

### Health Reform Update – Weeks of December 19, 2011

#### CONGRESS

##### ***Backlash causes House Republicans to consider acceding to extension of payroll tax holiday***

Last-ditch efforts may finally resolve the impasse over extending President Obama's payroll tax holiday and averting a 27 percent cut in Medicare physician payments at year's end.

Senate Republicans thought they had the agreement of Republican House leaders when they voted at the end of last week to overwhelmingly pass a temporary two-month extension of the payroll tax holiday and enhanced unemployment benefits, with a comparable delay in the Medicare physician payment cut. However, freshman tea-party backed Republicans defected from the compromise, insisting that Senators instead remain in session through Christmas to hammer out a full-year extension with more favorable offsets (such as higher premiums for wealthy Medicare enrollees).

Republican leaders in the Senate urged House Republicans to change course, stressing that public backlash to the stalemate was harming Republican chances to retake either the Senate or White House next fall. The American Medical Association (AMA) in particular reacted with scorn to the fact that such a dramatic cut in physician reimbursement was being used as political leverage by House members.

As the holiday recess approached, House Speaker John Boehner (R) was negotiating a "tweaked" version of the Senate-passed measure that would accept the two-month extension but require accelerated reconciliation on the House and Senate bills in January.

President Obama's public approval rating rose to nearly 50 percent during the skirmish, as he was able to at least momentarily seize the tax issue away from Republicans. If Congress fails to act before December 31<sup>st</sup>, payroll taxes will increase from 4.2 to 6.2 percent (increasing taxes for middle-class Americans by roughly \$40 per biweekly paycheck or \$1,000 per year).

##### ***Supreme Court sets aside three days for Affordable Care Act arguments***

The U.S. Supreme Court schedule released this week confirms that the court will hold oral arguments during the last week of March on the multistate challenge to the Affordable Care Act (ACA).

The initial hearing on March 26<sup>th</sup> will focus on whether the Court can even review the individual mandate's constitutionality before the tax penalty for not buying health insurance begins to be enforced in 2015. The Fourth Circuit Court of Appeals dismissed Virginia's challenge to the individual mandate by holding that the federal Anti-Injunction Act precludes judicial review of any tax before it actually goes into effect (see Update for Week of September 5<sup>th</sup>).

The justices will next hear arguments on March 27<sup>th</sup> regarding the core question of whether the individual mandate is outside of Congress' power to regulate interstate commerce. Bipartisan panels on the D.C. and Sixth Circuit appeals courts have upheld the mandate, while the 11<sup>th</sup> Circuit struck it down (see Update for Week of November 14<sup>th</sup>). An article published by a Harvard law professor in this week's *New England Journal of Medicine* suggests that the Court is likely to uphold the individual mandate given two centuries of Commerce clause precedent. In fact, the very first Congress in 1790 required ship owners purchase medical coverage for seaman (who also had to purchase their own hospital coverage).

The following day, the court will also hear arguments on whether the ACA's Medicaid expansion is constitutional. Several ACA lawsuits claimed that requiring states to expand Medicaid those with incomes up to 133 percent of the federal poverty level represents unlawful federal government coercion. However, not one federal appellate or district court has overturned this expansion, noting that states can voluntarily refuse federal matching funds and opt-out of Medicaid if they feel the expansion is unduly burdensome or coercive.

Despite this unanimity, a law professor at the National Conference of State Legislatures fall forum earlier this month warned that the high court may be most receptive to this Medicaid challenge. While Congress has broad latitude to attach conditions to federal funds accepted by states, ten percent of the Medicaid expansion must ultimately be funded by states. As a result, the Court has agreed to consider whether Congress can also dictate how states spend their own Medicaid funds whenever they accept federal Medicaid matching funds.

The remainder of the March 28<sup>th</sup> session will be devoted to arguments about whether the entire ACA law can remain in place should either the individual mandate or Medicaid expansion be found unconstitutional. Congress deliberately did not include the standard severability clause in the ACA, as the provisions expanding health insurance coverage would destabilize the market if not accompanied by mechanisms to ensure the risk pool includes both healthy individuals as well as more costly populations. However, every appellate court has thus far found that the individual mandate should still be severable from the rest of the law (see Update for Week of November 14<sup>th</sup>).

The court's devotion of three days to a single case is unprecedented. The March hearing appears to ensure that it will rule before the end of its term in June.

