

The 2020 Election and the Health Policy Landscape Post-COVID-19

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The COVID-19 pandemic is poised to shape the health policy landscape as the country continues to grapple with the unprecedented health and economic impact of the pandemic. With the 2020 election only a few months away, the COVID-19 pandemic has amplified the differences and potential impact of the policy priorities of not only President Donald Trump and presumptive Democratic presidential nominee Joe Biden, but also policymakers who are up for reelection this year. No matter the outcome of the election, the incoming Administration and Congress will not only need to address the impact of COVID-19 on individuals and the health care industry but do so in light of the Supreme Court's impending decision in *California v. Texas* regarding the constitutionality of the Affordable Care Act (ACA). With health care likely to take center stage in the 2020 election, this article provides an overview of the health policy landscape post-COVID-19.

CALIFORNIA V. TEXAS

The Supreme Court will review the constitutionality of the ACA during the Court's October 2020 term, setting up a decision for after the election. Earlier this year, the Supreme Court granted petitions to review the decision of the U.S. Court of Appeals for the Fifth Circuit in *Texas v. United States*, now *California v. Texas*. The Fifth Circuit held that the ACA's individual mandate to maintain health insurance is unconstitutional because it can no longer be justified under Congress' taxing power after Congress passed an amendment in 2017 setting the penalty for failing to comply with the mandate to zero dollars.¹ This will be the second time the Supreme Court weighs in on the constitutionality of the ACA's individual mandate.

Fifth Circuit's Decision in *Texas v. United States*

In 2012, the Supreme Court upheld the ACA's individual mandate as a constitutional exercise of Congress' taxing powers. In *National Federation of Independent Business v. Sebelius*, the Court found that the mandate could be read as an option to purchase insurance or pay a tax.² The

Court reasoned that the penalty produced revenue for the government; was paid into the Treasury by taxpayers; and was determined by factors like taxable income, dependents, and joint filing status.³ The Court noted that the requirement was enforced by the Internal Revenue Service, which collected the penalty in the same manner as taxes.⁴

In 2017, after Congress set the penalty for failing to comply with the individual mandate to zero dollars, 18 states and two private citizens brought suit in federal district court arguing, in part, that the individual mandate is no longer constitutional because it cannot be read as an option to purchase insurance or pay a tax.⁵ They argued that the mandate is inseparable from the rest of the ACA, requiring the entire law to be struck down. A federal district court held that the 2017 statutory change rendered the individual mandate unconstitutional and that the individual mandate could not be severed from the rest of the ACA.⁶

Upon review, the Fifth Circuit agreed with the district court that the individual mandate is unconstitutional because it can no longer be justified under Congress' taxing power.⁷ The Fifth Circuit, however, vacated the district court's ruling that required striking down the rest of the ACA.⁸ The Fifth Circuit remanded the case to the district court for the district court to analyze which provisions of the ACA are inseparable from the individual mandate and would need to be struck down, as well as to determine whether any relief should be limited to residents of the plaintiff states or to those who can show actual harm from the mandate.⁹

Impact on the Election and Health Policy Landscape

After declining petitions to expedite review of the case, the Supreme Court granted earlier this year petitions to review whether the individual mandate is unconstitutional

and can be separated from the rest of the ACA. As noted above, the Supreme Court is not expected to issue its decision on the case before the November elections; however, the future of the ACA and the possibility of health reform will impact the 2020 election and the health policy landscape, particularly as the federal government, state governments, and people throughout the country continue to endure the impact of the COVID-19 pandemic in the coming months.

In a statement regarding the Fifth Circuit's decision in *Texas v. United States*, President Trump praised the Fifth Circuit's decision as a "win for all Americans," while stressing that "[t]his decision will not alter the current healthcare system."¹⁰ President Trump said that his Administration would continue to work to "provide access to high-quality healthcare at a price you can afford, while strongly protecting those with pre-existing conditions."¹¹ He said that he would work to give people "the best healthcare in the world."¹²

During their primary campaigns, a number of former Democratic presidential candidates advocated for various alternatives to the ACA, including proposals for a comprehensive single-payer system. Presumptive Democratic nominee Joe Biden, however, has repeatedly expressed his support for the ACA, vowing to protect and build on it. Reacting to the Fifth Circuit's decision in *Texas v. United States*, he expressed his view that "coverage for millions of Americans and protections for pre-existing conditions are on the ballot. We have to protect the progress we've made and show up to the polls to defend the Affordable Care Act."¹³

