



# *The Advocate's Guide to:*

## **PRE-EXISTING CONDITION PROTECTIONS**



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# Problem: Potential Loss of Pre-existing Condition Protections

The Affordable Care Act (ACA) changed the landscape of health insurance by creating broad protections for people with pre-existing conditions. But a current court case, *Texas v. United States*, has put these protections at risk. Plaintiffs, joined by the U.S. Department of Justice (DOJ), argue that the ACA is rendered unconstitutional in the absence of an individual mandate penalty, and that the landmark health law should be struck down.<sup>1</sup> There is potential that the courts rule in favor of the plaintiffs but strike down only parts of the law, such as the pre-existing condition provisions DOJ targeted in their initial position in the case. The case is currently on appeal, and the ACA remains in effect during the ongoing litigation, but if the entire law or its key protections for people with pre-existing conditions are overturned, millions of people will be at risk of losing access to comprehensive, affordable health insurance.

# Potential Solution: Codify Pre-existing Condition Protections

Given the uncertainty about the future of the Texas case, state policymakers and advocates are considering ways to defend access to coverage for people with pre-existing conditions. In the possible absence of the federal law's key provisions, state consumer protections will become even more important, and many states are considering codifying the ACA's comprehensive approach to pre-existing condition protections into state law.

## What Are Pre-existing Conditions?

The term “pre-existing condition” is used by insurance companies to refer to a health condition that existed before an insurance policy began. A pre-existing condition can be an existing chronic condition such as diabetes, a previous condition that appears to have resolved such as a broken leg, or even a condition you are unaware of such as undiagnosed cancer. Today, it is estimated that approximately 133 million people have at least one pre-existing condition.<sup>2</sup>

## How Did Insurers Treat Pre-existing Conditions Before the ACA?

Before the ACA, insurance companies discriminated against people with pre-existing conditions in numerous ways. First, insurers used a practice called underwriting when people applied for coverage on the individual market. People with certain pre-existing conditions, such as being pregnant or having cancer, could be denied coverage entirely. Others, such as those with a history of depression, might receive coverage but would have to pay a higher premium.<sup>3</sup> Insurers also employed other methods to vary rates based on estimated health risk, such as the practice of gender rating, in which insurers charge women higher premiums, even for coverage that excludes maternity care.<sup>4</sup> Most

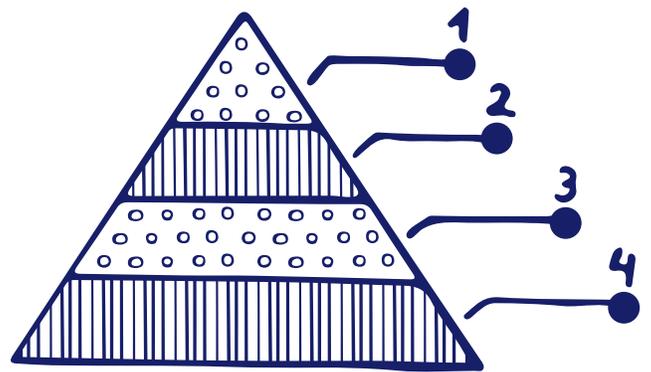
states allowed insurers to vary rates based on age by a differential as high as five times what they charge younger enrollees.<sup>5</sup>

Insurers also used benefit design to keep their risks low. Most individual market plans excluded coverage for pre-existing conditions, so even if consumers with pre-existing conditions were able to enroll in coverage, the cost of treatments for those pre-existing conditions could be entirely out of pocket. A process called post-claims underwriting was used to determine, after a claim was filed, if the condition was pre-existing. If it was, not only would the claim be denied as a pre-existing condition but sometimes the plan would be retroactively canceled (rescinded), regardless of whether or not the insured consumer knew about the condition.<sup>6</sup>

Other benefit designs also limited coverage for pre-existing conditions. By excluding or limiting whole categories of coverage for key services or medical conditions, such as mental health services or prescription drugs, insurers could effectively cherry pick healthier consumers by deterring those who may need access to those health services. Sometimes these exclusions applied to all enrollees, while other times insurers used exclusionary waivers to omit coverage of services related to an applicant's pre-existing condition. For example, if an individual with a history of mild depression was allowed to enroll, her plan may exclude all mental health services, including prescription drugs used to treat mental health conditions.<sup>7</sup> As result, people were left underinsured.<sup>8</sup>

## Before the ACA, Market Segmentation Created an Uneven Playing Field

In most states without pre-existing condition protections, people with high-cost health conditions could not buy any health insurance plan on the individual market. This led to market segmentation, where the sick people and those that presented a higher financial risk to insurers were separated out into another coverage "pool"; in some states there were high-risk pools, or one carrier that had to cover people with pre-existing conditions, but these plans often had extraordinarily high prices, restrictive limits on covered benefits, and even waiting lists. This created an environment in which those deemed "riskier" (for example, the sick, the old, and women) had much greater difficulty accessing affordable and comprehensive coverage, leading many to forgo coverage entirely.<sup>9</sup>



