

# McDermottPlus Check-Up

*McDermott+Consulting is pleased to provide the McDermottPlus Check-Up, your regular update on health care policy from Washington, DC.*



**THIS WEEK'S DIAGNOSIS:** Congress is back for the final legislative session before the August recess, and it's all about what can get done ahead of the break. House and Senate committees have already advanced a cost containment legislation that includes surprise billing and prescription drug cost provisions, among many other things. We still await any action from the Senate Finance Committee, which may impact any Senate floor action on these issues.

## CONGRESS

- + **ENERGY AND COMMERCE HELD MARKUP OF EXTENDERS BILLS AND NO SURPRISES ACT.**  
The House Energy and Commerce Health Subcommittee held a [markup](#) of a number of bills to reauthorize expiring health programs, the so-called health “extenders”, along with the No Surprises Act ([H.R. 3630](#)), which addresses surprise billing. All 10 bills considered were reported favorably to the full committee, which is expected to markup the same measures next week. Further changes are possible for the No Surprises Act as some members, notably Rep. Raul Ruiz (D-CA), have concerns about the benchmark payment rate approach to settling out-of-network bills. Additionally, Rep. Joe Kennedy (D-MA) offered an amendment to the Community Health Investment, Modernization and Excellence Act ([H.R. 2328](#)) to eliminate the scheduled disproportionate share hospital payment cuts for 2020 and 2021, and to lower the reduction from \$8 billion to \$4 billion in 2022. His amendment was agreed to.

## ADMINISTRATION

- + **PRESIDENT AND CMS ACT ON KIDNEY HEALTH.**
  - President Trump signed an [Executive Order](#) intended to improve care for patients with chronic kidney disease and end-stage renal disease (ESRD). The order directs the Department of Health and Human Services (HHS) to select a payment model aimed at delaying or preventing the onset of kidney failure and increasing the rate of transplants, propose a rule to enhance the procurement and use of transplant organs, propose a regulation to remove financial barriers to living organ donation, and streamline and expedite the kidney matching and delivery process.
  - Simultaneously, the Centers for Medicare and Medicaid Services (CMS) released a [proposed rule](#) announcing two new mandatory Medicare payment models: the Radiation Oncology model and the ESRD Treatment Choices Model. The [Radiation Oncology Model](#) intends to address differences in payment amounts

across sites of service for 17 types of cancer. It is projected to begin in 2020 and run through 2024. The [ESRD Treatment Choices Model](#) is focused on encouraging greater use of home dialysis and transplants for beneficiaries with ESRD. The model is projected to begin in January 2020 and run through 2026. The proposed rule came just as Center for Medicare and Medicaid Innovation Director Adam Boehler announced his departure from the agency. Finding his replacement is likely to slow down the rulemaking process.

- + **HHS SEEKING PARTICIPANTS FOR QUALITY SUMMIT.** HHS is seeking 15 industry stakeholders to join a summit responsible for drafting the [Health Quality Roadmap](#) required by President Trump's recent [Executive Order](#) on health care transparency. The purpose of the roadmap is to align quality measures across Medicare, Medicaid, the Children's Health Insurance Program, the health insurance marketplace, the Military Health System and the Veterans Affairs health system. Specifically, the summit will review quality programs in CMS and other agencies and determine how they can be better evaluated and adapted with an emphasis on patient outcomes. HHS Deputy Secretary Eric Hargan and patient safety expert Peter Pronovost will chair the summit, and HHS will accept nominations for the 15 industry positions through July 31, 2019. Aligning quality measures within CMS alone has seemingly been an on-going challenge.
- + **CMS RESCINDED MEDICAID ACCESS RULE.** CMS issued a [proposed rule](#) that rescinds parts of a CMS 2015 final rule which required states to develop and submit to CMS an access monitoring review plan (AMRP). Plans were to include information on beneficiaries' access to Medicaid services, and were intended to be used during a public process that solicits input on the potential impact of proposed reduction or restructuring of Medicaid payment rates on beneficiary access to care. States have noted administrative burden concerns in implementing the rule, especially for states that have a large Medicaid managed care population. The proposed rule would eliminate the AMRP requirements and subsequent regulatory process requirements for states to develop and update an AMRP and to submit certain access analysis when proposing to reduce or restructure provider payment rates. In an [Information Bulletin](#), CMS noted it will convene workgroups and technical expert panels to develop access requirements. There is a 60-day comment period for this proposed rule. However, the current regulatory requirements are still applicable until the rule is finalized.

## COURTS

- + **COURT OVERRULED ADMINISTRATION'S DTC ADVERTISING RULE.** A federal district court overturned the Trump administration's recently implemented rule that requires drug companies to include a drug's list price in direct-to-consumer (DTC) advertisements. The rule was overturned on the basis that CMS lacks the authority to regulate television ads. The court did not address the drug companies' argument that the rule was unconstitutional under the First Amendment. This is a setback for the Administration that has made addressing drug costs a priority. It is unclear if the Administration will appeal.
- + **COURT OF APPEALS HEARD ORAL ARGUMENTS IN *TEXAS V. UNITED STATES*.** Democrat-led states and the majority in the House of Representatives are seeking to overturn a lower court ruling that held the entire Affordable Care Act (ACA) unconstitutional. The lower court ruling was decided on the basis that Congress, led by Republicans in 2018, zeroed

out the individual mandate. As we noted in the last edition of the [Checkup](#), the Fifth Circuit also recently called into question the plaintiffs' standing, further complicating the case. Reactions after the oral arguments this week suggest that the Fifth Circuit is open to upholding the lower court's ruling, striking down all of the ACA. However, this is far from over. Regardless of how the appeals court rules, the case is sure to make its way to the Supreme Court – right in the middle of the 2020 presidential election cycle.

## STATES

- + **NEW HAMPSHIRE DELAYED MEDICAID WORK REQUIREMENT.** New Hampshire postponed enforcement of its Medicaid work requirement that took effect in June 2019. The Medicaid waiver establishing the work requirement mandates that qualifying beneficiaries complete at least 100 hours per month of work or community engagement activities, or lose coverage after two months of non-compliance. However, after receiving data that less than one-third of qualifying beneficiaries complied with the requirement for the first month, the state extended the deadline by an additional 120 days. The New Hampshire work requirement is currently under review by the US District Court for the District of Columbia, which previously overturned similar requirements in Arkansas and Kentucky. The New Hampshire data adds to the increasing amount of evidence that Medicaid work requirements can result in significant coverage losses.

## NEXT WEEK'S DOSE

Work to rally Senate Finance Committee members around a drug pricing proposal continues, and we'll be watching the House Energy and Commerce Committee for continued efforts on surprise billing and health care extenders.

For more information, contact [Mara McDermott](#), [Rachel Stauffer](#), [Katie Waldo](#) or [Emma Zimmerman](#).

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