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Background

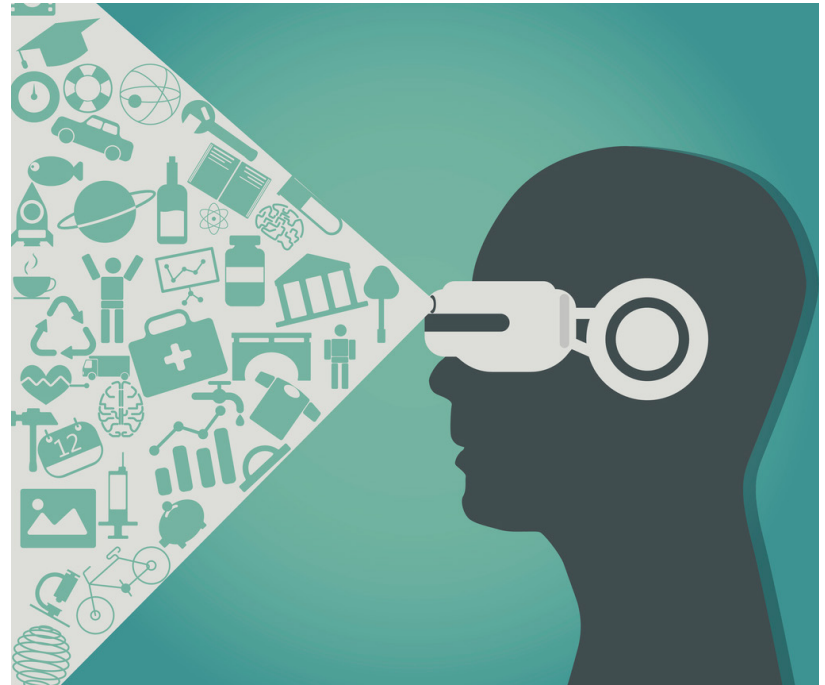
Section 1332 waivers, or State Innovation Waivers, officially became available for states to implement January 1, 2017. These waivers, made available by the Affordable Care Act (ACA), allow states to apply for an opportunity to utilize innovative strategies to provide access to “high quality, affordable health insurance while retaining the basic protections of the

ACA.”¹ COPE Health Solutions has previously published a Health Insights piece providing background and overview information on Section 1332 waivers, found [here](#) on our website. This piece is intended to focus on how states are currently planning to utilize these waivers and how states might leverage them to mitigate, or get ahead of, the potential repeal of the ACA based on the priorities expressed by the new federal administration.

Section 1332 waivers in motion

States could have applied for 1332 waivers prior to the kickoff date of January 1, 2017; Vermont submitted the earliest application in March of 2016. Only four states have expressed interest in pursuing 1332 waivers as of this publication.

The currently small number of states seeking waiver approval may be due to the several requirements states will face throughout the process from idea conception, to application, to formal approval. First, states are required to pass initial legislation to apply for and ultimately implement waiver-based reforms². For some states whose legislature only meets bi-annually, this requirement may delay the application process. Further, states may be unable to move forward in pursuing a 1332 waiver if the legislature does not initially pass the bill. Additional challenges facing the approval of 1332 waivers are the lack



¹ https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html#About

² <http://www.ncsl.org/research/health/state-roles-using-1332-health-waivers.aspx>

of clarity made available by The Center for Medicare and Medicaid (CMS) on the review and approval process or the timing associated with full approval. States have grown used to the average length of time, about one year, to approve Section 1115 Medicaid waivers (used to help transform state Medicaid programs) but may be apprehensive to initiate a 1332 application without knowledge or a precedent for an approval timeframe.

Apprehension to take on a lengthy approval timeline may also be heightened by the complexity of approval with the requirement that two agencies, the Department of Treasury and the Department of Health and Human Services (HHS)³, need to approve the application (versus one agency that is required for 1115 waivers). Furthermore, states who wish to waive items related to the ACA tax code will face scrutiny from the Internal Revenue Service (IRS), who has made it clear these provisions will be difficult to approve³.

