

State Innovation Waivers: Frequently Asked Questions

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Summary

Section 1332 of the Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended) provides states with the option to waive specified requirements of the ACA. In the absence of these requirements, the state is to implement its own plan to provide health insurance coverage to state residents that meets the ACA's terms.

Under a state innovation waiver, a state can apply to waive ACA requirements related to qualified health plans, health insurance exchanges, premium tax credits, cost-sharing subsidies, the individual mandate, and the employer mandate. The state can apply to waive any or all of these requirements, in part or in their entirety.

To obtain approval for a waiver application, a state must show that the plan it will implement in the absence of the waived provision(s) meets certain requirements. The state's plan must ensure that as many state residents have health insurance coverage under the plan as would have had coverage absent the waiver, and the coverage must be as affordable and comprehensive as it would have been absent the waiver. Additionally, the state's plan cannot increase the federal deficit.

The Secretary of the Department of Health and Human Services (HHS) and the Secretary of the Treasury share responsibility for reviewing state innovation waiver applications and deciding whether to approve applications. The earliest a state innovation waiver could go into effect was January 1, 2017. As of the date of this report, Hawaii is the only state with an approved state innovation waiver. Three other states—Alaska, California, and Vermont—have submitted waiver applications. California has since withdrawn its application, and the Secretaries have not yet issued a decision on Alaska's or Vermont's application.

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Section 1332 of the Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended) allows states to apply for waivers of specified provisions of the ACA. Under a state innovation waiver, a state is expected to implement a plan (in place of the waived provisions) that meets certain minimum requirements. The state's plan must provide coverage to as many state residents as would be covered absent the waiver, and that coverage must be as affordable and comprehensive as it would be absent the waiver. Additionally, the state's plan cannot increase the federal deficit. The earliest a state innovation waiver could go into effect was January 1, 2017.

This report answers frequently asked questions about how states can use and apply for state innovation waivers.

Which ACA Provisions May a State Waive Under a State Innovation Waiver?

A state may apply to waive *any or all* of the ACA provisions listed below for plan years beginning on or after January 1, 2017.¹

- **Part I of Subtitle D of the ACA:** Requirements related to the establishment of qualified health plans (QHPs).²
- **Part II of Subtitle D of the ACA:** Requirements related to the establishment of health insurance exchanges.
- **Section 1402 of the ACA:** Provision of cost-sharing subsidies to eligible individuals who purchase non-group health insurance through a health insurance exchange.³
- **Section 36B of the Internal Revenue Code (IRC):** Provision of premium tax credits to eligible individuals who purchase non-group health insurance through an exchange.
- **Section 4980H of the IRC:** Shared responsibility requirement for large employers (often called the *employer mandate*).⁴
- **Section 5000A of the IRC:** Requirement for individuals to maintain health insurance coverage (often called the *individual mandate*).⁵

Each part noted above is comprised of many provisions, which makes the scope of provisions that can be waived under a state innovation waiver quite broad. For example, Part I of Subtitle D of the ACA includes provisions that outline requirements for health plans to be certified as QHPs. It

¹ 42 U.S.C. §18052(a)(2).

² A qualified health plan (QHP) is a plan that meets certain requirements and is certified to be sold through a health insurance exchange (in the non-group or small-group market). Although QHPs are certified to be sold through exchanges, they also can be sold in the non-group or small-group market outside of exchanges. For more information see CRS Report R44065, *Overview of Health Insurance Exchanges*.

³ For more information about cost-sharing subsidies and premium tax credits, see CRS Report R44425, *Eligibility and Determination of Health Insurance Premium Tax Credits and Cost-Sharing Subsidies: In Brief*.

⁴ For more information about the employer mandate, see CRS Report R43981, *The Affordable Care Act's (ACA) Employer Shared Responsibility Determination and the Potential Employer Penalty*.

⁵ For more information about the individual mandate, see CRS Report R44438, *The Individual Mandate for Health Insurance Coverage: In Brief*.

defines the essential health benefits (EHB) package that each QHP must offer; places limitations on the enrollee cost sharing that QHPs may impose; and requires that the QHP provide coverage meeting a minimum level of actuarial value.⁶ Additionally, Part I of Subtitle D creates catastrophic health plans and determines eligibility for such plans.

Which Federal Agency Has the Authority to Grant a Waiver?

