



Medicaid Work Requirements for American Indians and Alaska Natives

Presented by:

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Key Concepts

- Objectives of Medicaid Program, “For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care[.]” 42 U.S.C. 1396
- Section 1115 of the Social Security Act authorizes CMS to waive the requirement that a state comply with certain provisions of the Social Security Act, but only if CMS finds that it is “likely to assist in promoting the objectives” of the Social Security Act.
- CMS is not requiring states to implement work requirements. States can submit 1115 waivers to implement work requirements
- Today’s Presentation is on Medicaid Work Requirements as they apply to American Indians and Alaska Natives not Work Requirements in general

2017 – Medicaid Reform

- 2016 Elections – New Administration, New Congress
- Expressed Support for Medicaid Reform
- Congressional Actions
 - ACA Repeal and Replace
 - Block Grants/Caps
 - Medicaid Work Requirements
- Administrative Actions
 - March 14th Letter to State Governors
 - Grant States more flexibility in operation of their Medicaid Programs
 - Fast track waivers and demonstration projects
 - Support work requirements

CMS SMD Letter on Work Requirements

- Issued January 11, 2018
- Supports state efforts to test incentives that make participation in work or other community engagement a requirement for continued Medicaid eligibility or coverage for certain adult Medicaid beneficiaries in demonstration projects under section 1115 of the Social Security Act
- State Flexibility in Design
- Exemptions
 - Medically Frails
 - Disability or Illness
- Transparency and Tribal Consultation requirements
- Provides Examples for States to consider on how AI/ANs can meet work requirements:
 - Tribal Work Programs, exemptions under SNAP and TANF Requirements

CMS Dear Tribal Leader Letter

- Issued January 17, 2018
- Acknowledged Tribal requests for Consultation in states that have proposed work requirements
- Acknowledged Tribal requests for CMS to exempt AI/ANs from work requirements
- “Unfortunately we are constrained by statute and are concerned that requiring states to exempt AI/ANs from work and community engagement requirements could raise civil rights issues.”
- States still required to comply with Tribal Consultation Requirements

Work Requirements do not Work in Indian Country

- **The IHS System Relies on Medicaid**
 - Medicaid Revenue for IHS ~\$700,000,000
 - IHS funded at 60% of need
- **Work Requirements will not incentivize AI/ANs to work**
 - Unlike other Medicaid enrollees, AI/ANs have a right to access IHS services.
 - AI/ANs would not need to meet mandatory work requirements to obtain coverage and may instead simply elect not to enroll in Medicaid
- **Mandatory Work Requirements are Inconsistent with Federal Treaty and Trust Obligations**
 - Mandatory work requirements will pose an artificial barrier to access the Medicaid program that is unique to AI/ANs
 - The United States has a duty to implement programs like the Medicaid program in a way that does not inadvertently raise barriers to participation by AI/ANs.

Indian Accommodations do not violate Equal Protection

- *Morton v. Mancari*, 417 U.S. 535 (1974)
- *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976)
- *Fisher v. Dist. Court of Sixteenth Judicial Dist. of Montana, in & for Rosebud Cty.* 424 U.S. 382 (1976)
- *United States v. Antelope*, 430 U.S. 641 (1977)
- *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977)
- *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979)
- *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979)
- *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012)
- *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991)
- *United States v. Decker*, 600 F.2d 733 (9th Cir. 1979)
- *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005)
- *E.E.O.C. v. Peabody W. Coal Co.*, 773 F.3d 977 (9th Cir. 2014)
- *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011)
- *United States v. Cohen*, 733 F.2d 128 (D.C. Cir. 1984)
- *Am. Fed'n of Gov't Employees, AFL-CIO v. United States*, 330 F.3d 513 (D.C. Cir. 2003)
- *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979)
- *Bordeaux v. Hunt*, 621 F. Supp. 637 (D.S.D. 1985)
- *Parravano v. Babbit*, 861 F.Supp. 914 (N.D. Cal. 1994)

- As long as the special treatment [for Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.”
- *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Trust Obligation to Provide Healthcare

