President-Elect Joe Biden will take office during uniquely challenging times. He will have the benefit of popular vote and electoral college victories but will likely face a divided Congress. Biden is unlikely to experience the energetic legislative cooperation expected during the first 100 days of a new president’s first term. The filibuster remains a powerful tool for obstruction, and Senate Majority Leader Mitch McConnell is likely to frustrate the Biden agenda, just as he did with President Obama. These challenges have commentators asking whether the much-discussed solution for remaining gaps in insurance coverage—the public option—is “already dead.”

Even with a legislative logjam, the incoming administration can act swiftly to address the health and economic crises facing the nation. Biden can issue executive orders, guide administrative rulemaking, and encourage agency leadership to reverse some of the damage done to the commercial insurance protections of the Patient Protection and Affordable Care Act (ACA) and the Medicaid program by the Trump administration. These executive acts could begin rebuilding a more universal and more accessible health care system. We suggest actions to be taken in the first 100 days of the Biden administration that could improve coverage for those experiencing hardship during the current public health crisis and beyond.

**Marketplaces**

As a candidate and throughout his presidency, Donald Trump called the ACA a “disaster,” and his administration worked to undermine the law. One of the earliest executive acts hampered enrollment in health insurance offered through the federal marketplace by eliminating television advertising, shortening open enrollment, and reducing funding for enrollment assistance. As the pandemic increased jobless rates and decreased health insurance coverage, the Trump administration refused to reopen enrollment on HealthCare.gov. Some of these actions have been struck down by the Supreme Court, such as the risk corridor payments the Trump administration denied to insurers, but much regulatory rebuilding remains to be done.

The Biden administration should reinstate funding for marketplace advertising and enrollment assistance, extend the length of open enrollment (originally 90 days, now 45), and facilitate enrollment opportunities that arise outside the open enrollment period. These reinforcements do not require congressional action and will be especially important for improving coverage as the unemployment crisis continues.

The ACA’s Section 1332 innovation waiver provision allows states to pursue their own commercial insurance coverage program if they protect consumers to the same degree as the ACA. On November 1, 2020, the Trump administration granted Georgia’s waiver, which would eliminate the marketplace and is projected to cause tens of thousands to lose coverage. The Biden administration should revoke the Trump administration’s Section 1332 waiver guidance, which relaxed the ACA’s guardrails by allowing less comprehensive coverage, higher out-of-pocket costs, and reduced attention to populations with higher risk. By reinstating guidance that enforces consumer protections while still encouraging innovation, the 35 states without a Section 1332 waiver could find ways to expand coverage instead of eroding it.
Medicaid

Medicaid is the joint federal-state program that pays for care for people with low incomes. The Trump administration initiated many policies designed to weaken Medicaid’s unique protections for ensuring continuous eligibility, comprehensive benefits, limited out-of-pocket payments, and a federal guarantee of money to states by granting questionable state applications for demonstration waivers. Accordingly, the incoming Centers for Medicare & Medicaid Services (CMS) administrator should immediately withdraw at least 2 of the Trump administration’s policies.

First, CMS should withdraw the 2019 Healthy Adult Opportunity guidance, which invited state applications for block grant funding. Oklahoma pursued this before a successful ballot initiative on Medicaid expansion, and Tennessee has an application pending. No state has implemented this policy yet, and CMS should clarify that these types of proposals are unlawful.

Second, new demonstration waiver applications containing work requirements and lockouts for failure to pay out-of-pocket costs should be rejected, and the unlawful 2018 policy supporting community engagement should be rescinded. The fate of already-approved waivers rests with federal courts, which have struck down work requirement waivers as “arbitrary and capricious,” and no state is implementing work requirements during the pandemic. Even so, the Biden administration should act quickly to eliminate this policy and to withdraw Department of Justice support for Arkansas’s petition to the US Supreme Court seeking to have work requirements declared legal. States should terminate waivers granted by the Trump administration that are highly likely to be struck down when challenged in court, saving time and money as well as undue confusion for Medicaid beneficiaries.

States’ attempts to cut Planned Parenthood out of Medicaid have been rejected by most courts, and the Biden administration should reimplement the Obama-era guidance instructing states that they cannot exclude Planned Parenthood under the Medicaid Act’s free-choice-of-provider provision. Relatedly, the Biden administration should reverse restrictions on Title X funding, the federal family planning program, which led Planned Parenthood to exit.

Equal Treatment

Another easy choice is to revisit the reinterpretation of the Section 1557 rule, which protects patients from discrimination on the basis of race, ethnicity, sex, age, and disability when federal funds pay for health care. The Trump administration revised regulations to permit discrimination against transgender individuals, elevate religious freedom over patients’ needs (ie, sterilization or abortion), and reduce availability of translation and interpretation services for those with limited English proficiency. Two federal courts have struck down the Trump administration’s reinterpretation in the wake of the Supreme Court’s June decision finding discrimination on the basis of sex includes sexual minorities.

The legislative priorities that President Biden chooses to pursue immediately will have unusual importance given the unprecedented crisis, but a divided Congress will present challenges. Even without Congress, the incoming administration can reinvigorate the near-universal coverage goal of the ACA, reforms that have helped US residents access health care and made it more equitable. Given the hard hit that populations with higher risk have experienced during the last 4 years, the new administration must act swiftly.
None reported.

REFERENCES

1. Keith K. Feds dramatically relax Section 1332 waiver guardrails. Health Affairs Blog. Published online October 23, 2018. doi:10.1377/hblog20181023.512033

2. Huberfeld N, Watson S, Barkoff A. Struggle for the soul of Medicaid. J Law Med Ethics. 2020;48(3):429-433. doi:10.1177/1073110520958865

3. Miller EA, Huberfeld N, Jones DK. Pursuing Medicaid block grants with the Healthy Adult Opportunity initiative: dressing up old ideas in new clothes. J Health Polit Policy Law. 2020;8802211:8802211. doi:10.1215/03616878-8802211

4. Rosenbaum S, Sommers BD, Johnson N. As Trump administration seeks US Supreme Court review, a second year of results from Medicaid work experiments emerges. Health Affairs Blog. Published online October 19, 2020. doi:10.1377/hblog20201016.709593

5. Sadeghi NB, Wen LS. After Title X regulation changes: difficult questions for policymakers and providers. Health Affairs Blog. Published online September 24, 2019. doi:10.1377/hblog20190923.813004