### ***Kaiser tracking poll finds Americans are again evenly split on Affordable Care Act***

Americans once again are nearly evenly divided in their opinion of the Affordable Care Act (ACA), according to the latest monthly tracking poll released this week by the Kaiser Family Foundation

Support for the new law had tanked in October, as flagging support from Democrats dropped overall approval to a record low of 34 percent (see Update for Weeks of November 21<sup>st</sup> and 28<sup>th</sup>). However, Kaiser found that by December, 41 percent of survey Americans now approve of the ACA, compared to 43 percent who continue to oppose it.

Kaiser attributes the increase to renewed support among Democratic constituencies, 64 percent of whom now view the law favorably. However, this still trails far behind Democratic approval numbers right after the ACA was enacted in March 2010. The tracking poll also found a surprising uptick in support among Republicans (from 11 to 19 percent).

Researchers note that approval ratings for the ACA have tended to mirror job approval ratings for President Obama, which have likewise slightly improved since bottoming out last fall.

Over two-thirds of voters still oppose the ACA mandate that everyone buy health insurance, although support shifted "dramatically" depending on how the question was phrased. When told that those who are currently covered by employer-based insurance would automatically satisfy the mandate, support nearly flipped to 61 percent. Nearly half also favored the individual mandate when surveyors noted that without the mandate, health plans could continue to deny coverage to sick Americans.

By contrast, support for the individual mandate drops precipitously when surveyors told respondents that the U.S. Supreme Court is reviewing its constitutionality, or that Americans would have to buy coverage they do not want.

## FEDERAL AGENCIES

### ***Six drug manufacturers have now cut prices for struggling state ADAPs***

Bristol-Myers Squibb (BMS) and Merck became the latest drug manufacturers this week to voluntarily expand discounts or reduce prices for products furnished to cash-strapped state AIDS Drug Assistance Programs (ADAPs).

BMS announced that it will broaden financial eligibility requirements for its "Access Virology" Patient Assistance Program beginning in January 2012. This includes "fast tracking" clients currently on an ADAP waiting list through accelerated advancement of their applications.

Merck agreed to cut prices on its Isentress drug through 2013, though it did not specify the amount of the discount. Isentress received approval this week by the Food and Drug Administration for use in children under age 18 (it was approved for adults since 2007).

BMS and Merck become the fifth and sixth companies to expand efforts in recent months to assist ADAPs, in conjunction with the ADAP Crisis Task Force formed by the National Association of State and Territorial AIDS Directors (NASTAD) (see Update for Week of December 5<sup>th</sup>).

## HEALTH CARE COSTS

### ***More than one in eight Americans cannot afford their prescription drugs***

The Center for Studying Health System Change (HSC) released a new report last week concluding that the proportion of Americans reporting trouble affording prescription drugs remained level between 2007 and 2010, with more than one in eight going without a prescribed drug in 2010.

HSC's Health Tracking Household Survey of over 17,000 Americans found that the most vulnerable (uninsured or low-income) continue to face the most unmet prescription needs. About half of people in fair or poor health and almost 70 percent of those suffering from multiple chronic conditions reported foregoing a prescription in 2010 because of cost concerns.

However, the study acknowledges that it is "somewhat surprising" that these numbers did not increase despite the nearly 21 percent spike in the uninsured rate from the recession. HSC suggests that the sizeable increase in loss of patent protections made cheaper generic drugs more affordable during this time period.

## STATES

### ***State economies continue to significantly improve, with revenues climbing 5.6 percent***

The Census Bureau confirmed this week that both state and local government tax revenues rose 4.1 percent in the third quarter of 2011, the eighth consecutive quarter in which it has increased.

Overall tax collections are running far ahead of 2010 figures, thanks to largely to boosts in property, sales, and personal income taxes from fewer Americans being out of work. However, corporate income taxes declined for the first time since this time last year.

The revenue gains appear to confirm states are recovering from the recession, as it marks the longest stretch of growth since the economy bottomed out in 2008. Because of extreme budget cuts enacted over the past two years, the sudden influx of cash has resulted in unexpected surpluses in several states (see Arizona, Hawaii, and Tennessee articles below, as well as the Update for Week of December 12<sup>th</sup>).

State revenues in particular rose by 5.6 percent overall, far exceeding the mere 1.6 percent forecast by the National Association of State Budget Officers. Only four states (California, New York, Missouri and Washington) are now projecting budget shortfalls, down from 15 a year ago, and nearly all states in 2009.

The improvement has helped fuel a rally in the \$3.7 trillion municipal bond market and caused Fitch Ratings to lift the negative outlook it put on U.S. state bond ratings earlier this year.

