



## Federal Issues

### Legislative

### Hospitals & Insurers Push for Recommendations During the Lame-duck Session

Hospitals are asking federal lawmakers to make them a priority in the lame-duck session.

#### Policy priorities supported hospitals include:

- COVID-19 relief, including: additional funding for the provider relief fund, federal liability protections, support for frontline health care workers, coverage for the uninsured, and full accelerated payment forgiveness for all hospitals;
- Eliminating cuts to the Medicaid disproportionate share hospital (DSH) program in the next fiscal year; and
- Extending the Congressionally enacted moratorium on the application of the Medicare sequester cuts until the public health emergency ends.

The lame-duck session refers to the time between the November 3 election and the beginning of a new Congress on January 3, 2021. Congress has indicated that its primary focus will be to avoid a government shutdown by passing appropriation bills to fund the

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government, and may concentrate efforts on a COVID-19 relief package.

### **Insurer Recommendations**

Insurers are also recommending Congress take action on a number of issues during the lame-duck session, including:

- **COVID-19 testing:** To ensure adequate funding for testing as well as other public health activities (e.g. contact tracing);
- **COVID-19 vaccines:** Advocate for a safe, effective and affordable vaccine that is based on sound scientific evidence along with actions to support vaccinations (e.g., communications, equitable distribution, data infrastructure and monitoring);
- **Consumer protections:** Reduce costs for consumers by addressing surprise billing and urging price gouging protections for patients during the public health emergency;
- **Health equity:** Promote policies to address disparities in maternal health outcomes, vaccination rates and behavioral health diagnosis and treatment.

**Why this matters:** The hospital community is grateful that the federal Coronavirus, Aid, Relief, Economic Security (CARES) Act provided funding and other relief measures to support hospitals; however, additional action is needed as hospitals begin to mount a second wave response to the resurgence of COVID-19.

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## **Federal Issues**

Regulatory

### **Supreme Court Hears Arguments in California v. Texas ACA Litigation**

The U.S. Supreme Court heard oral arguments in *California v. Texas*, the lawsuit filed by a Texas-led group of 18 states and several individuals challenging the constitutionality of the ACA following the zeroing out of the individual mandate penalty. Both a [transcript](#) and an [audio recording](#) are available.

### **Background**

- The Fifth Circuit Court of Appeals last year ruled the ACA's individual mandate unconstitutional and sent the case back to the district court in Texas for the judge to determine which of the law's provisions could survive without the mandate. 20 Democratic-led states and the District of Columbia petitioned the Supreme Court to review the decision.
- This is the third time the Supreme Court has heard a significant challenge to the law.
- In 2012, Chief Justice Roberts cast the key vote in a 5-4 decision, holding that the law's individual coverage mandate was valid under Congress' taxing power.
- By 2017, the Republican-led Congress reduced the tax penalty for those who lacked insurance to zero as part of a year-end tax overhaul.
- The Republican-led states then sued, arguing that—since the mandate was no longer tied to a specific tax penalty—it had lost its legal underpinning. They also argued that, because the individual mandate was intertwined with a multitude of other provisions, the entire law—including protections for people with preexisting conditions—should fall.

**Standing examined:** All nine Justices posed questions addressing a wide range of issues, most questioning both sides on whether the Texas-led states and individual plaintiffs had standing to bring suit (i.e. had been injured). If a majority of the Court finds a lack of standing, the Court could avoid reaching the more provocative legal questions.

**Beyond standing, the court examined whether:**

1. The zeroed individual mandate remains a constitutional exercise of Congress's power; and
2. If not, whether the remaining provisions of the ACA (either in part or in whole) are inseverable from that mandate and must be struck down.

The court posed several questions to both sides regarding the constitutionality of the mandate and were very pointed on the issue of severability. While a Justice's comments and questions do not always telegraph how they will rule, both Chief Justice Roberts (who pointed to "compelling evidence" of Congress's intent to leave the ACA intact) and Justice Kavanaugh (who deemed the severability inquiry "straightforward" and "fairly clear") appeared reluctant to strike down any provisions of the ACA other than perhaps the mandate itself.

**Why this matters:** Justices Kagan, Sotomayor, and Breyer also shared that sentiment in their questioning. Collectively, those five Justices constitute a majority of the Court, which implies their ruling could allow the ACA to remain intact regardless of the mandate's fate.

A decision in this case could come as late as June of next year, which means that the ACA is intact for the 2021 open enrollment period happening now. People who qualify and need health care can, and should, continue to enroll in ACA plans.

Amicus briefs have been filed by [America's Health Insurance Plans](#) (AHIP), the [Blue Cross Blue Shield Association](#) (BCBSA), and the [American Hospital Association](#) (AHA) throughout this legal process, supporting the defendants' position that the individual mandate is severable from the ACA, thus the rest of the law should be preserved.

