided absent the waiver, will provide coverage and cost sharing protections that keep

care at least as affordable as would be provided absent the waiver, will provide coverage to at least a comparable number of residents as would be provided coverage absent the waiver, and will not increase the Federal deficit;

- Actuarial analyses and actuarial certifications to support State estimates that the waiver will comply with the comprehensive coverage requirement, the affordability requirement, and the scope of coverage requirement;
- A detailed 10-year budget plan that is deficit neutral to the Federal government;
- A detailed analysis of the impact of the waiver on health insurance coverage in the state;
- A description and copy of the enacted state legislation providing the state authority to implement the proposed waiver; and,
- A detailed plan as to how the state will implement the waiver, including a timeline.

The regulations provide more detail about each of the application elements and should be consulted carefully as states develop applications.

(4) State Law Example:

RHODE ISLAND
H 5900, Signed into law June 30, 2015
Art18
RELATING TO HEALTH REFORM ASSESSMENT AND HEALTH BENEFIT EXCHANGE

[excerpt of text]

. . . . .

42-157-5. Regional purchasing, efficiencies, and innovation. -- To take advantage of economies of scale and to lower costs, the exchange is hereby authorized to pursue opportunities to jointly negotiate, procure or otherwise purchase exchange services with or partner with another state or multiple states and to pursue a Federal Affordable Care Act 1332 Waiver.

42-157-6. Audit. -- (a) Annually, the exchange shall cause to have a financial and/or performance audit of its functions and operations performed in compliance with the generally accepted governmental auditing standards and conducted by the state bureau of audits or a certified public accounting firm qualified in performance audits.

(b) If the audit is not directly performed by the state bureau of audits, the selection of the auditor and the scope of the audit shall be subject to the approval of the state bureau of audits.

(c) The results of the audit shall be made public upon completion, posted on the department's website and otherwise made available for public inspection.

42-157-7. Exchange advisory board. -- The exchange shall maintain an advisory board which shall be appointed by the director. The director shall consider the expertise of the members of the board and make appointments so that the board's composition reflects a range and diversity of skills, backgrounds and stakeholder perspectives.

42-157-8. Reporting. -- HealthSource RI shall provide a monthly report to the chairpersons of the house finance committee and the senate finance committee by the fifteenth day of each month beginning in July 2015. The report shall include, but not be limited to, the following information: actual enrollment data by market and insurer, total new and renewed customers, number of paid customers, actual average premium costs by market and insurer, number of enrollees receiving financial assistance as defined in the Federal Act, as well as the number of inbound calls and the number of walk-ins received. The data on inbound calls shall be segregated by type of call.

Source: RI Legislative site:
http://webserver.rilin.state.ri.us/billtext15/housetext15/article-018-sub-a-as-amended.htm

(5) State Bill Example **2015 MN S 813**	**Author:** Marty **Version:** Amended **Version Date:** 03/16/2015

SF 813

1st Engrossment - 89th Legislature (2015 - 2016) Posted on 03/17/2015

A bill for an act relating to health; preparing for a Minnesota innovation waiver under section 1332 of the Affordable Care Act; developing a health care system that best serves Minnesotans; requiring a cost analysis; appropriating money.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. SECTION 1332 WAIVER COST AND BENEFIT ANALYSIS.

Subdivision 1. Contract for analysis of proposals.

In preparation for a section 1332 waiver request, the commissioner of management and budget shall contract with the University of Minnesota School of Public Health and the Carlson School of Management, to conduct an analysis of the costs and benefits of up to three specific proposals that seek to create a better health care system which would increase access, affordability, and quality of care in comparison to the current system.

Subd. 2. Plans.

After consulting with interested legislators, the commissioner of health shall submit to the University of Minnesota the following proposals:

(1) a free-market insurance-based competition approach;

(2) a universal health care plan designed to meet the following principles:

(i) ensure all Minnesotans receive quality health care;

(ii) cover all necessary care, including all coverage currently required by law, complete mental health services, chemical dependency treatment, prescription drugs, medical equipment and supplies, dental care, long-term care, and home care services;

(iii) allow patients to choose their own providers; and

(iv) use premiums based on ability to pay; and

(3) a third alternative may be submitted by the commissioner that offers a different approach.