As of late 2016, 18 states took the initial step of proposing initial legislation with the intent to apply for a 1332 waiver⁴. These states included: Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Kentucky, Maine, Massachusetts, Minnesota, New Mexico, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Vermont and Washington². Of the bills put forth in these 18 states, 12 have been enacted into law, 20 received no attention after introduction and three passed at least one legislative chamber but have not yet been enacted⁴.

The states which have expressed interest in 1332 waivers demonstrate the potential for bi-partisan support of state innovation waivers. Of states who held a vote for 1332 initial legislation in at least one legislative chamber, eight of 15 had a Republican governor, Republican control of at least one legislative chamber or both at the time of passage⁴.

The legislation put forth by each state appears to be broad in scope, essentially providing the permission to explore or apply for 1132 waivers. Some states bills' request formal reports to be provided to the legislature prior to, or immediately after application submittal to review the contents of the application and potential impacts to current state law, such as Massachusetts². Another example of the broad legislation is from Senate Bill 1386 of Oklahoma, which grants the state authority to submit multiple waiver submissions “[to] create Oklahoma health insurance products that improve health and health care quality while controlling costs” and “authorizes the Insurance Department to review [the] health insurance market after waiver implementation; provides for codification; [and] provides an effective date”².

The table below shows the summary of four states who have formally applied for a 1332 waiver as of February 2017, the status of the application and the focus of each individual waiver application⁵.

³ <http://healthaffairs.org/blog/2016/05/26/the-acas-section-1332-escape-hatch-or-straightjacket-for-reform/>

⁴ Singer, P. M. (2017). The Future of Health Care Reform — Section 1332 Waivers and State-Led Reform. *New England Journal of Medicine*, 376(2), 108-111. doi:10.1056/nejmp1612830

⁵ https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html#Section%201332%20State%20%20Waiver%20Applications

State	Alaska ⁶	California ⁷	Hawaii ^{8,9}	Vermont ¹⁰
Application status	<ul style="list-style-type: none"> Received a letter on January 17, 2017 stating the application is complete and started 180-day review period for formal approval 	<ul style="list-style-type: none"> Withdrew application as of January 18, 2017 	<ul style="list-style-type: none"> Approved December 30, 2016 	<ul style="list-style-type: none"> Application was deemed incomplete on June 9, 2016 and no new application is posted on the CMS website to date
Goals	<ul style="list-style-type: none"> Stabilize the individual health care market and waive the inclusion of the Consumer Operated and Oriented Plan Program (CO-OP) and the Community Health Option Achieve a small increase in the number of Alaska residents covered by an individual health insurance plan Partially fund the Alaska Reinsurance Program (ARP) beginning in 2018 because without a permanently funded ARP, rates in the individual health care market are expected to rise at an unsustainable rate 	<ul style="list-style-type: none"> Waive ACA requirements that limit expanding access to undocumented individuals Offer new health insurance options, California Qualified Health Plans (CQHP), to individual's ineligible to purchase QHPs because of their immigration status 	<ul style="list-style-type: none"> Waive requirements that enumerate marketplace requirements that conflict with the Hawaii Prepaid Health Care Act of 1974 (Prepaid) Preserve the employee protections provided by Prepaid Achieve pass through funding in lieu of the ACA small employer tax credit be passed through to the State to supplement the Prepaid Premium Supplementation Fund Anticipates that the proposed waiver will result in a decrease in administrative burden and related costs for all relevant parties 	<ul style="list-style-type: none"> Maintain its current system by requesting a waiver of the federal requirement that employers enroll through an internet portal Maintain the current configuration of its small group market by eliminating the requirement to have a small business exchange website for enrollment and premium processing Maintaining the current market structure instead of building a SHOP website would allow Vermont to focus on outreach and education in the small business community as well as continued work with registered agents and brokers to encourage participation
Sections requested to be waived	<ul style="list-style-type: none"> Section 1301(a)(2)- which would have allowed the state to establish a CO-OP or Community Health Option Federal pass-through funding under section 36B of the Internal Revenue Code and 1402 relating to Advanced Premium Tax Credits (APTC) and cost sharing reductions for plans offered within the marketplaces 	<ul style="list-style-type: none"> Section 1311(d)(2)(B)(i)- prohibits Exchanges from making available any health plan that is not a QHP Section 1312(a) – defines Qualified Individuals as a “citizen or national of the United States or an alien lawfully present in the United States” as specified in Section 1312(f)(3) of the Affordable Care Act 	<ul style="list-style-type: none"> Section 1311(b)(1)(B) & Section 1321(c)(1) - state establishment of a Small Business Health Options Program (SHOP) Section 1312(a)(2) – Employee choice of qualified health plans (QHPs) at a single level of coverage through SHOP Section 1312(f)(2)(A)- definition of “qualified employer” Section 1304(b)(4)(D)(i) & (ii)- Continuation of participation in SHOP for growing small employers Section 1301(a)(1)(C)(ii)- Definition of QHP offering silver and gold plans through SHOP Section 1301(a)(2)- Solely for the requirement that CO-OPs and multi-state plans be recognized as QHPs in the small group market 	<ul style="list-style-type: none"> Section 1311 (b)(1)(B) & Section 1321(c)(3) - state establishment of a Small Business Health Options Program (SHOP) (in addition to other requirements within Section 1311⁸) Section 1312(a)(2) – Employee choice of qualified health plans (QHPs) at a single level of coverage through SHOP Section 1312(f)(2)(A)- definition of “qualified employer”