- 25 U.S.C. § 1601(1) (“Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.”)
- H.R. REP. NO. 94-1026, pt. III, at 21 (1976) (“[T]he Federal government has treaty obligations to provide [health] services to Indians...”)
- Centers for Medicare and Medicaid Services Tribal Consultation Policy (Nov. 10, 2015), at 1 (recognizing CMS’s provision of health care to Indians is tied to fulfilling trust responsibility)
- Department of Health and Human Services Tribal Consultation (Dec. 12, 2010), at 1-2
- Department of Health and Human Services Strategic Plan FY 2018-2022 (2018)

Legal Authority for AI/AN Exemption

- CMS has legal authority to exempt AI/ANs from work requirements and doing so does not raise any “civil rights concerns”
- If the United States is acting in furtherance of its unique obligations to Indians, such actions are political in nature, and as a result do not constitute prohibited race based classifications.
- Courts have repeatedly affirmed this principle.
- It applies to acts of Congress and acts of administrative agencies.
- HHS has taken numerous actions singling out AI/ANs in the past, and has an obligation to do so again.
 - 1999 Regulation prohibiting cost-sharing for AI/AN children in the Children’s Health Insurance Program (CHIP). 42 U.S.C. § 1397bb(b)(3)(D)
 - 2001 Policy Statement requiring states to consult with Tribes within their borders on Medicaid waiver proposals and renewals to CMS. 42 U.S.C. §§ 1396a(a)(73), 1397gg(e)(1)(C).
 - Many others

Other Authorities

- HHS Secretary required to encourage states to take action to increase AI/AN enrollment in Medicaid and CHIP.
 - HHS Secretary required to facilitate agreements between tribes and States to increase AI/AN enrollment in Medicaid and CHIP
 - 42 U.S.C § 1320b-9
- HHS is directed to provide grants to increase AI/AN enrollment in Medicaid and CHIP
 - 25 U.S.C § 1644

Kentucky Lawsuit

- January 24, 2018 - Kentucky Medicaid enrollees filed suit in D.C. District Court to challenge CMS approval of the waiver
- June 29, 2018 – Court rules that the Kentucky waiver did not meet the objectives of the Medicaid program and the Secretary exceeded his authority in approving the 1115 waiver
 - *Stewart v. Azar*, Case 1:18-cv-00152-JEB (D.D.C. June 29, 2018)
- Remands waiver back to CMS because it entirely failed to consider how it would remove people from the program

Arkansas Lawsuit

- August 14, 2018 - Arkansas Medicaid enrollees filed suit in D.C. District Court to challenge CMS approval of the waiver
Gresham v. Azar, Case 1:18-cv-01900 (D.D.C.)
- Decision still pending