REPUBLICAN HEALTH CARE PLAN

President Trump's Health Care Plan

President Trump has made health care a policy priority leading to his 2020 reelection campaign. Last year, President Trump announced that he would issue a health

care plan to replace the ACA in the fall of 2019.¹⁴ His remarks followed proposals in the White House fiscal year (FY) 2019 and FY 2020 budget requests that called for various reforms that Republicans had proposed in 2017 as their most recent effort to repeal and replace the ACA.¹⁵ After Democrats took back the House in 2018, in part by campaigning on the potential impact of repeal and replace, Republicans turned to more targeted ACA measures and other health care priorities. President Trump has not yet issued a plan to repeal and replace the ACA. While the White House FY 2021 budget request, consistent with his remarks on *Texas v. United States*, calls for protections for patients with pre-existing conditions, it reduces funding and makes changes to reforms established by the ACA.¹⁶

Surprise Billing and Prescription Drug Pricing

Over the past year, both the Administration and Congress have also focused on advancing proposals to address health care price transparency and prescription drug pricing. The Administration, for example, issued a price transparency final rule last year requiring hospitals to make public an annual list of standard charges for items and services as well as a proposed rule requiring certain health plans to make available negotiated rates and other information.¹⁷ In Congress, there has been a bipartisan, bicameral effort to advance proposals to address what is commonly referred to as “surprise billing,” which may occur when a patient receives care from an out-of-network provider or when their health plan fails to pay for covered services.¹⁸

With respect to drug pricing reform, the Administration has proposed that the federal government pay certain vendors directly for Part B drugs at rates that are benchmarked to align with prices paid in economically similar countries.¹⁹ It has also issued a plan to allow the importation of drugs from abroad.²⁰ Drug pricing

reform proposals have gained traction in Congress. Last year, the House of Representatives passed a measure to allow the government to negotiate drug prices which was opposed by Senate Republicans.²¹ Other proposals, however, have bipartisan, bicameral support, including changing the Medicare Part D benefit to cap patients’ out-of-pocket costs and requiring drug companies to pay rebates if they increase their prices more rapidly than inflation, though some Republicans have opposed the latter.²²

Republican Study Committee’s Health Care Plan

As the Administration and Congress have focused on price transparency and drug pricing reform, the Republican Study Committee (RSC), a conservative caucus within the House of Representatives, released last year “A Framework for Personalized, Affordable Care,” a GOP forward-looking health care plan which was presented as an alternative for Republicans on the campaign trail to Democrats’ proposals to build on the ACA and expand access to public insurance through Medicare-for-All or a public option.²³

The RSC’s health care plan builds on past ACA repeal and replace proposals. Among other things, the plan would remove ACA requirements and guarantees, including requirements relating to guaranteed issue and the prohibition on coverage exclusions, as well as ACA requirements pertaining to essential health benefits; medical loss ratio; annual lifetime limits; dependent coverage; actuarial value; and medical loss ratio.²⁴ The plan would undo community rating, age-banding, and single risk pool requirements, moving individuals with high-cost illnesses to federally funded, state-administered Guaranteed Coverage Pools instead.²⁵

The RSC’s plan would repurpose funding for ACA premium subsidies and Medicaid expansion toward federal grants

for states to subsidize coverage for low-income individuals.²⁶ The plan would expand the accessibility of health savings accounts (HSAs), allowing individuals to use HSAs to pay for insurance premiums and would no longer require that HSAs be linked to high deductible health plans.²⁷ Finally, it would enhance access to telemedicine, association health plans, and health sharing ministries.²⁸

DEMOCRATIC HEALTH CARE PLAN

Expanding Public Health Insurance

As policymakers weighed policy proposals to increase access to health care coverage and address cost, proposals to expand public health insurance gained traction among progressive Democratic policymakers. During the Democratic presidential primary, former candidates generally supported expanding access to public health insurance as part of their health care plans, though the details and scope of their proposals varied. This backdrop provides important context as Democrats forge a path ahead on health care policy.

By way of background, some former candidates, such as Senators Bernie Sanders (I-VT) and Elizabeth Warren (D-MA), advocated for “Medicare for All,” a single-payer benefits system modeled after Medicare that would replace most forms of health insurance, which would be available only to supplement the government benefits.²⁹ Others, like Senator Kamala Harris (D-CA), advocated for a Medicare for All system where private health insurance plans are allowed to offer a plan in the new system if they agree to certain requirements to ensure they lower costs and expand services, much like Medicare Advantage plans.³⁰ People would be able to purchase supplemental health insurance that covers services that are not included.

Finally, candidates like Joe Biden, Pete Buttigieg, and Senator Amy Klobuchar (D-MN) proposed a “public option,” where individuals would have the choice to opt

into a public insurance plan.³¹ Unlike Medicare for All proposals, public option plans would not replace current forms of health insurance. Some of these public option plans would expand federal subsidies available under the ACA to middle-income Americans.

