NEW RULES ADVANCE INSURANCE PLANS WITHOUT ACA PROTECTIONS
RISKS POSED BY ASSOCIATION HEALTH PLANS AND SHORT-TERM LIMITED DURATION PLANS

Advocacy Action Guide for AAP Chapters

Overview

- In 2018, the Trump administration took several actions to advance the use of insurance products that would not adhere to federal Affordable Care Act (ACA) consumer protections. Such plans would leave families exposed to considerable risk:
  - On June 21, 2018, the Department of Labor issued a final rule to allow for the expanded use of Association Health Plans (AHPs).
  - On August 1, 2018 the Internal Revenue Service (IRS), the Employee Benefits Security Administration, and the US Department of Health and Human Services (HHS) issued a final rule to lengthen the maximum time limit of short-term, limited-duration (STLD) insurance plans.
  - On October 22, 2018, the Centers for Medicare and Medicaid Services (CMS) and the Department of Treasury issued new guidance on ACA Section 1332 waivers, now called State Relief and Empowerment Waivers, that give states significant flexibility to promote STLD plans, AHPs, and similar coverage.

- This follows the December 22, 2017 enactment of the Tax Cut and Jobs Act, which zeroed-out the ACA individual mandate penalty so that individuals without “minimum essential coverage” will no longer pay a penalty for being uninsured or underinsured, beginning in 2019.

- This also follows the April 9, 2018 HHS final Notice of Benefit and Payment Parameters (NBPP) for 2019, which further undermines ACA protections including that of essential health benefits (EHB). The AAP has developed an Advocacy Action Guide to help chapters and advocates protect against harmful changes to
EHB, as allowed by this rule.

- The Trump Administration’s regulatory actions on AHPs, STLD plans, and new State Relief and Empowerment Waivers may harm children and families purchasing health insurance in marketplaces by expanding options without critical ACA protections. While they may be less expensive, non-ACA compliant plans would not cover essential health services like prescription drugs and maternity care, and would likely appeal to younger, healthier consumers, exposing more children and families to less robust coverage and increased risk. Importantly, the use of such plans would also make ACA-compliant plans more expensive and the ACA market less stable.

- **States can act to bolster insurance plan consumer protections and prevent expansion of plans that could harm children and families.**

### Association Health Plan (AHP) Final Rule

- An Association Health Plan (AHP) is held by an organization that covers its individual members. The association could be a legitimate business/trade association, professional employer organization, or other entity.

- Previous law limited the ability of AHPs to act as a large employer for purposes of coverage and thus gain exemption from state and federal ACA protections. The final AHP regulation would allow more individuals and small businesses to access AHPs by permitting employers “in the same trade, industry, line of business or profession” or those businesses that have a principal location within a specific region to band together for the expressed purpose of acting as an employer to offer AHP coverage. This would allow such employers to purchase cheaper AHP coverage that, depending on the coverage, likely would not include critical ACA protections.

- Those banding together in the same trade, industry, line of business or profession could offer AHP coverage across state borders. Employers banding together would be required to meet specific business conditions to guard against fraud and would be required to form an organization to administer the AHP plan. The rule would also clarify that sole proprietors and their dependents would be eligible to participate in an AHP.

- The final rule clarified that AHPs are subject to some ACA requirements, including the provision of preventive care without cost sharing, and caps on annual out-of-pocket costs and annual and lifetime dollar limits for covered benefits. However, AHPs are not required to cover EHBs and can use several different factors to establish premiums. AHPs can also be regulated large-group coverage, which would make them largely exempt from the ACA and state laws that apply only to the individual and small-group insurance market. A 2018 Avalere study indicates as many as 4.3 million individuals could move to AHP coverage by 2022.
State Regulation of AHPs

- States have authority to regulate AHP financial solvency, marketing and rating practices, and contracts. States also have the authority to require AHPs to adhere to state insurance plan benefit mandates and meet other standards, such as rating rules and other individual/small group market rules.

- The final rule clarifies that states retain authority to regulate health plans sold to AHPs and can regulate self-insured AHPs to the extent that doing so is not inconsistent with the Employee Retirement Income Security Act of 1974 (ERISA). The administration indicates in the rule, however, that it could use its ERISA authority in the future to exempt categories of AHPs from state regulation if states “go too far in regulating” AHPs “in ways that interfere” with the final rule.

