GOVERNING
THE STATES AND LOCALITIES

States Seek Immunity from SCOTUS Ruling on Health Subsidies

By Chris Kardish
November 18, 2014

The U.S. Supreme Court took many by surprise when it announced earlier this month that it will review a case that has the potential to make health insurance significantly less affordable in the states that rely on the federal exchange. With a decision expected in June, a number of states are likely to consider action to avert a worst-case scenario.

The case, *King v. Burwell*, is one of two suits brought by opponents of the Affordable Care Act's requirement that everyone has health insurance. Inspired by the libertarian Cato Institute, the plaintiffs argue that, as written, the health law restricts the federal subsidies to only states that host their own exchange. By the U.S. Department of Health and Human Services' count, 18 states operate their own exchanges. The rest, if the court sides with Obamacare's critics, would see premiums soar in the absence of federal subsidies.

The consulting firm Avalere Health estimates that nearly 5 million people would see their premiums spike 76 percent, on average, if the Supreme Court strikes down subsidies in states that don't operate their own exchange. That estimate assumes a greater number of exchanges are considered federal, not state-based, but the question of what exactly constitutes a "state-based" health exchange is murky.

Exchanges are online marketplaces where consumers can shop for health insurance plans, but they're far more than just websites because they also make determinations about eligibility and subsidy levels and manage many other aspects of insurance coverage. States have the option of running their own exchange completely (a state-based exchange), managing aspects of plan design or consumer outreach (a partnership exchange) or leaving everything to the federal government (a federally facilitated exchange).

Of the 18 states and the District of Columbia that HHS considers to have state-based exchanges, several use the federal website, HealthCare.gov, but still maintain control over aspects such as plan approval, data collection and quality reporting. Those include Nevada and Oregon -- both of which abandoned their own failed technology platforms -- as well as New Mexico. Utah and Mississippi are both considered state-based exchanges by HHS because they host their own small-business exchange but let the federal government host their sites for individuals.

Along with the 25 states considered federally facilitated exchanges, the seven partnership exchanges would also lose subsidies if the Supreme Court sides with the plaintiff, according to

Tim Jost, an expert on health law at Washington and Lee University who supports the ACA. The states in the partnership category are Arkansas, Delaware, Illinois, Iowa, Michigan, New Hampshire and West Virginia.

Those seven states are where lawmakers and/or governors will most likely advocate to develop full state-based exchanges in the coming months. But there could also be pushes in more politically moderate federal-exchange states such as Pennsylvania. To be ready for the next open enrollment period, states have until June of next year to apply for state exchange status. That would require completing or updating an application spelling out responsibilities. Before doing that, though, states need the legal authority to apply. In some states, such as Kentucky, the governor can create an exchange via executive order; in others, such as Illinois, the legislature has to pass a bill.

HHS won't say exactly what a state needs to do to qualify as running a state-based exchange, but the federal government handles some of the duties listed on the application for state-based exchanges in New Mexico, Nevada and Oregon. There's ample precedent for states to apply to HHS, which has broad authority on how it defines exchanges, for full state-based status along similar lines, said Joel Ario, a health consultant who previously worked as the director of HHS' Office of Health Insurance Exchanges.

"Their classification shouldn't depend on their IT decision," he said. "It should depend on plan management and consumer assistance."

According to Justin Giovannelli, a Georgetown University health policy researcher, "many of the states, even those that are not state-based exchanges, are doing the things [state-based exchanges] already do. They just don't have the legal status."

But Jost disagrees, pointing out that, for example, partnership states still don't have governing boards for their exchanges. But Delaware, for one, says it's already actively certifying the plans offered on the exchange and doing most of the things a traditional state exchange does -- it just needs formal status.

Delaware will apply for state-based status after getting authorization by executive order or through the legislature, said Jill Fredel, the director of communications for the state's Department of Health and Social Services. Fredel argues the state simply doesn't have the resources to run the necessary IT, but it's doing just about everything else a state exchange does.

Illinois' outgoing governor, Democrat Pat Quinn, said he's pushing his legislature to authorize a state-based exchange before Republican Bruce Rauner starts the job in January. But it won't be easy because legislation passed during the upcoming veto session requires a two-thirds vote, according to state Rep. Greg Harris, who holds leadership posts on the insurance and human services appropriation committees.

"You have an awfully heavy lift to get the votes and you have essentially four days to do it," he said. "Every single thing would have to fall into place perfectly just to meet the deadlines mechanically of getting a bill through the legislature."

The effort could be even tougher in Iowa, where Democrats narrowly control the Senate and Republicans control the House and the governor's mansion. State Sen. Pam Jochum, the majority leader, said her party will try to pass an authorizing bill this session. But past efforts failed due to Republican opposition and a recent statement from Gov. Terry Branstad's communications director won't likely raise hopes for supporters:

"Gov. Branstad has always worked to make health care insurance more predictable and affordable for Iowa families and businesses, and a hastily built exchange, which some states are considering, would not support either of those goals," said Jimmy Centers.

In Arkansas, which has worked to fit aspects of the law to a more conservative worldview, lawmakers might wait until after the Supreme Court decision, if at all. State Sen. David Sanders, a key supporter of the state's privatized Medicaid expansion, said he'd rather wait until after the ruling because it could force HHS to grant even greater flexibility.

"We have been operating under the assumption that at some point we'll have the flexibility we want," he said. "My directive is to see how we can continue to get more of that."