The Secretary of the Department of Health and Human Services (HHS) is to review waiver requests for provisions not included in the IRC; the Secretary of the Treasury is to review requests to waive provisions in the IRC (the availability of premium tax credits and the application of the employer and individual mandates).⁷

What Are the Minimum Requirements for a Successful Application?

The Secretary of HHS or Treasury is to assess a waiver application to determine whether the state's plan meets the requirements related to coverage, affordability, comprehensiveness, and federal-deficit neutrality outlined in statute and further described in guidance.⁸ These requirements are described in **Table 1**. The Secretary or Secretaries (as appropriate) may grant a request for a state innovation waiver if a state's application meets the requirements.

An answer to a subsequent question in this report explains that the Secretaries are required to develop a process for coordinating the application processes for state innovation waivers and other existing waivers under federal law relating to the provision of health care (see "How Does a State Innovation Waiver Work with Other Federal Waiver Authorities?"). In guidance, HHS and the Treasury note that their assessment of a state innovation waiver application does not "consider changes contingent on other federal determinations, including approval of federal waivers pursuant to statutory provisions other than section 1332."⁹ So, for example, the Secretary's or Secretaries' (as appropriate) assessment of a state innovation waiver application will not consider the effects of any other applications for waivers submitted under the coordinated waiver process.

⁶ For more information about the essential health benefits package, see CRS Report R44163, *The Patient Protection and Affordable Care Act's Essential Health Benefits (EHB)*.

⁷ 42 U.S.C. §18052(a)(6).

⁸ 42 U.S.C. §18052(b)(1) and Department of the Treasury, Department of Health and Human Services (HHS), "Waivers for State Innovation," 80 *Federal Register* 78131, December 16, 2015 (Hereinafter "Waivers for State Innovation guidance"). The requirements are not covered in regulations.

⁹ Waivers for State Innovation guidance, p. 78134.

Table I. Requirements for a Successful State Innovation Waiver Application
(as described in statute and guidance)

Statute	Guidance
Coverage: The state's plan must provide coverage to at least a comparable number of individuals as the provisions of Title I of the Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended) would provide.	At least as many individuals who had minimum essential coverage (MEC) absent a waiver must have MEC under the waiver. ^a This requirement must be forecast to be met for each year the waiver is in effect. In considering whether this requirement is met, the plan's impact on all state residents, regardless of coverage type, will be considered and the plan's effects on different groups of individuals in the state, particularly those considered vulnerable, will be assessed. ^b Whether the plan sufficiently prevents gaps in or discontinuations of coverage also will be considered.
Affordability: The state's plan must provide coverage and cost-sharing protections that are at least as affordable as the provisions of Title I of the ACA.	An individual's health care coverage under the waiver must be as affordable as coverage absent the waiver. Affordability is generally measured by comparing the sum of an individual's premium contributions and cost-sharing responsibilities for a health plan to the individual's income. Spending on health care services that are not covered by a health plan may be considered if the services are affected by the state's plan. This requirement must be forecast to be met for each year the waiver is in effect. In considering whether this requirement is met, the plan's impact on all state residents, regardless of coverage type, will be considered and the plan's effects on different groups of individuals in the state, particularly those considered vulnerable, will be assessed. ^b In assessing the plan, the affordability of coverage on average will be considered and how the plan affects individuals who have large health care spending burdens relative to their incomes will be examined.
Comprehensiveness: The state's plan must provide coverage that is at least as comprehensive as the essential health benefits (EHB), ^c as certified by the Office of the Actuary of the Centers for Medicare & Medicaid Services (CMS).	Health care coverage under the state plan must be at least as comprehensive overall for individuals as coverage was absent the waiver. Comprehensiveness is measured by comparing coverage under the plan to coverage under the state's EHB benchmark plan or coverage under the state's Medicaid program and/or the State Children's Health Insurance Programs (CHIP), as appropriate. ^c This requirement generally must be forecast to be met for each year the waiver is in effect. In considering whether this requirement is met, the proposal's impact on all state residents, regardless of coverage type, will be considered and the effects of the proposal on different groups of individuals in the state, particularly those considered vulnerable, will be assessed. ^b
Deficit Neutral: The state's plan must not increase the federal deficit.	Projected federal spending net of federal revenues must be equal to or lower than it would be absent the waiver. The state's plan must not increase the federal deficit over the period of the waiver or in total over the 10-year budget plan submitted by the state as part of its application. ^d

Source: Congressional Research Service's compilation and summary of statute (42 U.S.C. §18052(b)(1)) and guidance (80 *Federal Register* 78131, December 16, 2015). The requirements are not covered in regulations.

