

SECTION 1332 WAIVERS

What is a Section 1332 Waiver?

Section 1332 of the Affordable Care Act (ACA) allows states to submit “State Innovation Waivers” for federal approval to waive certain parts of the law to improve access to high quality, affordable health insurance. Under the original guidance provided by the Obama administration, coverage provided through these innovative measures must be (1) at least as comprehensive in covered benefits as federally operated marketplaces, (2) affordable, (3) provided to a comparable number of residents as would be provided absent a waiver, and (4) budget neutral to the federal government. These waivers apply to the health insurance marketplace and cannot impact other public programs, such as Medicare and Medicaid.

In October 2018, the Trump administration issued new guidance on Section 1332 waivers, renaming them “State Relief and Empowerment Waivers.” The guidance allows greater flexibility for states to address their individual marketplaces. Notably, the guidance does not require state proposals to satisfy all the conditions listed above and outlines five principles guiding whether the federal government would approve waiver applications:

- Increasing access to private market coverage, including association health plans and short term, limited duration health plans.
- Promoting “cost effective” coverage.
- Fostering state innovation.
- Supporting low-income or high-cost populations.
- Promoting consumer-driven health care.

The guidance allows for significantly less comprehensive coverage, to be covered under the ACA and removes explicit protections for vulnerable populations present in the original guidance. Most notably, the guidance evaluates proposals on whether individuals have access to affordable, comprehensive coverage, as opposed to mandating this coverage for all individuals, as with the old guidance. This change may make some insurance options cheaper for healthier individuals but may make it less affordable and comprehensive for others, especially for individuals with complicated health conditions.¹

What Can Be Waived Under Section 1332?

Specific provisions of the ACA and Internal Revenue Code can be waived through Section 1332 waivers, including sections relating to the establishment of qualified health plans, consumer choice and insurance competition, premium tax credits and cost-sharing reductions for plans offered within marketplaces, employer shared responsibility payments, and individual shared responsibility payments. Examples of permissible adjustments include changing requirements for qualified health plans and bronze, silver, gold, and platinum health insurance marketplace plans; waiving consumer choices such as essential health benefits; and modifying or replacing the insurance marketplaces. States may also change premium tax credits and cost-sharing reductions through a waiver.

Under the 2018 guidance, states are allowed additional flexibility. Unlike under the Obama-era guidance, states no longer must enact legislation to apply for a waiver; rather, they may call on existing legislative authority to submit a Section 1332 waiver for federal approval. States are also able to

¹ Centers for Medicare and Medicaid. (2018). Section 1332: “State Innovation Waivers.” Web.

introduce additional changes to the federal healthcare.gov platform and even change the definition of minimum essential coverage. The Trump administration's interpretation of Section 1332 – which some concluded goes beyond the original intent of the statute – is the subject of a [pending lawsuit](#).²

Approved Waivers

Since 2017, 15 out of the 16 states (AK, CO, DE, GA, HI, ME, MD, MN, MT, ND, NH, NJ, OR, PA, RI, WI) that have received Section 1332 approval have established state-level reinsurance programs to stabilize premiums in the individual insurance market.³ Alaska's Section 1332 [waiver](#), effective January 2018 and similar to reinsurance programs in the other fifteen states, established a state-operated reinsurance plan covering claims in the individual market for individuals with one or more of 33 identified high-cost conditions. The state receives pass-through funding that individuals would have otherwise received as premium tax credits to offset the costs of this program.

Hawaii's non-reinsurance-related [waiver](#), enacted in January 2017, forgoes the ACA provision requiring the state to operate a Small Business Health Options Program (SHOP) in favor of the state's Prepaid Health Care Act, which is Hawaii's existing law regarding employer coverage. This law requires more generous coverage than is required under the ACA and allows the small business tax credit amounts that would have otherwise been paid to small employers purchasing coverage through SHOP to be provided to the state as pass-through funding to support small businesses offering health coverage.

In November 2020, CMS approved Georgia's Section 1332 [waiver](#), the broadest ever approved, which includes a standard reinsurance program and the Georgia Access Model. With this model, Georgia would completely transition away from the federal healthcare.gov platform by 2023 in favor of a decentralized network of web-based brokers and insurers which may expose consumers to non-Affordable Care Act compliant plans. Critics argue that this violates the statutory "guardrails" under the Section 1332 process and would result in significantly diminished enrollment. Along with the 2018 guidance, this waiver is included in the pending lawsuit in federal district court.⁴

Other 1332 Waiver Application Activity

Several states, including California, Iowa, and Oklahoma, submitted Section 1332 waivers before ultimately withdrawing them. The [California waiver](#) sought to allow undocumented workers to purchase coverage through the state's individual marketplace; however, shifting political realities following the 2016 election caused the state to withdraw the waiver request. Delays from CMS led both [Oklahoma](#) and Iowa to withdraw their waiver requests to establish reinsurance programs.⁵

Waivers submitted by Massachusetts, Ohio, and Vermont have been deemed incomplete by CMS. Massachusetts' waiver proposal to waive acceptance of cost-sharing reduction payments to low-income individuals in favor of a reinsurance program was submitted too close to 2018 open enrollment. Ohio's waiver to eliminate the ACA's individual mandate did not include a plan to offer coverage meeting Obama administration guidance. Vermont's request to waive the ACA requirement that small employers must enroll through an online SHOP portal was also deemed incomplete; the issue is now obsolete as states are no longer required to operate an online SHOP portal.⁶

Looking Ahead

On January 28, 2021, President Biden issued an [executive order](#) directing agencies to reexamine waivers that limit coverage or undermine programs. This action signals the Biden administration may roll back the guidance regarding Section 1332 waivers by the Trump administration and encourage the use of Section 1332 waivers to expand rather than limit coverage. The Biden administration will also need to file a response in court to the Georgia lawsuit, the contents of which will also indicate how the Biden administration will address waivers approved by the previous administration.

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² Keith K. (2018). "Feds Dramatically Relax Section 1332 Waiver Guardrails." *Health Affairs*. Web.

³ Kaiser Family Foundation. (2021). "Tracking Section 1332 State Innovation Waivers." Web.

⁴ Keith K. (2021). "Lawsuit Challenges GA's 1332 Waiver." *Health Affairs*. Web.

⁵ Meyer H. (2017). "Iowa withdraws request to establish alternative insurance model." *Modern Healthcare*. Web.

⁶ Kaiser Family Foundation. (2019). "Tracking Section 1332 State Innovation Waivers." Web.