### Arizona

#### ***Supreme Court to [finally] hear Medicaid enrollment freeze for childless adults***

The Arizona Supreme Court agreed this week to consider challenges to the Medicaid enrollment freeze that it previously sought to avoid.

Three public-interest law groups had challenged the Medicaid enrollment freeze for childless adults enacted last summer by Governor Jan Brewer (R), which were upheld by lower and appellate courts. The plaintiffs are insisting that cuts violated a voter referendum in 2000 approving the expansion of Medicaid to everyone earning less than the federal poverty level. However, lower courts held that the referendum does not force lawmakers to expand coverage if no funding is available (see Update for Week of December 5<sup>th</sup>).

The Supreme Court set oral arguments in the case for February 15<sup>th</sup>.

#### ***Republicans resist calls to restore severe budget cuts in wake of budget surplus***

Arizona became the latest of many states this week to forecast a budget surplus for their next fiscal years, thanks to revenue collections that have far outpaced prior estimates.

For the first time in four years, lawmakers will not face a massive budget deficit, but are instead likely to have the enviable problem of deciding how to allocate a surplus of up to \$650 million. Republican lawmakers immediately credited the \$500 million in budget cuts enacted last year for the improved revenues, and insisted that the state needed to continue reducing spending in order to continue economic growth.

Governor Brewer shares their austere outlook, refusing to use the word “surplus” and rebuffing Democratic calls to restore the most severe of her cuts to Medicaid and other health programs. She notes that the surplus is merely a one-year reprieve, as lawmakers are likely face a \$3.7 billion general fund shortfall when temporary taxes expire next year. The Governor could also lose court challenges to her Medicaid cuts, including the Arizona Supreme Court’s review of her enrollment freeze for childless adults (see above).

However, the Governor did indicate some wiggle room for new “strategic” spending, including limited funds for Medicaid. However, she promises the state will not repeat its mistakes from 2007, when it squandered a \$1 billion surplus on tax cuts and broad program expansions, only to face a severe recession and record deficits in subsequent years.

### Colorado

#### ***Second time around, lawmakers agree to apply for federal exchange establishment grant***

Colorado lawmakers finally granted approval for the state to apply for an \$18 million federal grant to establish the health insurance exchange required by the Affordable Care Act (ACA).

The Legislative Health Benefit Exchange Implementation Review Committee voted 9-1 to apply for the grant by December 30<sup>th</sup>, only months after Republicans on the evenly-split panel blocked a similar

\$22 million grant application because it contained language stating that Colorado would “conform with federal requirements” (see Update for Week of September 26<sup>th</sup>). The application was rewritten and approved by the Colorado Health Benefits Exchange Board to emphasize Colorado’s ability to operate its own exchange to meet its unique health care challenges, even though the state intends to operate an exchange that complies with the ACA (see Update for Week of October 10<sup>th</sup>)

However, some Republicans who voted in favor of the application, such as Rep. Bob Gardner (R), still insist that the ACA is not the “law of the land” and will be ultimately struck down by the U.S. Supreme Court (see article above).

The \$18 million will go towards developing the information technology necessary to operate the online marketplace.

#### District of Columbia

##### ***Final exchange bill allows price negotiation, bars health insurers from oversight board***

The D.C. Council gave final and unanimous approval this week to a measure creating the health insurance exchange required by the Affordable Care Act (ACA).

Passage follows nearly a year of community discussions regarding the design of the exchange led by Mayor Vincent Gray (D). The final bill (B19-2) written by Health Committee chair David Catania (I) follows the “active purchaser” model in place since 2007 in Massachusetts, where the exchange board can negotiate prices and exclude plans that are not affordable. California and Maryland are among the states that have chosen to create a similar model, as opposed to the more passive, low-regulation clearinghouse in place in Utah, where any plan that meets minimum ACA-standards can participate.

The measure also imposes among the strictest conflict of interest sought by any state. It not only bars any individual with a financial stake in health insurance or medical from serving on the exchange oversight board, it prohibits all board members from being employed by a health insurer within one year after their departure from the board.

A less severe but rejected version sought by Councilmember Yvette Alexander (D) would have allowed insurance brokers or agents to serve on the board.

#### Hawaii

##### ***Governor boosts spending as Hawaii expects 14.5 percent increase in state revenues***

Governor Neil Abercrombie (D) is proposing an \$11.1 billion budget for next year that includes \$189 million in new spending and no new taxes.