Notes: The Secretary of the Department of Health and Human Services (HHS) is to review waiver applications for provisions not included in the Internal Revenue Code (IRC); the Secretary of the Treasury is to review requests to waive provisions in the IRC (the availability of premium tax credits and the application of the employer and individual mandates).

- a. MEC is defined in the tax code (26 U.S.C. §5000A(f)) and includes most types of comprehensive coverage, including public coverage, such as coverage under programs sponsored by the federal government (e.g., Medicaid, Medicare), as well as private insurance (e.g., employer-sponsored insurance, non-group insurance).

- b. Vulnerable individuals include “low-income individuals, elderly individuals, and those with serious health issues or who have a greater risk of developing serious health issues.” (80 *Federal Register* 78131, December 16, 2015, p. 78132)
- c. Under the ACA, certain health plans must cover the EHB. The ACA does not explicitly define the EHB; rather, it lists 10 broad categories from which benefits and services must be included and requires the Secretary of HHS to further define the EHB. For information about the 10 categories as well as how the EHB are currently defined, see CRS In Focus IF10287, *The Essential Health Benefits (EHB)*.
- d. The state innovation waivers cannot extend longer than five years unless a state requests continuation and such request is not denied by the appropriate Secretary. Statute requires that an application for a waiver include a 10-year budget plan that is budget neutral for the federal government (42 U.S.C. §18052(a)(1)(B)(ii)).

Are There Any Limitations on the Scope of State Innovation Waivers?

In guidance, HHS and the Treasury describe some federal operational considerations that may limit the scope of the waivers.¹⁰ HHS administers all federally facilitated health insurance exchanges (FHEs), and it operates the same infrastructure technology platform in each state that has an FHE. The agencies explain that HHS cannot accommodate any state-specific changes to FHE platforms. For example, waivers that would require a state’s FHE to use different rules for calculating the financial assistance available to an individual in the state are not feasible. Similarly, the Internal Revenue Service (IRS) cannot accommodate any state-specific changes to tax rules. For example, waivers that would require the IRS to use different eligibility rules for premium tax credits for individuals in one state are not feasible.

What Is the Application Process for a State Innovation Waiver?

A state seeking a state innovation waiver must enact a law that allows the state to carry out the actions under the waiver prior to submitting an application for a waiver.¹¹ Prior to submitting an application, a state must provide a public notice and comment period and conduct public hearings regarding the state’s application.¹² Upon conclusion of these activities, a state may submit its application to the Secretary of HHS. The Secretary of HHS is to transmit any application seeking to waive requirements in the IRC to the Secretary of the Treasury for review.

The Secretary or Secretaries (as appropriate) will review a state’s application to determine whether it is complete. A state’s application is not considered complete unless it includes the materials identified in regulations.¹³ The materials include, but are not limited to, information about the enacted state legislation allowing the state to carry out the actions under the waiver, a description of the plan or program the state expects to implement in place of the waived provisions, and analyses showing that the state’s plan or program meets the requirements for granting a waiver. If a state’s application is not complete, the state will be notified about the

¹⁰ Waivers for State Innovation guidance.

¹¹ 42 U.S.C. §18052(b)(2).

¹² The public notice and comment period is to be “sufficient to ensure a meaningful level of public input for the application for a section 1332 waiver.” 45 C.F.R. §155.1312.

¹³ 45 C.F.R. §155.1308(f).

missing elements and given an opportunity to submit them. Once the Secretary or Secretaries (as appropriate) make a preliminary determination that a state's application is complete, the entire application is to be made available to the public for review and comment.¹⁴

The final decision of the Secretary or Secretaries on a state's application must be issued no later than 180 days after the determination that the Secretary of HHS received a complete application from a state.¹⁵

Is Any Federal Funding Available Under a State Innovation Waiver?

It is possible for a state to receive federal funding under an approved waiver. A state's receipt of a state innovation waiver could result in the residents of the state not receiving the "premium tax credits, cost-sharing reductions, or small business credits under sections 36B of the Internal Revenue Code of 1986 or under part I of subtitle E for which they would otherwise be eligible."¹⁶ If this occurs, the state is to receive the aggregate amount of subsidies that would have been available to the state's residents had the state not received a state innovation waiver.¹⁷ The state is to use the funds for purposes of implementing the plan or program established under the waiver.¹⁸

How Long Can a State Innovation Waiver Be in Effect?