Joe Biden’s Health Care Plan

Joe Biden, the presumptive Democratic presidential nominee and former Vice President and Senator, has vowed to protect and build on the ACA. To this end, he has proposed offering individuals a public health insurance option while reducing the Medicare eligibility age to 60 instead of 65.³² Under his plan, individuals would have the option to enroll in and keep private health insurance or opt into the public option. Individuals who are at least 60 would have the option of opting into Medicare, the public option, or a private plan.

Furthermore, in an effort to bolster the ACA while increasing health care coverage, Mr. Biden has proposed to increase the value of ACA tax credits to help individuals who choose private health care insurance pay for coverage.³³ Additionally, Mr. Biden has proposed providing individuals in states that have not expanded Medicaid under the ACA premium-free access to the public option.³⁴ States that have expanded Medicaid would have the option to transition their Medicaid expansion population to the premium-free public option.

Finally, to lower consumer health care spending, Mr. Biden proposed to address surprise billing by barring health care providers from charging patients out-of-network rates when the patient does not have control over which provider the patient sees.³⁵ Mr. Biden’s health care plan also includes prescription drug pricing proposals. Among other things, he has proposed to allow Medicare to negotiate lower prices with pharmaceutical companies and prohibit pharmaceutical companies from increasing their prices more than the general inflation rate and also allow

consumers to import prescription drugs from other countries.³⁶

HEALTH POLICY LANDSCAPE Post-COVID-19

COVID-19 is poised to shape the health policy landscape as the country faces the health and economic impact of the pandemic. At the time of this writing, the Centers for Disease Control and Prevention had reported over 2.6 million cases of COVID-19 and nearly 127,000 associated deaths.³⁷ The U.S. Bureau of Labor Statistics reported an unemployment rate of 13.3 percent in May, following a record 14.7 percent in April, which represented the highest unemployment rate since the Great Depression.³⁸ COVID-19 has put health care and the economy on center stage, particularly as the pandemic impacts the country's most vulnerable populations.

The 2020 Election

COVID-19 is thus likely to play a central role in the 2020 election. The COVID-19 pandemic has amplified the differences and potential impact of the health care plans and policy priorities of not only President Trump and presumptive Democratic presidential nominee Joe Biden, but also Congressional leaders and policymakers on Capitol Hill, some of whom face competitive races this fall. Since late March, Congress has passed four coronavirus relief packages aimed at mitigating the health and economic impact of COVID-19.³⁹ Most of these packages were quickly negotiated and approved with overwhelming bipartisan support.

As part of these measures, Congress provided direct financial assistance to individuals, as well as enhanced family and sick leave and unemployment insurance, among other forms of relief.⁴⁰ The legislation provided no-cost COVID-19 testing and increased access to health care by providing health care providers with forms of relief and flexibilities.⁴¹ It also provided financial assistance to states and local

governments as well as relief to small and large businesses, including relief for specific industries.⁴² Since Congress passed these measures, stakeholders have voiced concerns that additional relief may be needed.

To this end, the House of Representatives passed in May the Health and Economic Recovery Omnibus Emergency Solutions Act, a \$3 trillion COVID-19 relief package, on party lines. Congressional Republicans were quick to dismiss the measure, which has been characterized as a messaging bill of Democratic priorities. In late June, Senate Republicans announced intentions to work on a proposal during July, with the hope of having both chambers approve a measure before their district work period in August. Negotiations are likely to be more partisan than in previous packages, as Democrats and Republicans are currently divided on key issues. With the election only a few months away, however, there is increasing pressure to act on an additional COVID-19 relief package, as this is considered the last potential vehicle for comprehensive policy changes before the election.

Health Policy Landscape

No matter the results of the election, the Administration and Congress are likely to continue to work on addressing COVID-19, as well as the potential impact of the Supreme Court's impending decision in *California v. Texas*, both of which could open the door for potential health care reform next year. In this regard, the House of Representatives passed the Patient Protection and Affordable Care Enhancement Act (H.R. 1425), House Democrats' proposal to build on the Affordable Care Act (ACA) as the Administration presses to overturn the law. The House vote came as the Department of Justice urged the Supreme Court to declare the law unconstitutional in *California v. Texas*. Although the Senate is not expected to take up the bill, the vote

has brought health care to the center stage of the COVID-19 response and the 2020 election. Congress may also work on some of the health care priorities it had hoped to act on this year, including surprise billing and drug pricing reform. Congressional action on both priorities was put on pause as Congress addressed COVID-19, though efforts are ongoing to try to include related proposals as part of the next relief measure.

The Administration is also likely to continue to address the impact of COVID-19 and assess its response to the pandemic. The U.S. Department of Health and Human Services (HHS) granted health care providers a wide range of regulatory flexibilities to respond to COVID-19.⁴³ President Trump issued an Executive Order directing federal departments and agencies to assess whether flexibilities granted in response to COVID-19 could be made permanent.⁴⁴ The Executive Order also directs them to consider rescinding or modifying, temporarily or permanently, regulatory standards that may inhibit economic recovery.⁴⁵ As HHS makes these assessments, it is possible that new flexibilities could be granted and existing flexibilities extended.

