



## Perspective

### The Fate of Health Care Reform — What to Expect in 2012

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The Patient Protection and Affordable Care Act of 2010 (ACA) is arguably the most significant health legislation enacted in generations. As remarkable a political and policy achievement as it was,

what the reform will actually accomplish is largely yet to be determined. Whether it slows the growth of costs, increases access to care, or improves the quality of care will depend on how it is implemented. Although major components of the law do not go into effect until 2014, the fate of the ACA depends on the outcome of four key events in 2012.

First is the 2012 state legislative sessions. One of the defining features of the ACA is the role it assigns to the states.<sup>1</sup> States face important decisions about high-risk pools, regulating the commercial insurance market, Medicaid

eligibility, creating a health insurance exchange through which small businesses and individuals can more easily compare and purchase plans, and under guidelines released in December 2011, defining essential health benefits packages. States not meeting certain requirements by January 2013 will lose control of the exchanges to the federal government. Although some states will be able to act administratively and through executive order — as Governor Lincoln Chafee (I) of Rhode Island has done — much of what they need to do requires legislation. The 2012 session is the last

chance states have to act before the January 2013 deadline.

The vast majority of state legislative activity will take place between January and June. At least 40 states are scheduled to start their 2012 sessions by mid-February. Nearly 75% will have sessions lasting less than 6 months, more than a dozen will meet for less than 3 months, and four are not scheduled to meet at all. The timing of the state legislative sessions is particularly important given the timing of the second event, the Supreme Court ruling on the constitutionality of the ACA, which is expected to be issued by the end of June. Given that only nine states have sessions running into July, waiting until the end of June to see how the Court rules would be a risky strategy for many states, which may

by default cede control of key elements to the federal government.

The Court's decision will have far-reaching policy implications. It's possible that the entire law will be struck down or that the Anti-Injunction Act will be interpreted to mean that penalties for not obtaining insurance coverage cannot be challenged until they have been collected and that therefore the courts should not rule until after the mandate becomes operational in 2014 and taxes are assessed in 2015. The most likely scenarios, however, are that the law will be upheld or that the individual mandate, the Medicaid expansion, or both will be found unconstitutional but the rest of the law will stand.<sup>2</sup> Although much of health care reform would therefore remain in place, its policy merits would be severely weakened. For example, prohibiting insurers from excluding enrollees on the basis of pre-existing conditions without a mandate that everyone obtain coverage will incentivize people to purchase insurance only when they are sick. And without an expansion of Medicaid, the reform will do significantly less than it otherwise would to reduce the number of uninsured Americans.

Regardless of how the Supreme Court rules, the timing of the decision during the heat of the presidential campaign ensures that it will have serious political ramifications. It's possible that a victory in the Court would hurt President Barack Obama's campaign as much as a defeat would: the individual mandate is deeply unpopular with Republicans and independents,<sup>3</sup> and the Republican nominee would probably use the Court's decision to rally these groups. If either Mitt Romney or

Newt Gingrich is the nominee, this issue may be somewhat neutralized, given those candidates' complicated histories with the Tea Party and health insurance mandates.

The third key event is the June 29 deadline for applications for the final federal grant that states can obtain to support establishment of a health insurance exchange. The process of creating exchanges has largely been driven by the requirements and timing of a series of federal grants. Hundreds of millions of dollars have been given to support implementation of the exchanges, including more than \$200 million to states that are suing the federal government over the ACA. The most substantial grants will provide funding through 2014, when the exchanges are supposed to be self-sustaining. Because these grants represent states' last chance to receive federal funding for creating an exchange, states choosing not to apply will face the unpleasant choice of either ceding control to the federal government or spending their own resources. Although the Department of Health and Human Services won't officially evaluate exchange implementation until January 1, 2013, the importance of securing funding may make June 29 the de facto deadline. Even if their legislatures are still in session, states that are protesting the ACA by not accepting federal grants will probably have only a matter of days between the Court's ruling and the grant deadline. Again, this means that states choosing to wait will most likely be stuck with a federal exchange.

The fourth important event is election day, on November 6.<sup>4</sup> If

the ACA survives its judicial and legislative challenges, Obama's winning a second term would allow him to ensure that implementation unfolds as scheduled. If he loses and the law is still on the books, most Republican candidates say that as President they will use waivers and executive orders to slow implementation. Republicans running for Congress will probably campaign on a promise of "repeal and replace." However, even if Republicans retain control of the House and gain control of the Senate, it will be very difficult for them to reach the 60 Senate seats needed to repeal or replace the ACA.

Implementation of the ACA will also be affected by state-level elections. In 2012, governors are being elected in 13 states, as are nearly 6000 legislators in 44 states. Incumbent Republicans fear being beaten from the right and are in the difficult position of trying to appeal to the Tea Party in the primary without losing moderate voters in the general elections. Democrats in some states are planning to run "ghost candidates" who will back off if the moderate incumbent wins the Republican primary but will campaign heavily otherwise. Some of the most consequential races in some states may be for less high-profile offices. Heads of departments of insurance are elected in 10 states, and three of these positions are on the ballot in 2012. Commissioners in both Montana and North Carolina have played a role in the exchange-creation process and will have the unusual experience of campaigning on their role in a highly salient and politically charged national issue. Winning these races may be a backdoor way for Republicans to

affect implementation in these states.

In January 2013, the federal government will evaluate whether states have made sufficient progress to maintain control over creating exchanges and implementing other elements of the ACA. Ironically, many of the states most opposed to federal involvement are putting themselves in a position to cede control. The gamble that leaders in these states are taking is that the Supreme Court will strike down the entire law, that a new President

will weaken the implementation administratively, or that Congress will repeal the ACA. Rather than laying the groundwork in case none of these events happen, they are being guided by the fear that implementing any aspect of the reform will legitimize the law and thus undermine their opposition. If they choose to wait, however, they will probably not have time to do enough to maintain control.

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