The Governor insists that the state can afford the new expenditures thanks to agency projections that general fund revenues will jump by 14.5 percent during the next fiscal year beginning July 1<sup>st</sup>. Some of that spending is intended to restore spending cuts enacted to fill a \$1.3 billion budget deficit last year.

#### Massachusetts

##### ***Commonwealth receives federal approval to use global budgets, extend landmark reforms***

The landmark Massachusetts health reforms in 2007 have allowed more than 98 percent residents to have health insurance. However, the success of these reforms (upon which the Affordable Care Act is modeled) hinged on federal approval of a five-year demonstration waiver that was set to expire, until extended this week by the Centers for Medicaid and Medicare Services (CMS).

The federal extension until 2014 means that Massachusetts can continue to ignore certain Medicaid regulations that other states without a waiver must follow. However, as part of the extension, CMS will allow Massachusetts to also experiment with new global budget payment methodologies sought by Governor Deval Patrick (D). These allow hospitals and physicians to be combined into single networks that will be reimbursed a lump-sum amount each year, instead of the traditional fee-for-service reimbursement (see Update for Week of December 6, 2010).

## Michigan

### ***Obama Administration denies Michigan's request to phase-in rules capping insurer profits***

Michigan became the sixth state this week to be rebuffed in their efforts to phase-in new federal regulations capping insurer profits.

The Affordable Care Act (ACA) requires that individual and small group health plans spend at least 80 percent of premium revenue on direct medical care starting in 2011. However, Michigan had insisted that immediate compliance would disrupt the marketplace as many smaller insurers would be unable to meet the new standard.

The U.S. Department of Health and Human Services (HHS) rejected Michigan's request for a temporary waiver from the new medical-loss ratios (MLRs), concluding that most health insurers in the state are profitable enough to already meet the new standard or adjust their business practices to do so.

HHS made similar findings for waiver requests from Delaware, Indiana, Louisiana, and North Dakota, and most recently Florida (see Update for Week of December 12<sup>th</sup>). It has allowed another six states to phase-in compliance in order to avoid market destabilization.

Requests from five states remain pending. Texas is slated to receive a decision by December 28<sup>th</sup>, unless CMS extends the deadline (as it has frequently done for other states). Democrat members of Texas' Congressional delegation urged CMS this week to deny their states application.

### ***Insurance commissioner determined to move forward on exchange, despite opposition***

The Director of the Department of Licensing and Regulatory Affairs (LRA) declared his intent this week to work around legislative inaction on a bill authorizing the creation of the health insurance exchange required by the Affordable Care Act (ACA).

Despite the support of Governor Rick Snyder (R) and the Republican-led Senate, House Speaker Bolger (R) and tea-party backed House Republicans have delayed action on exchange legislation until next session, electing instead to "wait and see" if the U.S. Supreme Court overturns the entire ACA law (see Update for Week of December 12<sup>th</sup>).

LRA Director Steven Hilfinger acknowledges that he needs legislative authorization to use the \$9.8 million in federal exchange establishment grants procured by Governor Snyder in order to design the new exchange. However, Hilfinger insists that waiting until next year will leave the state with insufficient time to meet the federal deadline for exchange certification in January 2013. He notes that Michigan risks losing the entire \$9.8 million if it has done nothing with it by the June 30<sup>th</sup> deadline to apply for additional federal grants.

As a result, Hilfinger concedes that he is exploring other "legal channels" to allow him to move forward, but declined to state whether that would include an executive order – an option chosen by at least 11 other state governors to circumvent legislative opposition to an exchange.

Governor Snyder previously estimated that at least half a million uninsured Michigan residents would buy private coverage through the exchange, starting in 2014.

Missouri***Assembly health chair tries to block executive implementation of insurance exchange***

Senator Luann Ridgeway (R) introduced legislation last week (S.B. 560) that would prevent the Governor or any state agency from creating or operating a state-based health insurance exchange unless so ordered by the legislature or a ballot referendum.

The measure specifically would prohibit Governor Jay Nixon (D) from following the lead of at least 11 other Republican and Democratic governors by circumventing legislative opposition via executive order. If passed by the General Assembly, the measure must be approved by voters in order to take effect.

Senator Ridgeway is the chair of the Health, Mental Health, Seniors and Families Committee and member of Senate Interim Committee on Health Insurance Exchanges. Republican lawmakers recently delayed action on any exchange-authorizing legislation until the U.S. Supreme Court has resolved all legal challenges to the Affordable Care Act (ACA) (see Update for Week of September 19<sup>th</sup>).

