



# Policy Updates

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Board of Directors Meeting, July 11, 2019

# Policy Updates

**The Health Connector continues to analyze and adapt to a dynamic health policy landscape, and is closely monitoring a number of potential threats to health coverage and health reform in Massachusetts.**

- Final Health Reimbursement Arrangement (HRA) rule
- Proposed Rule on Section 1557 of the Affordable Care Act on Nondiscrimination
- Forthcoming final Public Charge rule from the Dept. of Homeland Security
- *Texas v. United States* (ACA) case heard by the 5<sup>th</sup> Circuit Court of Appeals on Tuesday
- Other rulemaking and federal actions & looking ahead

# Health Reimbursement Arrangements (HRA)

**A final rule on Health Reimbursement Arrangements has implications for State-Based Marketplaces and for the merged market that bear monitoring.**

## **New federal HRA regulations were finalized on June 13<sup>th</sup>**

- HRAs have historically been required to be coupled with an ACA-compliant group health plan with the exception of qualified small employer HRAs or “QSEHRAs” which can be paired with an individual market plan
- The new final HRA rule (effective January 2020) allows employers of any size to provide an HRA that is integrated with individual health insurance coverage

## **Implications for the Health Connector**

- If employers offer an HRA that is integrated with individual health insurance coverage, employees may be barred from receiving federal Advance Premium Tax Credits (APTCs).
- The Health Connector and other SBMs will need to work to develop tools and/or systems adjustments to incorporate an HRA offer into an individual’s eligibility determination
- While the final rule includes some guardrails and protections against employers’ ability to “cherry pick” which workers to keep in traditional group coverage and which to offer HRA coverage to (thereby pushing higher risk individuals into the individual market), merged market impact will need to be carefully analyzed and closely monitored

# Section 1557

**The Trump Administration has proposed changes to prior interpretations of ACA Section 1557, seeking to roll back explicit protections against discrimination on the basis of gender identity.**

**On May 24th, the U.S. Department of Health and Human Services (HHS) issued a proposed rule on non-discrimination in health and health education programs**

- The proposed rule revises the agency's prior interpretation of Section 1557 of the ACA which is the law's primary anti-discrimination provision.
- If finalized, the changes would remove protections on the basis of gender identity as a specifically defined component of sex discrimination and, further, seeks to narrow the applicability of Section 1557 protections.
- The rule would also eliminate requirements related to supports for those with limited English proficiency (LEP)

## **Implications for the Health Connector**

- Attempts to roll back federal protections for LGBTQ populations are in conflict with the Health Connector's commitment to equity, equal protections, and robust consumer health care protections generally.
- If the rule is finalized, the Health Connector can continue to provide additional assurances of non-discrimination and "taglines" in multiple languages alerting readers to availability of translation assistance.
- State law prohibits discrimination on the basis of gender and the Division of Insurance has clarified that health insurance carriers are prohibited from discrimination on the basis of gender identity or gender dysphoria, which is still in effect.
- However, even with state level protections, removal of federal protections against non-discrimination on the basis of gender identity weakens access, equity, and legal protections for targeted populations.

# Public Charge

**The Department of Homeland Security (DHS) is expected to issue a final Public Charge rule in September, which will likely have significant bearing on coverage and public program utilization by immigrant communities.**

## **Anticipating a final public charge rule**

- DHS issued a proposed rule in October 2018, proposing to dramatically alter its approach to public charge determinations by widening the criteria for what could be used to deny visas or green cards to certain categories of immigrants by looking beyond cash benefits to also include non-cash health and social service benefits, including Medicaid, Section 8 housing subsidies, Medicare Part D subsidies, and Supplemental Nutrition Assistance Program (SNAP) benefits.
- Exchange subsidies (e.g., APTC) and CHIP were not included in the proposed rule. But there will be interdependencies to be aware of with respect to Exchange enrollees.
- With regard to the direct impacts and broader “chilling effect” on immigrant populations, a recent JAMA Pediatrics study estimated 8.3 million children could lose health and nutrition benefits nationally.

## **Implications for the Health Connector**

- Likely to reduce overall health insurance coverage rates in the Commonwealth
- Individual mandate implications
- Risks of erosion in the trust and familiarity in immigrant communities; will need to address consumer confusion/fear around a legally complex topic

# Texas v. United States Lawsuit

**A lawsuit challenging the constitutionality of the Affordable Care Act has reached the 5<sup>th</sup> Circuit Court of Appeals, and oral arguments began this week.**

- *Texas v. U.S.* challenges the entirety of the ACA, centering on an argument related to the removal of the federal individual mandate penalty
- The case is being brought by 17 state Attorneys General, led by Texas. 21 Attorneys General, led by California and including Massachusetts Attorney General Healey, are intervening defendants in the lawsuit to defend the ACA. Defendants are now joined by the US House of Representatives.
- In December 2018, federal Judge Reed O'Connor of the Northern District of Texas ruled in favor of the plaintiff states, finding that the ACA is unconstitutional. The defendant states immediately appealed the decision.
- On March 25, the U.S. Department of Justice indicated in a briefing memo to the court that it would cease to defend the constitutionality of the ACA, leaving the intervening-defendant states' Attorneys General and the US House of Representatives as the law's sole defenders in the case.
- The U.S. Court of Appeals for the 5<sup>th</sup> Circuit began hearing oral arguments about the constitutionality of the law on July 9.

## **Implications for the Health Connector**

- Implications if the ACA were to be struck down are deeply consequential for Massachusetts and the nation generally, given how interwoven the law is with the health care and health insurance system, and the tens of millions of Americans whose coverage depends on the ACA.
- At stake are billions of dollars of federal funding, including Exchange subsidies as well as consumer health insurance market protections (e.g., protections for people with pre-existing conditions).

# Looking Around and Looking Ahead

## Analyzing other recent federal actions:

- Request for comments on changes to federal poverty indexing methodology
- Array of Public Charge ‘adjacent’ policy-making (e.g., White House memo on sponsorship, DOJ public charge deportation rule pending at Office of Management and Budget)

## Watching activity in other states:

- Several new states pursuing state-based marketplaces: NV, NJ, PA, and NM
- California implementing a state-based individual mandate and offering state subsidies for residents between 400-600% FPL; Washington state implementing a “public option”; Maryland implementing an ‘Easy Enrollment’ program; and many states taking action on non-compliant plans and health sharing ministries.

## Monitoring legal challenges related to the Affordable Care Act (see appendix)

## Anticipating future rule-making on:

- Program Integrity and 2021 Notice of Benefit and Payment Parameters (watching for regulatory actions on automatic re-enrollment via SBMs and prohibitions on silver loading)

# Looking Ahead

- The Health Connector will continue to seek out strategies to preserve the approaches to health coverage that have proven successful in Massachusetts.
- Staff will keep the Board of Directors apprised of new developments related to these regulatory and legal actions, and their impact to the Health Connector, the population it serves, and the health coverage landscape in the Commonwealth more broadly.

# Appendix: Ongoing ACA Related Litigation

- Unpaid risk corridor payments (SCOTUS)
- Association health plans rule (DC Circuit)
- Short-term, limited duration insurance rule (district court – DC)
- Unpaid cost-sharing reduction (CSR) payments (Federal Circuit)
- Contraceptive coverage mandate (Third and Ninth Circuits)
- Nondiscrimination protections (district court – TX)
- Provider conscience rule (district court – NY)
- Risk adjustment methodology (Tenth Circuit)
- “Take Care” challenge on multiple policy decisions (district court – MD)