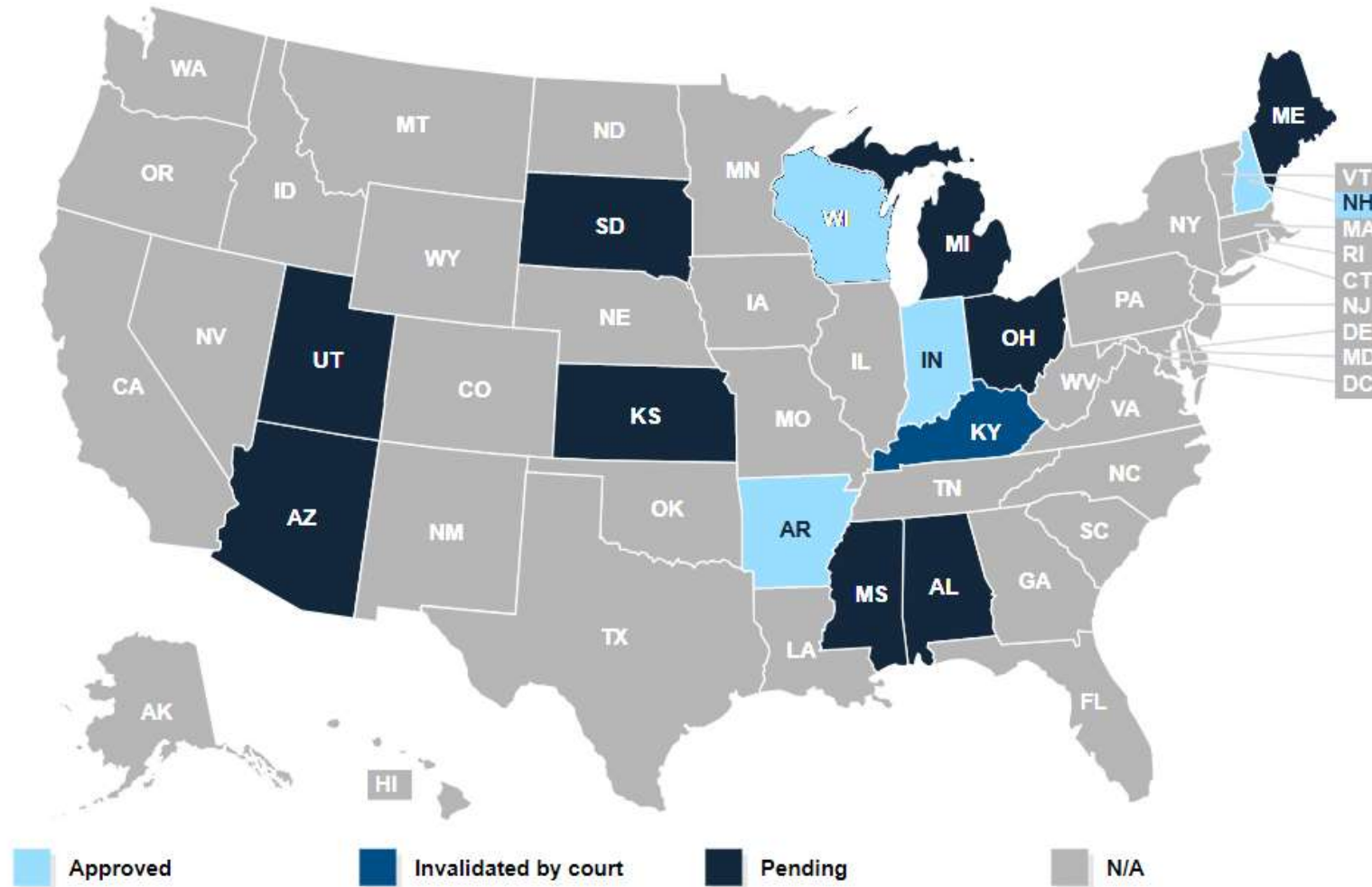
Tribal Advocacy

- February 14, 2018 – TTAG letter to CMS Opposing Work Requirements and Providing Legal Memoranda on Incorrect Interpretation by the Division of Civil Rights
- March 6, 2018 – TTAG Letter requesting an immediate meeting with the Office of Civil Rights and CMS leadership on Work Requirements
- April 11, 2018 – Tribal Delegation Met with CMS Leadership, CMS OGC, HHS OCR
 - HHS and CMS stated they could not provide a blanket exemption for AI/AN due to Civil Rights and Constitutional Concerns
 - No Statutory Authority to Exempt
 - Could not provide specific information around their “concerns” due to ongoing litigation and privileged communication
- April/May 2018 – Tribal leaders work with members of Congress to send letters to Secretary Azar and Administrator Verma supporting Tribal Sovereignty and Political Status of Tribes

Continued...

- House Labor HHS Appropriations Subcommittee Report
 - *"Federally-recognized Indian Tribes are sovereign nations residing within a State. Moreover, Indian Tribes are political, sovereign entities to which the Federal government owes a trust responsibility. As a result of this responsibility, the Federal government has consistently held Indian Tribes as a unique group when applying Federal law and policy. Congress has routinely codified this relationship, most notably in the provision of health care by establishing a health system for Tribal populations exclusively. In addition, the Federal government has enacted exemptions to ensure States would not bear the burden of additional costs. Specifically, the Social Security Act provides a 100 percent Federal match for Medicaid services provided by an Indian or by an Indian Health Service or Tribally-operated facility. No discretionary action taken by any Administration can impede the direct relationship between the Federal government and the provision of health care for Indian Tribes."*
 - H.R. REP. NO. 115-862, at 97 (2018)

Current Outlook



Source: Kaiser Family Foundation, State Health Facts, [Approved Section 1115 Medicaid Waivers](#) and [Pending Section 1115 Medicaid Waivers](#), October 29, 2018

Thank you!

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