State innovation waivers cannot extend longer than five years unless a state requests continuation and such request is not denied by the appropriate Secretary.¹⁹ Requests for continuation will be deemed granted if they are not denied by the appropriate Secretary within 90 days after submission.

¹⁴ The public notice and comment period is to be "sufficient to ensure a meaningful level of public input and does not impose requirements that are in addition to, or duplicative of, requirements imposed under the Administrative Procedures Act, or requirements that are unreasonable to unnecessarily burdensome with respect to state compliance." 45 C.F.R. §155.1316(b).

¹⁵ 42 U.S.C. §18052(d)(1) and 45 C.F.R. §155.1316(c).

¹⁶ 42 U.S.C. §18052(a)(3).

¹⁷ Under the Patient Protection and Affordable Care Act (ACA; P.L. 111-148, as amended), eligible small employers can receive small business health insurance tax credits to help pay the cost of providing health insurance to employees. In general, these credits are available only to small employers that purchase coverage through a Small Business Health Options Program (SHOP) exchange. The statutory text quoted above makes it unclear whether the subsidy amounts a state could receive under a state innovation waiver could include amounts that small employers would have received in small business health insurance tax credits, because the text refers to "small business credits" but the following language does not identify the section of the ACA that provides for the credits (which is Part II of Subtitle E of Title I). This ambiguity has not been resolved in regulations or guidance; however, the Centers for Medicare & Medicaid Services (CMS) recently approved Hawaii's application for a state innovation waiver and is giving small business tax credit funds to the state. For more details, see "Have Any States Applied for State Innovation Waivers?"

¹⁸ 42 U.S.C. §18052(a)(3).

¹⁹ 42 U.S.C. §18052(e).

How Does a State Innovation Waiver Work with Other Federal Waiver Authorities?

The Secretaries are required to develop a process for coordinating applications for state innovation waivers and for other existing waivers under federal law relating to the provision of health care, including waivers available under Medicare, Medicaid, and the State Children's Health Insurance Program (CHIP).

Under the coordinated process, a state must be able to submit a single application for a state innovation waiver and any other applicable waivers available under federal law.²⁰ The single application must comply with the procedures described for state innovation waiver applications and the procedures in any other applicable federal law under which the state seeks a waiver.²¹ (For information about how coordinated waivers will be assessed, see "What Are the Minimum Requirements for a Successful Application?")

Have Any States Applied for State Innovation Waivers?

Yes, as of the date of this report, at least four states have submitted applications for state innovation waivers—Alaska, California, Hawaii, and Vermont.²² California has since withdrawn its application,²³ and the Centers for Medicare & Medicaid Services has approved Hawaii's application. Under Hawaii's approved waiver, the state will no longer be required to operate a Small Business Health Options Program (SHOP) exchange for small employers.²⁴ Additionally, the amounts that residents of Hawaii would have received in small business tax credits for coverage purchased through a SHOP exchange will be provided to the state to support a program that assists small employers with the cost of health insurance coverage.²⁵

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²⁰ Ibid.

²¹ 45 C.F.R. §155.1302(a).

²² For information about each state's application, see CMS, Center for Consumer Information and Insurance Oversight (CCIIO), "Section 1332: State Innovation Waivers," at https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Section_1332_State_Innovation_Waivers-.html.

²³ Letter from Peter V. Lee, Executive Director of Covered California, to Kevin J. Counihan, Director and Marketplace Executive Officer, CCIIO, January 18, 2017, <http://hbex.coveredca.com/stakeholders/Covered%20California%201332%20Waiver/1332%20Application%20Withdrawal%20Request%20001%2018.pdf>.

²⁴ For information about SHOP exchanges, see CRS Report R44065, *Overview of Health Insurance Exchanges*.

²⁵ For more details, see CMS, "Fact Sheet: Hawaii: State Innovation Waiver," December 30, 2016, at <https://www.cms.gov/CCIIO/Programs-and-Initiatives/State-Innovation-Waivers/Downloads/Hawaii-1332-Waiver-Fact-Sheet-12-30-16-FINAL.pdf>.

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