- Several states have sued to prevent the implementation of the AHP final rule. In the interim, some states have begun acting to regulate AHPs:
  
  o **Vermont** issued an emergency rule indicating that AHPs have to offer EHBs and other consumer protections and cannot discriminate based on pre-existing conditions. The emergency rule further indicates that the federal AHP rule does not preempt Vermont’s authority to regulate insurance and protect its citizens.
  
  o **New York** issued a statement and **Massachusetts** issued a bulletin indicating that the federal rule does not preempt state law, and that state insurance laws apply to AHPs.
  
  o **Oregon** issued a bulletin indicating it will follow a more strict interpretation of a *bona fide* association for purposes of issuing AHP coverage.
  
  o Alternatively, **Nebraska** issued guidance indicating that it would welcome AHPs as the then-proposed federal rule would allow.

- AHPs have also begun to appear in different states. Following the above guidance, the Nebraska Farm Bureau unveiled an AHP plan. Meanwhile a large dairy employer has created an AHP for employees in 2 states, and a number of chambers of commerce are partnering with issuers to offer AHP coverage.

Short Term, Limited Duration (STLD) Plan Final Rule

- Short term, limited duration (STLD) insurance is designed to provide bridge coverage during periods of uninsurance, such as when one is between jobs or when a student takes a semester off from school. STLD insurance plans are not considered individual coverage, and therefore are exempt from ACA individual plan consumer protections. Previous 2016 federal regulations limited the maximum time length of STLD insurance products to less than 3 months.
The 2018 final rule significantly expands this cap to allow for STLD insurance plans of less than 12 months and allows for such plans to be renewed for up to 3 years.

A 2018 Urban Institute report estimates that 4.2 million people would enroll in STLD coverage in 2019, including 1.7 million who would go otherwise uninsured, and 2.5 million who would leave more robust ACA marketplace plan coverage.

State Regulation of STLD Plans

Several patient advocacy organizations sued to prevent the implementation of the STLD final rule, but their request for a preliminary injunction was not granted. As such and as of the 2019 open enrollment period beginning on November 1st, 2018, STLD plans can be sold to consumers as an alternative to ACA-compliant plans. The new STLD insurance regulation does not change state authority to regulate these plans, and states have several tools at their disposal to limit the expansion of STLD insurance products, including:

- Prohibiting the sale of STLD plans: At least 4 states (CA, MA, NJ, NY) have placed conditions on insurance products that effectively disallow the sale of STLD plans in the state.
- Limiting the duration of STLD plans: States can limit the duration of a STLD plan to a period less than the 12 months, as at least 13 states (AZ, CA, CO, CT, IN, MI, MN, NV, NH, ND, OR, SD, WA) have done.
- Limiting renewals or total amount of STLD coverage: States can limit STLD plan renewals or total lengths of STLD coverage, as at least 9 states (CO, ME, MI, MN, NV, NH, OR, WA, WI) have done.
- Requiring compliance with other rules: States can require STLD plans to meet rules for the individual market, which would make enrollment in ACA plans more attractive.

States have a number of other options to protect consumers from these plans.

Section 1332 “State Relief and Empowerment Waivers”

Section 1332 of the ACA allows states to waive some provisions of the law to provide states alternative mechanisms of expanding affordable coverage.

Previously known as “State Innovation Waivers,” Section 1332 waivers are required by statute to meet 4 guardrails in order to be approved by HHS: (1) benefits must be as comprehensive; (2) cost-sharing protections must be maintained and coverage must be as affordable; (3) a comparable number of people must have health coverage as under the ACA; and (4) the waiver must not increase the federal deficit.
In December 2015, CMS issued Section 1332 guidance that reinforced these 4 guardrails and contained strong provisions to protect consumers. In effect, this December 2015 guidance made it difficult for states to create 1332 waiver proposals that would in any way offer less robust coverage. As such and to-date, use of 1332 waivers has largely been focused on state reinsurance plans.

The October 2018 CMS guidance rescinds and replaces the December 2015 guidance, renames Section 1332 waivers “State Relief and Empowerment Waivers,” and provides significant new flexibility for CMS to approve state waivers that offer less robust coverage.

In doing so, the administration relaxes the evaluation framework of the above 4 guardrails so that a waiver could be approved if a comparable number of state residents would have access to coverage that is as comprehensive and affordable under the waiver, whether or not residents actually obtain it.

This means that states will have flexibility under the guidance to direct individuals toward STLD plans and AHPs (and in some cases, even perhaps utilize and/or reformat ACA premium tax credit subsidies for such plans) and still meet the requirements for a Section 1332 waiver.