CONCLUSION

The Administration and Congress will continue to address the health and economic impact of the COVID-19 pandemic. The federal government's response to COVID-19 is likely to play an increasingly important role in the 2020 election as Congress advances a fifth coronavirus relief package and conducts oversight of the federal response to the COVID-19 pandemic. With the Supreme Court set to decide the future of the ACA in *California v. Texas*, regardless of which party wins control during the 2020 elections, the incoming Administration and Congress will have to make important health policy decisions in short order regarding the future of the country's health care system. As described in this article, current health care plans to

address health care coverage and the cost of health care vary widely, and decisions concerning these matters will be largely dictated by the results of the 2020 election. These decisions could have profound implications for health care providers and consumers post-COVID-19.

Endnotes

1. See *Texas v. United States*, No. 19-10011 2019, U.S. App. LEXIS 37567 (5th Cir. Dec. 18, 2019).
2. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 562 (2012).
3. *Id.* at 563–64.
4. *Id.*
5. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017).
6. See *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018).
7. See *Texas v. United States*, No. 19-10011 2019, U.S. App. LEXIS 37567 (5th Cir. Dec. 18, 2019).
8. *Id.*
9. *Id.*
10. See White House, Statement by the President (2019), www.whitehouse.gov/briefings-statements/statement-by-the-president-31/.
11. *Id.*
12. *Id.*
13. See Biden, Joe (JoeBiden). "Coverage for millions of Americans and protections for pre-existing conditions are on the ballot. We have to protect the progress we've made and show up to the polls to defend the Affordable Care Act." Jan. 2020. Tweet.
14. See Cohen, Ariel, Trump Tees Up Health Care As Focus Of 2020 Campaign, Inside Health Policy (June 17, 2019).
15. See Office of Management and Budget, An American Budget, Fiscal Year 2019, The White House (Feb. 2018); see also Office of Management and Budget, A Budget for a Better America, Fiscal Year 2020, The White House (Mar. 2019).
16. See Office of Management and Budget, A Budget for America's Future, Fiscal Year 2021, The White House (Feb. 2020).
17. See 84 Fed. Reg. 65524 (Nov. 27, 2019); see also 84 Fed. Reg. 65464 (Nov. 27, 2019).
18. See, e.g., Lower Health Care Costs Act, S. 1895, 116th Congress (2019); see also Consumer Protections Against Surprise Medical Bills Act, H.R.5826, 116th Congress (2020); Ban Surprise Billing Act, H.R.5800, 116th Congress (2020).
19. See 83 Fed. Reg. 54546 (Oct. 30, 2018).
20. See 84 Fed. Reg. 70796 (Dec. 23, 2019).
21. See Elijah E. Cummings Lower Drug Costs Now Act, H.R.3, 116th Congress (2019).
22. See, e.g., Prescription Drug Pricing Reduction Act of 2019, S.2543, 116th Congress (2019).

23. See Republican Study Committee, *The RSC Health Care Plan: A Framework for Personalized, Affordable Care* (Oct. 2019).
24. *Id.* at 32.
25. *Id.* at 33.
26. *Id.* at 43.
27. *Id.* at 33.
28. *Id.* at 44.
29. See Sanders, Bernie, *Health Care as a Human Right—Medicare For All* (2019); see also Warren, Elizabeth, *My First Term Plan for Reducing Health Care Costs in America and Transitioning to Medicare for All* (2019).
30. See Harris, Kamala, *Medicare for All* (2019).
31. See Biden, Joe, *Health Care* (2019); Buttigieg, Pete, *Medicare for All Who Want It* (2019); Klobuchar, Amy, *Health Care* (2019).
32. See Biden, Joe, *Health Care* (2019).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. See Centers for Disease Control and Prevention, *Cases in the United States* (2020).
38. See U.S. Bureau of Labor Statistics, *The Employment Situation—April 2020* (2020).
39. See Coronavirus Preparedness and Response Supplemental Appropriations Act, H.R. 6074 (Public Law No: 116-123); Families First Coronavirus Response Act, H.R. 6201 (Public Law No: 116-127); Coronavirus Aid, Relief, and Economic Security Act, H.R. 748 (Public Law No: 116-136); Paycheck Protection Program and Health Care Enhancement Act, H.R. 266 (Public Law No: 116-139).
40. *Id.*
41. *Id.*
42. *Id.*
43. Centers for Medicare & Medicaid Services, *COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers* (2019).
44. White House, *Executive Order on Regulatory Relief to Support Economic Recovery* (May 19, 2020).
45. *Id.*

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