## How Are Pre-existing Conditions Treated Under the ACA?

The ACA addressed this discrimination head on. Under the law, insurers are prohibited from using a consumer's health status to deny coverage (guaranteed issue), set individual and small group market rates (community rating), exclude coverage of pre-existing conditions, or cancel a policy. Additionally, all non-grandfathered individual and small group market plans must cover a minimum set of services, called the Essential Health Benefits, which helps prevent insurers from weeding sick or high-risk consumers through benefit design.<sup>10</sup>

Pre-existing condition protections are part of the ACA's "three-legged stool" to expand access to coverage, along with federal subsidies for monthly premiums and cost sharing for those who

qualify, and an individual mandate that requires people to maintain a certain level of coverage. These provisions are critical to ensuring a healthy risk pool by avoiding adverse selection that can lead to a shrinking and increasingly expensive insurance market. While Congress recently repealed the ACA's individual mandate, the markets have proved to be relatively stable. Despite this fortitude, current litigation threatens the ACA's most critical protections for people with pre-existing conditions

## What Are the Possible Litigation Outcomes?

The ACA's protections are still in place as *Texas v. United States* works its way through the courts. While it could be months or even years before we know the outcome of the case, there are several possible scenarios:

1. The ACA essentially remains in full effect, preserving federal protections for people with pre-existing conditions. This is the outcome that many legal scholars anticipate.<sup>11</sup>
2. Some provisions of the ACA are determined inseparable from the individual mandate and are overturned while the rest of the law remains in effect. One potential scenario if this happens is that the three provisions of the ACA that the DOJ initially refused to defend (guaranteed issue, community rating, and the ban on pre-existing condition exclusions) are overturned, essentially debilitating federal protections for people with pre-existing conditions.
3. The entire ACA is overturned, resulting in a monumental step backwards for consumers' health security across coverage programs, including cuts to Medicaid, increased drug costs for Medicare recipients, the elimination of federal protections for people with pre-existing conditions and general disorder in the insurance market.

Protections for people with pre-existing conditions have widespread support from the public and elected officials.<sup>12</sup> But if the ACA's protections are removed as a result of current litigation or future repeal efforts, most consumers would be left high and dry. The CBO estimates that the American Health Care Act, federal legislation introduced in 2017 to repeal the ACA, would have increased the number of uninsured by 17 million people in the first year alone.<sup>13</sup> Without the ACA's federal standards for protecting people with pre-existing conditions, there will be a patchwork of state protections leaving gaping holes across the country. In most states, we will return to the days where people are denied health insurance or charged higher premiums because of their health status. Those who are able to get coverage will have the coverage they need excluded because of a pre-existing condition. Researchers found that the vast majority of state statutes do not include the ACA's three major pre-existing condition protections or similar provisions, recently reporting that only four states reached that level of comprehensive guardrails against discrimination.<sup>14</sup>

## Policy Considerations

### State Considerations

States can codify the ACA's pre-existing condition protections into state law<sup>15</sup>

Given the dearth of states with laws on the books that would defend access to health insurance for residents with pre-existing conditions, legislatures across the country are looking at bills that would enact protections to prevent discriminatory insurance practices. The ACA took a multi-pronged approach to these protections. The three protections that the DOJ initially said should be struck down in the Texas case are, at a minimum, ones that states should consider codifying:

- **Guaranteed issue:** The ACA guarantees issuance of coverage in both the individual and group market. This provision requires insurers to offer health insurance products to everyone in the market, regardless of health status.<sup>16</sup>
- **Community rating:** The ACA's rating rules prohibit insurers from charging higher premiums based on an insured's health status. Insurers offering coverage on the individual and small group market can only vary rates based on geographic rating area, age (limited to a 3:1 differential), tobacco use (limited to a 1.5:1 differential), and whether or not it is individual or family coverage.<sup>17</sup>
- **Ban on Pre-existing Condition Exclusions:** Under the ACA, insurers are not allowed to limit or exclude coverage of services and treatment based on an enrollee's pre-existing condition.<sup>18</sup>

States hoping to establish these and similar policies should first look at their existing statute and code to see how pre-existing conditions are currently treated under state laws and market rules. Several states have codified these provisions or equivalent protections into state law: Colorado, Massachusetts, New York, and Virginia.<sup>19</sup> Others have implemented some but not all of the key protections. For example, Michigan's law requires insurers to issue policies to consumers regardless of health status and prohibits rating based on health status, but insurers could impose pre-existing condition exclusions if the ACA provision is struck down. Still other states have adopted at least one of the protections, but their statute stipulates that some or all of these protections in state law are void if the ACA's provisions go away.