Subd. 3. Proposal analysis.

(a) The analysis of each proposal must measure the impact on total public and private health care spending in Minnesota that would result from each proposal. "Total public and private health care spending" means spending on all medical care, including dental care, prescription drugs, medical equipment and supplies, complete mental health services, chemical dependency treatment, long-term care, and home care services as well as all of the costs for administering, delivering, and paying for the care. The analysis of total health care spending shall include whether there are savings or additional costs compared to the existing system due to:

(1) increased or reduced insurance, billing, underwriting, marketing, and other administrative functions;

(2) timely and appropriate use of medical care;

(3) market-driven or negotiated prices on medical services and products, including pharmaceuticals;

(4) shortages or excess capacity of medical facilities and equipment;

(5) increased or decreased utilization, better health outcomes, increased wellness due to prevention, early intervention, and health-promoting activities;

(6) payment reforms;

(7) coordination of care; and

(8) non-health care impacts on state and local expenditures such as reduced out-of-home placement or crime costs due to mental health or chemical dependency coverage.

(b) The analysis must also estimate for each proposal job losses or gains in health care and elsewhere in the economy due to implementation of the reforms.

(c) The analysts shall work with the authors of each proposal to gain understanding or clarification of the specifics of each proposal. The analysis shall assume that the provisions in each proposal are not preempted by federal law or that the federal government gives a waiver to the preemption.

(d) The proposals must be submitted to the University of Minnesota analysts within 30 days after final enactment of this legislation. The analysis shall be completed by August 1, 2016.

Sec. 2. APPROPRIATION.

$..... is appropriated in fiscal year 2015 from the general fund to the commissioner of management and budget to contract with the University of Minnesota to conduct an economic analysis of costs and benefits of section 1332 waiver health care system proposals specified in section 1.

Sec. 3. EFFECTIVE DATE.

Sections 1 and 2 are effective the day following final enactment.

Source:
https://www.revisor.mn.gov/bills/text.php?number=SF813&version=1&session=ls89&session_year=2015&session_number=0&su=0

(6)
THE NCSL BLOG - April 1, 2016

INNOVATION WAIVERS: CAN YOUR STATE CHANGE THE HEALTH LAW?

By Richard Cauchi

Beginning next January, a new state option, known as "1332 Waivers," within the Affordable Care Act (ACA) will take effect.

For the first time since the federal law was signed six years ago (on March 23 and April 1, 2010) this new process allows any state to apply to modify key parts of the health law.

Researchers for The Commonwealth Fund, who work in collaboration with NCSL, have published an updated examination of how, when and if, "these waivers may propose broad alternatives or targeted fixes to a number of the ACA's private insurance provisions, so long as they stay true to the law's goals and consumer protections."

After years of focus on implementing, selecting or opting out of the ACA's provisions, recent final regulations, released in late December, now provide states with details on what may be possible.

The latest guidance and requirements are summarized in the posted alert, and include these facts and clarifications:

- States can request a waiver from many of the ACA's requirements related to private health insurance, including those concerning covered benefits, subsidies, the marketplaces, and the individual and employer mandates.
- There's a critical catch: States can forge their own path only within certain limits set by the law itself. A waiver must ensure that coverage is at least as comprehensive and affordable as the ACA provisions called for, must cover a comparable number of residents and cannot add to the federal deficit.
- Important, too, is that while section 1332 gives states flexibility over the ACA's private coverage provisions, it does not create new waiver opportunities for public coverage programs such as Medicaid. As in the past, any state that wishes to modify its Medicaid program must seek permission using a separate section 1115 waiver, which federal officials will evaluate independently of any changes the state might propose under section 1332.

Requirements include:

1. **Enrollment** - Waiver program must provide coverage to a comparable number of state residents as would receive coverage without it.
2. **Affordability** - Waiver program must provide coverage and cost-sharing protections against excessive out-of-pocket spending that are as affordable as would be provided without it.
3. **Comprehensiveness** - Waiver program must provide coverage that is as comprehensive as would be provided without it.
4. **Deficit Neutrality** - Waiver program must not increase the federal deficit.
5. **Legislative Role Required** – 1332 waiver programs must be filed and passed by the state legislature.