## **CMS Issues Medicaid & CHIP Managed Care Final Rule**

The Centers for Medicare & Medicaid Services (CMS) on November 9, released the 2020 Medicaid and Children's Health Insurance Program (CHIP) Managed Care [final rule](#). The rule was designed to improve federal oversight and state flexibility, while maintaining beneficiary protections and providing a high quality of care for the 55 million beneficiaries who are enrolled in Medicaid managed care plans. This includes 79% of CHIP managed care plan beneficiaries in 32 states.

**Why this matters:** The rule fosters accountability by ensuring CMS issues guidance to help states more quickly complete the federal rate review process while preserving the requirement for states to implement a quality rating system for the managed care plans with which it contracts. This will ensure that beneficiaries can have information about their plan and make informed decisions about their health care. The rule also reinforces CMS' commitment to providing access and quality care to beneficiaries living in rural America by changing the minimum standards states must use in developing network adequacy requirements in a way that supports state facilitation for telehealth options.

CMS issued a [2016 final rule](#) to update the regulations governing Medicaid and CHIP managed care programs; however, numerous stakeholders complained that the 2016 regulations were overly prescriptive and burdensome. As a result, CMS formed a working group with the National Association of Medicaid Directors and state Medicaid directors to review and prioritize areas of concern within the managed care regulations. The recommendations from this group culminated in the proposals that CMS put forward for comment during [November 2018](#).

The 2020 final rule strengthens some provisions from the 2016 rule while also taking into consideration the working group comments. It includes significant revision in the following areas of the managed care regulatory framework:

- Setting actuarially sound capitation rates (Medicaid);
- Pass-through payments (Medicaid);
- State-directed payments (Medicaid);
- Network adequacy standards (Medicaid and CHIP);
- Risk-sharing mechanisms (Medicaid);
- Quality rating system (Medicaid and CHIP);
- Appeals and grievances (Medicaid and CHIP); and
- Requirements for beneficiary information (Medicaid and CHIP).

CMS posted detailed information related to each provision. The majority of these changes will be effective 30 days after issuance of the final rule, which was published in the Federal Register on November 13, 2020. There are two provisions that will be effective with contract rating periods starting on or after July 1, 2021, and two provisions with which states will be required to come into compliance for certain reports and quality strategies submitted on or after July 1, 2021.

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## Coronavirus Updates

- The Biden-Harris transition team announced the formation of the [Transition COVID-19 Advisory Board](#) who will advise President-elect Biden, Vice President-elect Harris, and the transition team's COVID-19 staff. The Transition COVID-19 Advisory Board will be led by co-chairs Dr. David Kessler, Dr. Vivek Murthy, and Dr. Marcella Nunez-Smith.
- Pfizer [announced](#) its coronavirus vaccine is more than 90% effective, according to the first look at data from a late-stage U.S. trial involving nearly 44,000 participants.

- The Centers for Disease Control and Prevention (CDC) released draft executive [summaries](#) of the interim COVID-19 vaccine plans each jurisdiction submitted.
  - The Centers for Medicare & Medicaid Services (CMS) [announced](#) that Medicare beneficiaries can receive coverage of monoclonal antibodies to treat COVID-19 with no cost-sharing during the public health emergency (PHE). Medicare will not pay for the monoclonal antibody products that providers receive at no cost, but yesterday's action provides for reimbursement for the infusion of the product. When health care providers begin to purchase monoclonal antibody products, Medicare anticipates setting the payment rate in the same way it set the payment rates for COVID-19 vaccines. CMS will issue billing and coding instructions for health care providers in the coming days. State Medicaid programs receiving the FMAP increase of 6.2% are also required to cover this new treatment. At this time all 50 states and the District of Columbia are accepting the FMAP increase.
  - The Department of Health and Human Services (HHS) [announced](#) a partnership with large chain pharmacies to get the COVID-19 vaccines supported by Operation Warp Speed into communities as quickly as possible with no out-of-pocket costs. Albertsons, Costco, CVS, Publix, Walgreens, Walmart, and Kroger are among the 19 companies that are part of the program, which HHS said is aimed at increasing access to a future vaccine in underserved areas of the country. Pharmacists, interns, and technicians they supervise, are charged to help administer vaccines.
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## State Issues

### Pennsylvania

#### Legislative

#### **Senate and House Conduct Leadership Elections, Achieving Several Milestones**

This week leadership elections were conducted by the Senate and House caucuses, with the exception of Senate Democrats, who are still awaiting the outcome of races. It is noteworthy that the elections resulted in women capturing enough votes to serve in top leadership posts. Below are the results of elections held to date:

#### **Senate Republican Caucus:**

- President Pro Tempore: Senator Jake Corman (R-Centre), succeeds retiring Pro Tempore Joe Scarnati
- Republican Floor Leader: Senator Kim Ward (R-Westmoreland), beat two challengers to become the first female elected to the Office of Majority Leader
- Republican Whip: Senator John Gordner (R-Columbia)
- Republican Appropriations Committee Chair: Senator Pat Browne (R-Lehigh)
- Republican Policy Committee Chair: Appointed position to be named by the new leadership team
- Republican Caucus Chair: Senator Bob Mensch (R-Montgomery)
- Republican Caucus Administrator: Appointed position to be named by the new leadership team
- Republican Caucus Secretary: Senator Ryan Aument (R-Lancaster)