Moreover, the new CMS guidance revises the previous requirement that states enact legislation to specifically create a Section 1332 waiver. Instead, waivers can now be approved if there is existing state legislation or an executive order that can be interpreted to authorize such a waiver application. This change will likely allow state administrations to create Section 1332 waiver applications without involving their legislatures.

In November 2018, CMS issued a State Empowerment and Relief Waiver Concepts Fact Sheet, outlining 4 specific models CMS envisions under the new 1332 guidance. These model concepts would allow states new flexibilities, including the restructuring of the ACA’s advanced premium tax credits:

- **Account-Based Subsidies:** A state could direct public subsidies into a defined-contribution, consumer-directed account that an individual uses to pay for health insurance premiums or other health care expenses.
- **State-Specific Premium Assistance:** A state could create a new, state-sponsored premium subsidy program that could be designed to meet specific objectives.
- **Adjusted Plan Options:** This would allow a state to provide financial assistance for the purchase of non-ACA-compliant coverage and even catastrophic health plans. This model could be paired with one of the above models to allow subsidies to be directed to such plans.
- **Risk Stabilization Strategies:** This would allow states to implement a state-based reinsurance program or high-risk pool in an effort to stabilize premiums.
Guidance for AAP Chapters

- Taken together, these rules allow for expanded use of STLD plans and AHPs that do not offer critical ACA protections and are likely to drive up the cost of ACA compliant plans that offer comprehensive and robust coverage, including the ten categories of the EHBs and all the ACA’s consumer protections.

- State Relief and Empowerment Waivers may serve to promote such non-ACA-compliant coverage on a larger scale as a state.

- AAP chapters may take different approaches at the state level to address these plans and should talk to state Insurance Commissioners about possible options to protect children and families. Depending on the makeup of your state, working with lawmakers on a legislative solution may also be a consideration. Provisions to prevent such plans from negatively affecting coverage include:
  
  - To the extent feasible, **prohibiting the sale of STLD plans and AHPs**.
  - As a more measured step, **putting limits on STLD plans and AHPs**, such as:
    - **Limiting the duration and renewability of STLD plans** (ie, to a specific number of months and to prevent renewability).
    - **Requiring such plans to adhere to EHB and all other state and federal ACA consumer protections** (including but not limited to the preventive services mandate that ensures all Bright Futures services are provided to children without cost sharing).
    - **Requiring all plans sold in the state—including AHPs that may originate in another state—to abide by all relevant existing state insurance laws**.
    - **Limiting the sale of AHPs to bona fide, existing associations**.
    - **Requiring plans to be reviewed by the state prior to being sold to ensure they meet all state and federal requirements**.
  
  - **If sold, requiring prominent notification that any non-compliant coverage is not comprehensive.** As an example, the STLD plan final rule requires plans sold in 2019 to be accompanied with the following language in 14-point font:

    This coverage is not required to comply with certain federal market requirements for health insurance, principally those contained in the Affordable Care Act. Be sure to check your policy carefully to make sure you are aware of any exclusions or limitations regarding coverage of preexisting conditions or health benefits (such as hospitalization, emergency services, maternity care, preventive care, prescription drugs, and mental health and substance use disorder services). Your policy might also have lifetime and/or annual dollar limits on health benefits. If this coverage expires or you lose eligibility for this coverage, you might have to wait until an open enrollment period to get other health insurance coverage.
- Working with state Insurance Departments to issue notices to consumers citing the differences between AHPs and STLD plans and ACA compliant plans and/or existing state law. Providing consumers with information on these types of plans and the possibility of less coverage or unanticipated costs will help families make more informed decisions about their health coverage.

- Prohibiting the state from applying for a Section 1332 waiver that would reduce existing consumer protections and/or requiring legislative approval of any Section 1332 waiver. As the new federal guidance gives state administrations considerable latitude to make changes, legislation could be enacted to prevent the state from doing so, or from doing so without legislature involvement or approval.

We Are Here to Help

- These rules are some of the latest federal attempts to weaken ACA protections and to expand access to cheaper, less robust coverage. AAP chapters are encouraged to work with other physician, patient, and family advocacy organizations in advocating for state proposals to ensure individuals and families are protected from the increased risk AHPs and STLD plans pose.

- Chapters are further encouraged to advocate against any 1332 waiver proposal that would advance the use of non-ACA compliant plans.

- AAP chapters are also encouraged to contact the AAP at stgov@aap.org with questions or for targeted consultation on these issues.

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1 For a detailed analysis of state limits on STLD plans, see Appendix of *State Regulation of Coverage Options Outside of the Affordable Care Act: Limiting the Risk to the Individual Market*, Commonwealth Fund, March 2018.