A few states—including Arkansas, Hawaii, Massachusetts and Ohio—have taken a lead so far with more decisions possible during 2016 and 2017 legislative sessions. However there is no deadline for action.

Read the full post online for what each requirement means on the state level. For details on state actions, also see NCSL's online memo, State Roles and Legislation Related to 1332 Waivers.

Richard Cauchi covers health insurance reforms for NCSL. *Email Richard*

TO THE POINT
Quick Takes on Health Care Policy and Practice

Innovation Waivers and the ACA: As Federal Officials Flesh Out Key Requirements for Modifying the Health Law, States Tread Slowly

Wednesday, February 17, 2016
By Kevin Lucia, Justin Giovannelli, Sean Miskell and Ashley Williams

Toplines

- New federal guidance explains what states should consider as they explore ACA innovation waiver options
- A look at the states considering an ACA innovation waiver for 2017

The Affordable Care Act (ACA) established a framework—including now-familiar elements like insurance marketplaces and premium tax credits—to expand access to affordable, comprehensive health insurance coverage. However, the law also gives states a chance to realize these goals using alternative solutions. Starting in 2017, states can pursue "innovation waivers," sometimes known as 1332 waivers, which allow them to modify key parts of the ACA. These waivers may propose "broad alternatives or targeted fixes" to a number of the ACA's private insurance provisions, so long as they stay true to the law's goals and consumer protections. With 2017 fast approaching, the Obama administration recently published guidance that supplies important considerations for states to weigh as they explore their waiver options and explains the "guardrails" designed to protect the ACA's objectives.

The Rules on Waivers

Section 1332 authorizes states to develop new approaches to deliver on the promise of health reform. States can request a waiver from many of the ACA's requirements related to private health insurance, including those concerning covered benefits, subsidies, the marketplaces, and the individual and employer mandates.

But there's a critical catch. States can forge their own path only within certain limits set by the law itself: a waiver must ensure coverage is at least as comprehensive and affordable as the ACA, must cover a comparable number of residents, and can't add to the federal deficit.

Important, too, is that while section 1332 gives states flexibility over the ACA's private coverage provisions, it does not create new waiver opportunities for public coverage programs. As in the past, any state that wishes to modify its Medicaid program must seek permission using a so-called section 1115 waiver, which federal officials will evaluate independently of any changes the state might propose under section 1332. For example, a state cannot count savings it expects to achieve via an 1115 waiver toward the deficit neutrality requirements of its separate 1332 waiver.

Unlike previously released regulations that addressed the procedural aspects of a waiver application, the new federal guidance offers substantive information about the statutory guardrails (Exhibit 1).

Exhibit 1. State Waivers of the ACA's Private Health Insurance Rules: Key Requirements

Requirement	What Does It Mean?
1. Enrollment Waiver program must provide coverage to a comparable number of state residents as would receive coverage without it	Waiver program must cover at least as many individuals as the ACA, in every year of the program. Federal officials will consider the impact of the program on all state residents, as well as its effects across different groups of residents. This review will focus on vulnerable populations, including those with low incomes, the elderly, and those with serious health issues.
2. Affordability Waiver program must provide coverage and cost-sharing protections against excessive out-of-pocket spending that are as affordable as would be provided without it	Affordability is measured by reference to residents' net out-of-pocket spending, including premium contributions, cost-sharing, and spending on noncovered services. Federal officials will consider both the average impact of the program and how it affects individuals with large health care spending burdens. Review also will focus on vulnerable populations.
3. Comprehensiveness Waiver program must provide coverage that is as comprehensive as would be provided without it	Waiver program must not decrease the number of individuals with coverage that satisfies the ACA's essential health benefits requirements or the number of individuals with coverage that includes the services covered under the state's Medicaid and CHIP programs. Federal officials will consider the impact of the program on all state residents, as well as its effects across different groups of residents. This review will focus on vulnerable populations.
4. Deficit Neutrality Waiver program must not increase the federal deficit	Waiver program must be federal deficit neutral in each year of the waiver and over a 10-year budget period. This analysis must account for the budget effect of all changes in federal income and spending resulting from the waiver, while holding the state's Medicaid policies constant. That is, any budget effects produced by changes to the state's Medicaid program from a Medicaid section 1115 waiver will not be considered when evaluating the 1332 waiver.