New Jersey***Assembly health chairman sponsors bill to expand rate review for certain health plans***

Assemblyman Herb Conway introduced legislation last week that would require a hearing and prior approval for any premium changes to individual and small group health plans. The measure (A.4416) would also require information relating to the rate filing to be posted on the website for the Department of Banking and Insurance.

Conway is a physician and chairman of the Health and Senior Services Committee.

New Mexico***Health chair sponsors legislation creating health insurance exchange, basic health plan***

The chair of the Senate Health and Human Services Committee has renewed her effort to enact legislation authorizing the creation of a state-based health insurance exchange authorized by the Affordable Care Act (ACA).

Senator Dede Feldman (D) pre-filed S.B. 6 this week, which would create the exchange as a non-profit public corporation with an oversight board of 13 members. Unlike legislation vetoed earlier this year by Governor Susana Martinez (R), the measure would allow the Governor to appoint up to four members who represent health insurance carriers. (Insurer representation on exchange boards has been the subject of intense controversy in other states.)

It is not clear that the changes to the bill will change the Governor's mind. Martinez surprised both Republicans and Democrats by vetoing S.B. 38 last session despite her earlier support for the legislation and acceptance of federal exchange grants (see Update for Week of April 11<sup>th</sup>). The Governor insisted that the state lacked sufficient guidance from the federal government to proceed. However, the federal Centers for Medicare and Medicaid Services (CMS) has since issued new regulations giving states greater flexibility in how and when they can move forward on exchange implementation.

Senator Feldman also pre-filed S.B. 7, which would exercise the provision in the ACA allowing states to create a Basic Health Plan serving those with annual incomes between 133 to 200 percent of the federal poverty level. A handful of states (including California) have elected to pursue this option.

South Carolina***U.S. Senator seeks federal probe into Governor's misuse of federal exchange grant***

The chairman of the U.S. Senate's Health, Education, Labor, and Pensions (HELP) Committee announced this week that he is seeking a federal investigation into charges that South Carolina Governor Nikki Haley (R) misused her state's \$1 million federal exchange planning grant.

Governor Haley has been dogged by the charges since local newspapers obtained e-mails of the Governor directing her appointees to an exchange study committee to find ways to avoid creating the health insurance exchange required by the Affordable Care Act (ACA) (see Update for Week of December 12<sup>th</sup>). Senator Tom Harkin (D-IA) alleged that the Governor's use of the federal grant to create a study committee that was actually an "ideologically-motivated facade" violated the conditions of the grant. He is asking the Office of the Inspector General for the Department of Health and Human Services to determine whether South Carolina should thus be forced to return the grant.

Haley's counterparts in Florida and Oklahoma have already rejected or returned their state's exchange grants. However, Haley elected instead to create a study committee and then follow its recommendation to reject a state-based exchange and allow a federal fallback exchange to operate in South Carolina (see Update for Week of November 14<sup>th</sup>).

### Tennessee

#### ***Lt. Governor says Tennessee will create own exchange if ACA is not overturned or repealed***

Lt. Governor Ron Ramsey (R) stated this week that he may ask Governor Bill Haslam (R) to call for a special session after next year's elections to pursue legislation authorizing the creation of the health insurance exchange required by the Affordable Care Act (ACA).

The Governor, Lt. Governor, and Senate Republican leaders had elected to postpone debate on the measure until they know whether the U.S. Supreme Court invalidates the entire law or Republicans gain sufficient control to repeal the ACA. However, if neither comes to fruition, he acknowledged that Republican leaders prefer creating a state-based exchange versus a federal fallback exchange that would result if Tennessee fails to make substantial progress by January 2013.

#### ***Revenue collections nearly double, thanks to jump in sales tax revenues***

Tennessee became the latest state this week to upgrade their revenue forecast as both the state and national economy improves.

Thanks to rapidly increasing sale tax collections (which make up three-fifths of state revenue), the State Funding Board nearly doubled state growth estimates during the remainder of the fiscal year ending June 30<sup>th</sup>. It approved new estimates projecting up to a 4.21 percent jump in state tax revenues, which are likely to bring in up to \$220.5 million more than Tennessee had budgeted.

The Board, which is made up of Tennessee's top financial officers, also estimated that tax collections will rise by up to another 3.65 percent next year. Despite the influx of unexpected cash, Finance Commissioner Mark Emkes (R) insists that Tennessee still lacks funding to cover the continued growth in Medicaid costs and endorsed additional spending cuts for TennCare in next year's budget.