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VIEWPOINT

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Are Medicaid Work Requirements Legal?

On January 12, 2018, the Centers for Medicare & Medicaid Services (CMS) approved a waiver allowing Kentucky to impose a work requirement on some non-disabled Medicaid beneficiaries. Similar waivers are sure to follow. Supporters see work requirements as a spur to force the idle poor to work; opponents see the requirements as a covert means of withholding medical care from vulnerable people. Setting the policy debate aside, however, are work requirements legal?

The answer will hinge on whether a state's waiver is a genuine "experimental, pilot, or demonstration project" that is "likely to assist in promoting the objectives" of the Medicaid program. That language comes from section 1115 of the Social Security Act, which was enacted in 1962 to allow experimentation in federal welfare programs. When Congress adopted Medicaid in 1965, it amended section 1115 to cover the new health program.¹

Congress thought that states would use section 1115 to launch small-scale tests: indeed, the Senate report accompanying the law assumed that "a demonstration project usually cannot be statewide in operation."² Over the past 5 decades, however, section 1115 has evolved into a central feature of Medicaid

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administration. State Medicaid programs operate pursuant to dozens of waivers, many of which allow for comprehensive, statewide adjustments to eligibility, benefits, cost-sharing, and payment rates.

Today, much of Medicaid's statutory text serves as a default set of rules, subject to whatever changes the states desire and CMS allows. Yet the courts have generally not interfered. The reason is simple: whatever Congress originally contemplated, the language of section 1115 is so broad that CMS can maneuver most waivers into it. All the agency has to do is explain how a waiver might yield insight into how to improve Medicaid and why such improvements, if they materialized, would "assist in promoting [Medicaid's] objectives." When the explanation is reasonable, judges will usually defer.

Only on rare occasions will the courts invalidate a waiver. In 1994, for example, the Ninth Circuit invalidated a California waiver that would have introduced work requirements into a welfare program. The court did not hold that work requirements are categorically inappropriate. The court held, instead, that the agency did not explain how work requirements would "promot[e] the objectives" of the pro-

gram: "In the present case, the record contains a rather stunning lack of evidence that the Secretary gave [the question] any such consideration....[T]he record contains no evidence that the Secretary ever considered the danger California's benefits cut would pose to recipients, the state's decision to impose a statewide benefits cut, the need for cutting benefits as a work-incentive, the merits of imposing a work-incentive cut on individuals whose disabilities preclude work, or the feasibility of excluding individuals who receive federal disability benefits or have already been adjudged unable to work in the context of other government programs."³

In a similar case from 2011, the Ninth Circuit invalidated Arizona's effort to increase co-payments for certain Medicaid beneficiaries. In the court's view, there was "no evidence" that CMS was interested in running a genuine experiment into the effect of co-payments. Indeed, because co-payments have been the focus of intense research, the court thought it was "questionable" that there was much left to learn.⁴

Any lawsuits targeting the new work requirements will probably try to leverage the rationale of these 2 cases. First, challengers will argue that CMS has not offered a cogent explanation for why work requirements advance Medicaid's purpose. By statute, Medicaid aims to furnish "medical assistance" to individuals "whose income and resources are insufficient to meet the costs of necessary medical services."⁵ As CMS acknowledges, work requirements will lead some people to lose their benefits. How exactly does losing Medicaid coverage advance Medicaid's purpose?

The claim has some force. For CMS, however, the purpose of Medicaid is not merely to pay for care; it is to promote medical, physical, and emotional health. CMS maintains that work requirements may advance that goal and points to studies that, in its view, provide "strong evidence that unemployment is harmful to health."⁶ The agency overstates matters: although the cited studies have found a robust association between unemployment and poor health, they offer less support for CMS's judgment that unemployment causes poor health. The causal arrow is at least as likely to run the other way: poor health may cause unemployment.

The courts, however, may be reluctant to intervene. The studies that CMS discusses are consistent with the causal story that the agency wants to tell, even if the studies do not conclusively demonstrate it. Courts may not feel equipped to second-guess CMS's conclusion that uncertainty about the health effects of work requirements may justify running some experiments.

Precedent is also not on the side of any legal challenges. In 1973, the Second Circuit rejected the

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argument that work requirements in New York did not advance the purposes of a welfare program because some people would lose their benefits. "Congress must have realized," the court wrote, "that extension of assistance to cases where parents, relatives or the child himself was capable of earning money would diminish the funds available for cases where they were not."⁷ In the court's view, it was appropriate for the agency to "take into account the growing antagonism to the welfare system" and the possibility that, without work requirements, the program's funding might be cut. The same rationale could undermine any effort to attack work requirements in Medicaid.

Second, challengers may press the argument that the Trump administration is not conducting an experiment into work requirements, but is instead using waivers as a pretext for adjusting eligibility rules established by Congress. Again, this argument holds some appeal. The White House has admitted that it hopes work requirements will prevent people from "taking advantage of the system."⁸ Preventing abuse is not the same as conducting an experiment.

The problem with this argument is that the courts are typically reluctant to question the sincerity of an agency's public rationale for acting. CMS has been careful to say that states will "test the hypothesis that requiring work or community engagement...will result in more beneficiaries being employed or engaging in other productive community engagement, thus producing improved health and well-being."⁶ That may not be the *only* reason that CMS has approved work requirements, but it is *one* reason—and that will probably be enough to pass judicial muster.

All told, then, opponents of work requirements may not want to pin their hopes on the courts. That is not to say that litigation should be written off altogether: ingenious lawyers may find other vulnerabilities, and judges in other settings have demonstrated extreme skepticism of the Trump administration.

But the courts have not been moved by the argument—true though it may be—that Congress never meant for section 1115 to be a vehicle for the adoption of sweeping, controversial, and partisan reforms to Medicaid. Instead of winning in court, the opponents of work requirements may need to win some elections.

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