⁶ <https://www.commerce.alaska.gov/web/Portals/11/Pub/Alaska-1332-Waiver-Application-with-Attachments-Appendices.pdf?ver=2017-01-05-112938-193>

⁷ <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Covered-California-Section-1332-Waiver-Application-12-16-16.pdf>

⁸ https://governor.hawaii.gov/wp-content/uploads/2014/12/REVISED-Hawaii-1332-Waiver-Proposal_-_August-10-2016.pdf

⁹ <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Hawaii-1332-Letter-final-and-signed.pdf>

¹⁰ <http://dvha.vermont.gov/global-commitment-to-health/vermont-1332-waiver-for-state-innovation-application.pdf>

Understanding 1332 and 1115 waivers

Understanding the similarities and differences between 1332 and 1115 waivers is important. Both waivers require budget neutrality to the federal government, meaningful public education and input, and negotiations between a state and HHS which are intended to be approved for five years initially with options to renew or extend.

The most notable difference between 1332 and 1115 waivers is the primary focus: 1115 waivers provide opportunities for a state to alter their Medicaid program with respect to eligibility requirements, delivery systems and overall benefits offered. Generally, 1115 waivers include an independent research evaluation which must be available to the public and provide periodic status reports to CMS as well. Should CMS desire, they have the authority to conduct additional federal evaluations of an 1115 waiver's impact to the population it is intended to serve.

1332 waivers face stricter operational limitations requiring a state provide all the minimum coverage requirements of the ACA, prohibits modifications to the state Medicaid program and must also be approved by the Secretary of the Treasury and, in some cases, the IRS as well. Section 1332 waivers contain no independent evaluation requirement but request that a state provide quarterly and annual reports to CMS and cooperate with outside evaluators.

Federal guidance has been extremely clear that a state will be not be allowed to use cost savings in one type of waiver to meet budget neutrality requirements under another. States seeking to obtain both a 1332 and an 1115 waiver may submit a single application. However, if a state chooses to submit a single application for both 1332 and 1115 waivers, each waiver will be reviewed and approved independently with a special examination of a 1332 waiver's potential impact on a state Medicaid program¹¹.

Using 1332 waivers to enhance ACA repeal or replacement

Since the change of presidential administrations in January, there has been an intense focus on the future of the ACA throughout the health care industry. Most Republicans hope to fully repeal the law including its coverage provisions and financing mechanisms, which experts say will lead to over a trillion-dollar deficit over the next decade, leaving few options to a Republican Congress to repeal the ACA in a budget neutral environment.

The future of current 1332 waivers if the ACA is repealed

At this point in time, full repeal of the ACA is unlikely. With such tight guardrails limiting the application and approval of 1332 waivers, it appears that the only approved waiver in Hawai'i will be secure, at least for a few years.