#### **House Republican Caucus:**

- Speaker of the House: Representative Bryan Cutler (R-Lancaster)
- Republican Floor Leader: Representative Kerry Benninghoff (R-Centre)
- Republican Whip: Representative Donna Oberlander (R-Clarion)
- Republican Appropriations Committee Chair: Representative Stan Saylor (R-York)
- Republican Policy Committee Chair: Representative Martin Causer (R-McKean)
- Republican Caucus Chair: Representative Mike Reese (R-Westmoreland), formerly held the leadership position of Caucus Secretary
- Republican Caucus Administrator: Representative Kurt Masser (R-Northumberland)
- Republican Caucus Secretary: Representative Martina White (R-Philadelphia), secedes Representative Mike Reese

#### **House Democratic Caucus:**

- Democratic Floor Leader: Representative Joanna McClinton (D-Philadelphia and Delaware), the former Caucus Chair, becomes the first female and African-American elected to the position of Democratic Leader
- House Democratic Whip: Representative Jordan Harris (D-Philadelphia)
- Democratic Appropriations Committee Chair: Representative Matt Bradford (D-Montgomery)
- Democratic Policy Committee Chair: Representative Ryan Bizzarro (D-Erie) defeated incumbent Representative Mike Sturla (D-Lancaster) for this leadership position
- Democratic Caucus Chair: Representative Dan Miller (D-Allegheny) secedes Representative McClinton
- Democratic Caucus Administrator: Representative Mike Schlossberg (D-Lehigh) secedes the retiring Representative Neal Goodman (D-Schuylkill)
- Democratic Caucus Secretary: Representative Tina Davis (D-Bucks) secedes the retiring Representative Rosita Youngblood (D-Philadelphia)

## **State Issues**

### **Pennsylvania**

#### Regulatory

#### **Hospital and Clinical Leaders Address COVID-19 Resurgence**

As Pennsylvania public health officials continue to announce record-setting daily increases in positive cases of COVID-19—including consecutive days with more than 5,000 new cases last week—the hospital community is reviewing strategies and efforts to ensure Pennsylvania patients have access to care in the face of increasing strain from rising hospitalizations.

Last week, the Hospital & Healthsystem Association of Pennsylvania (HAP) convened the Special Task Force for COVID-19 Second Wave Mitigation Efforts, bringing together clinical and executive leaders from hospitals across the state to discuss hospital preparedness and capacity management.

The hospital leaders noted that lessons learned since the spring surge will improve the response. The medical field has a better understanding of the disease, and new treatments and therapies are being deployed to improve outcomes for patients. Hospitals have implemented protocols and workflows to keep patients and staff safe. Resources, although still strained, are more available.

### **Hospitals are engaged in facility-level capacity management efforts such as:**

- At-home care and remote monitoring;
- Alternative care sites;
- Patient cohorting strategies;
- Therapeutics that effectively reduce resource utilization and shorten length of stay; and
- Partnerships with long-term care facilities to reduce the outflow of residents to hospitals.

Collaboration at local and regional levels also allows hospitals to share resources and proactively mitigate capacity challenges that may impact hospitals' abilities to meet the health needs of the population on an equitable basis.

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## **Industry Trends**

Policy / Market Trends

### **CMS Releases Enrollment Snapshot for First Week of Open Enrollment**

The Centers for Medicare & Medicaid Services (CMS) has released the first Weekly Enrollment [Snapshot](#) providing data on plan selections in the 36 states using [healthcare.gov](#) during the first week (November 1-7) of 2021 individual market Open Enrollment. As a reminder, New Jersey and Pennsylvania transitioned to their own SBE platforms for 2021, thus they are not on the HealthCare.gov platform for 2021 coverage. In prior years, those two states accounted for 7% percent of all plan selections.

**Why this matters:** CMS reports the plan selections totaled 818,365 during this time, with 21% of these plan selections attributed to new customers. The 2021 total plan selections during this first week is an 8.4% increase in enrollment, or roughly 65,000, compared to the first full week (November 3-9) of [2020 open enrollment](#), which saw 754,967 plan selections. There is also an increase in consumers renewing coverage: 645,021 in week one of 2021 open enrollment compared to 558,962 in week two of 2020 open enrollment.

CMS will be issuing enrollment snapshots for the [HealthCare.gov](#) platform on a weekly basis throughout 2021 Open Enrollment. The agency notes these snapshots only report new plan selections and active plan renewals, without indicating how many consumers have paid premiums to effectuate their enrollment.

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Pennsylvania Legislation: [www.legis.state.pa.us](http://www.legis.state.pa.us).

West Virginia Legislation: <http://www.legis.state.wv.us/>

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