

AB 1063 (Petrie-Norris): Ensuring Key Standards & Legislative Review If California Seeks to Waive ACA Consumer Protections

AB 1063 (Petrie-Norris) would require legislative approval prior to California applying for a 1332 innovation waiver to the federal government. AB 1063 ensures ACA patient protections despite the Trump Administration's new federal guidance, published last fall, which allows and encourages states to use Section 1332 innovation waivers to undermine and sabotage our Affordable Care Act and our health system as a whole.

The Federal Government Re-Interpreted 1332 Waivers to Undermine the ACA

The Trump Administration continues to relentlessly sabotage the ACA. Last October 2018, the federal administration released an executive action that would further erode consumer protections. The new guidance arguably conflicts with the actual language of the ACA.

The Trump Administration's guidance permits states to pursue 1332 waivers without explicit state legislative authority through the state regulation changes or an executive order. Under this new federal interpretation, states would no longer need explicit state-level legislation to pursue a 1332 waiver of provisions of the ACA. States can now pursue innovation waivers authorized merely through state regulation, executive order or other action by a state agency like Covered California if the state entity has broad authority to apply to the federal government.

A 1332 innovation waiver allows a state to waive certain provisions of the Affordable Care Act (ACA) in order to allow for alternative strategies of offering coverage in the individual and small group health insurance markets, consistent with the goals of the ACA. The provisions of the ACA that can be waived through a 1332 waiver are: 1) the rules regarding the regulation of qualified health plans; 2) cost-sharing reductions; and 3) premium tax credits and the individual and employer mandates. Under the federal law, states cannot outright waive other key market-wide ACA protections, such as ban on pre-existing condition exclusions and underwriting based on health status.

While the provisions that can be waived are expansive, states still must meet certain standards to be granted waivers. Under the ACA and Obama-era guidance, federal officials can grant a Section 1332 waiver only if a state demonstrates that their proposal meets certain "guardrails" outlined in the statute. These guardrails ensure that the states continue to:

- Provide coverage that is **at least as comprehensive** as the coverage under the ACA;
- Provide coverage and cost sharing protections against excessive out-of-pocket spending that are **at least as affordable** as the coverage under the ACA
- Provide **coverage to at least a comparable number of its residents**; and
- Not increase the federal deficit.

The new guidance from the Trump Administration undermines these "guardrails" that states were required to meet to obtain a waiver. For example, under the new guidance, states will no longer be required to provide the same level of comprehensive coverage, affordability of coverage, or access to that coverage.

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On Access – The Trump administration will no longer require that a state’s alternative health system provides comprehensive coverage to a comparable number of residents. Instead, as long as there is at least just one *offering* of ACA-compliant coverage made available, the Trump Administration would permit states to offer and to count non-compliant coverage like substandard short-term insurance plans or association health plans. The Trump Administration would also allow states and consumers to use federal financial subsidies to pay for such “junk” coverage like short-term plans or association health plans.

On Coverage – The Trump Administration reinterprets what coverage is allowed, wherein coverage can be either “minimum essential coverage” which is what ACA requires or “health insurance coverage,” which includes a wide range of insurance types, such as short-term plans and association health plans.

On Comprehensiveness and Affordability – The new guidance allows states to provide options that are less comprehensive or less affordable. This means that states can develop a waiver that provides comprehensive or affordable coverage to fewer people relative to the ACA, so long as it provides some access to comprehensive and affordable coverage. Specifically, on “comprehensiveness” of coverage that is based on an essential health benefits benchmark plan, states can choose other states’ EHB benchmark plans, and those benchmark plans could be less comprehensive.

On the Need for State Legislation – And finally, states are no longer required to adopt new legislation to authorize a 1332 waiver application. States may submit a 1332 waiver through regulation or executive order authorizing the waiver, and without legislative review or scrutiny. This circumvents the public process inherent in passing state legislation, and lowers the procedural threshold so that states may more easily vandalize the ACA.

AB 1063 (Petrie-Norris) Ensures Legislative Engagement in Health Policymaking

AB 1063 would assure that the State of California submits and applies for a 1332 waiver only if it is consistent with the Obama-era interpretation of federal law and only if there is state legislation authorizing the waiver application. No state agency, including Covered California, could apply unless there was further legislation passed by the Legislature and signed by the Governor.

This bill is modeled after SB 1108 (Hernandez), which was enacted last year to stop 1115 waivers that would add restrictions to the Medi-Cal program limiting enrollment or the scope of services.

AB 1063 (Petrie-Norris) is co-sponsored by Health Access California and Western Center on Law and Poverty. For more information, contact: Jessica Moran, Health Access California at jmoran@health-access.org or Jen Flory, Western Center on Law and Poverty at jflory@wclp.org