A key component of the ACA, the Innovation Center, is at risk for elimination under HHS Secretary Tom Price. The Innovation Center has helped to align and coordinate multiple Medicaid and Medicare waiver applications from states. While the Innovation Office is not the formal office to approve 1332 and 1115 waivers, it may be difficult to coordinate special cases, such as how Maryland and Vermont have in the past, without the center's support¹².

Changes required to current 1332 rules

States could use 1332 waivers to achieve the broad goals of the ACA in entirely new ways if Republicans could scale back the narrow requirements for approval put forth by the Obama administration. The guardrails currently require state innovation models to cover a similar number of people as the ACA

¹¹ <https://www.macpac.gov/wp-content/uploads/2016/08/Comparing-Section-1332-and-Section-1115-Waiver-Authorities.pdf>

¹² Future of 1332 waivers [Telephone interview]. (2017, February 28).

does; offer coverage that is no less comprehensive and just as affordable; and have no effect on the federal deficit¹³. Softening the requirements for 1332 approval would put states in a place to consider waiving more requirements than is currently allowed.

If Republicans are successful and eliminate the individual and employee mandates retroactively back to 2016, meaning that the current guardrails put in place by the Obama administration that the individual and employee mandate must be maintained could be removed, this will open the door for more flexibility in the types of 1332 waivers eligible for submission since they will no longer have to meet those requirements. Furthermore, Congress would need to find a way to work with the Department of the Treasury and the IRS to alter the current tax policy and use of the 1040 form for tax subsidies paid to individuals if states hope find a way to utilize tax credits in a reformed manner under a 1332 waiver¹².

Possibilities for 1332 waivers if the ACA is not repealed

Some deliberation may occur regarding the ACA's coverage provisions but maintain the financing mechanisms, however the administration also has the option to consider leveraging 1332 waivers to put the onus on states to put forth innovative solutions and reform models to provide coverage to their residents instead of trying to immediately repeal and replace the entire ACA law . If provided the right guidance on 1332 approvals, Congress could create opportunities for some states to potentially develop more conservative models that would appeal to current agency approvers, or on the other hand, more liberal states could attempt to pass waiver applications featuring regulations that support their approach to health care, e.g. public health plans, if the administration would approve such applications¹³.

Speaker Paul Ryan and other House Republican leaders met in mid-February 2017 to outline their current thinking on the future of the ACA. While no direct information was provided on 1332 waivers, the impact of other ideas presented may provide clues or opportunities for the types of 1332 waivers a state might seek under revised approval guardrails in the new administration. If the individual and employee mandates are eliminated, states might introduce waivers to request that tax credits be redirected to the states and not individuals. If states were to receive the tax credits based on their residents directly, they might attempt to require an individual to search for a job or complete a wellness assessment as a requirement to earn their individual tax credit¹². However, unless a solution is reached with the IRS to be able to account for tax credits outside of current tax forms, waivers of this kind would be unlikely.

1332 waivers may see greater flexibility under the Trump administration if guardrails are relaxed and the administration encourages states to utilize the waivers to achieve the market style of innovation that the new administration wants to encourage. In the absence of a single comprehensive reform of the ACA, the administration may allow states to offer reduced benefit packages and privatize all functions within their state health care system. It is anticipated that we will see more conservative friendly interpretations of 1332 language and requirements and states may be allowed to do more of what they would like to do but currently cannot because of restraints of budget laws¹².

About COPE Health Solutions

COPE Health Solutions has deep expertise in clinical redesign and business requirements development for population health and integrated delivery systems. Managing the health care (and finances) of different payor populations can be a challenge, but doing so is possible with the right tools and understanding COPE Health Solutions brings. We understand the complex waiver implications for health system lead agencies and partners. Our team has unparalleled experience and a proven track record of success from planning to implementation to measurement with 1115 Medicaid Waivers in New

¹³ <http://www.modernhealthcare.com/article/20161215/NEWS/161219951>

York, Texas and California. Our team understands that there is no such thing as a “one-size fits all” approach, and develops customized goals and solutions to help all our clients better navigate through today’s uncertain health care regulatory environment. For more information on our experience, please refer to our services [here](#).