Source: U.S. Department of the Treasury and U.S. Department of Health and Human Services, "Waivers for State Innovation," 80 Fed. Reg. 78131, Dec. 16, 2015.

In addition to the legal limitations, operational considerations also constrain what states can do. Because the federal marketplace enrollment platform, HealthCare.gov, can't yet accommodate different rules for different states, those states using the federal technology won't be able to modify certain aspects of the ACA—including financial assistance levels and enrollment periods, among others—unless they first transition to their own enrollment platform. And though the ACA's tax provisions are fair game for a waiver, the IRS generally isn't able to administer its rules differently state to state. Thus, while states might waive all the ACA's tax provisions and design new rules administered by their own tax officials, they won't be able to require the IRS to implement a state-specific program.

Baby Steps from States

To date, only a few states, including Hawaii and Massachusetts, and Vermont, have publicly released waiver applications. The proposals offered by these states are modest and largely seek to better harmonize the ACA's requirements with reforms or practices already in place in these states. For example, prior to the ACA, Massachusetts merged its individual and small group health insurance markets. Now the state seeks to maintain this arrangement under a 1332 waiver. (Though merged markets are allowed under the ACA, the state needs a waiver to preserve certain state rules, concerning premium rate filing and enrollment timing for small groups, that are not contemplated by the federal law.) Hawaii, which decades ago expanded access to health insurance by requiring employers to offer coverage to most workers, hopes to use its 1332 request to harmonize the ACA's small business insurance rules with the state's own, often more stringent standards, including by waiving the requirement to maintain a Small Business Health Options Program (SHOP) exchange. Similarly, Vermont is requesting to waive the ACA's requirement to establish an online SHOP exchange, seeking instead to allow small employers to continue to purchase qualified health plans directly from insurers.

Though no other state has yet moved as far as these in the development of a waiver application, the prospect of obtaining additional flexibility over the ACA's coverage programs has sparked interest among a range of policymakers. For example, California's marketplace has partnered with the state's Department of Health Care Services to engage stakeholders and the public about possible 1332 proposals. In Minnesota, a Health Care Financing Task Force has been evaluating 1332 waiver opportunities for the past year. Although Vermont

considered but ultimately abandoned using 1332 waivers to create a single-payer system, Coloradans will vote on a similar approach later this year.

For other states, interest in the new waivers has built on existing efforts to modify their Medicaid programs under a section 1115 waiver. These waivers, which get their name from section 1115 of the Social Security Act, allow states to use Medicaid funding in ways not otherwise permitted by federal rules for demonstration projects that further the goals of the Medicaid program. The possibility of combining Medicaid section 1115 waivers with new 1332 waivers has led to discussions about the potential for "super waivers." Combining 1332 changes with 1115 waiver authority would provide states with the opportunity to significantly alter the coverage arrangements available to their residents, particularly the low-income, vulnerable populations traditionally served by Medicaid. For example, Kentucky's new governor recently expressed interest in pursuing twin waivers to change the state's approach to its insurance marketplace and Medicaid expansion. Likewise, as Arkansas legislators consider whether to revisit their private option approach to Medicaid expansion, they have weighed legislation requiring the state to pursue 1332 waivers to complement those changes. However, in light of the administration's guidance limiting the ability of states to pursue coordinated 1115 and 1332 waivers, further analysis of these state approaches may now be warranted.

Putting It All Together

Innovation waivers give states freedom to improve on the health law's coverage framework. But a waiver is not a magic wand that lets states undermine or avoid the ACA. The law itself sets boundaries on states' power to waive federal requirements, and the new guidance makes clear that regulators intend to take these limits seriously. The ACA was intended to improve coverage access, affordability, and comprehensiveness for all Americans, including the most vulnerable. State efforts to innovate under the law must share this focus.

http://www.commonwealthfund.org/publications/blog/2016/feb/innovation-waivers-and-the-aca