## **State-level protections are important regardless of litigation outcome**

The current court case has a number of possible outcomes. Codifying the three key pre-existing condition protections are an important step that may also be the most politically feasible in some states. While codifying these protections into state law would only directly address the scenario in which the court overturns these three key provisions of the ACA, enacting legislation will put states in a better position to protect consumers. Doing so will provide states clear regulatory authority in the event that the entire ACA is upheld, and if the entire law is found unconstitutional, states will have at least begun to rebuild the ACA's long list of reforms.

## **Other policy changes will strengthen protections for pre-existing conditions and may help ensure market stability**

The ACA's pre-existing condition protections are part of a carefully crafted and robust approach to expanding access to affordable, comprehensive health insurance, and the law includes a number of other provisions to help ensure market stability and further protect consumers. States should consider other policies that complement the key three protections to provide more complete protection for people with pre-existing conditions. For example, the ACA's Essential Health Benefits (EHB) ensure that plans offered on the individual and small group market have to cover a minimum set of services. And the ACA's ban on rescissions ensures a consumer's coverage can't be cancelled because of their pre-existing condition.

States that have the political and financial clout to do so might also consider enacting the other two legs of the ACA's three-legged stool by establishing a state individual mandate and premium and cost-sharing subsidies. This will help ensure a more robust and affordable market for coverage that can't discriminate based on health status, but this is likely a much smaller subset of states that would be able to recreate all three legs of the stool.

Given the popularity of pre-existing condition protections, it may be more feasible to start by codifying the ACA's key three pre-existing condition provisions. Still, states that have momentum in this area should evaluate other policy options as they consider ways to mount a comprehensive campaign to protect residents with pre-existing conditions.

## **Advocacy Considerations**

### **Advocates can push for more comprehensive protections**

Advocates can build on strong public support for maintaining protections for people with pre-existing conditions to codify in state law other ACA provisions important to ensuring continued access to comprehensive coverage, even if they are not lost as a result of the Texas case.<sup>20</sup> Comprehensive protections for people with pre-existing conditions would include a state requirement to provide coverage of EHB (with the ACA's ban on lifetime caps and limits on out-of-pocket spending) and a prohibition on rescissions of coverage. To protect against adverse selection that may occur if healthy people decide to forgo coverage until they need it, state advocates may also push for the other two legs of the ACA's three-legged stool: a requirement to maintain coverage and subsidies to make coverage more affordable. However, those provisions are likely harder to achieve, and their inclusion should not act as a barrier to codifying the other, more central protections for people with pre-existing conditions.

### **Skimpy coverage options will undermine state-level protections for pre-existing conditions**

Short-term plans and other coverage options exempt from the ACA's consumer protections and coverage standards can cherry pick the healthiest individuals and leave those with high-cost conditions for the marketplace. The result will be fewer plan choices and higher premiums for those with pre-existing conditions that must rely on coverage that meets strong consumer standards. A state that has not limited or prohibited coverage options that can discriminate based on health status will undermine state-guaranteed protections for people with pre-existing conditions.

### **State action must provide real protection**

Under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), all states had to designate a coverage option for individuals who met certain requirements and had a gap in coverage of no more than 63 days.<sup>21</sup> The ACA changed that by guaranteeing coverage to all individuals regardless of whether they had a gap in coverage.

Advocates should find out what protections are in state statute now. In most states, the pre-ACA provisions will provide inadequate protection.<sup>22</sup> Prior to the ACA, 35 states operated high-risk pools

as a source of guaranteed coverage. But premiums for high-risk pools were at least 150 percent of the standard rate in the individual market, and coverage was poor, with waiting periods for pre-existing conditions and annual and lifetime dollar limits on benefits.<sup>23</sup>

Also, advocates should be wary of legislation that claims to provide protection but is in fact unworkable or provides only weak protection for people with pre-existing conditions – an approach that characterized many Congressional attempts to “repeal and replace” the ACA.<sup>24</sup> For example, state legislation that only guarantees coverage to individuals who have maintained continuous coverage without a gap will leave many uninsured.

The cleanest way to ensure an adequate level of protection would be to codify the ACA provisions into state law, customized as needed to integrate into the state’s existing statutory structure. Further, state requirements that refer to or are contingent on the ACA may not be enforceable if the Texas case finds the ACA unconstitutional; states with language in their statute that refers to the ACA will be left similarly defenseless if they do not codify the actual protections for people with pre-existing conditions, or remove any “sunset” clauses that may render these protections unenforceable if the ACA’s protections are removed.

## Pre-existing condition protections impact a broad set of stakeholders

If some or all of the ACA provisions are lost as a result of *Texas v. United States*, a broad group of stakeholders will suffer losses, including hospitals that will see a spike in uncompensated care and states that lose federal funding and incur greater costs. The impact would be similar to the estimated impacts of the Congressional efforts to “repeal-without-replace,” which experts predicted would prompt far-reaching economic losses, including widespread job loss in non-health industries.<sup>25</sup> Advocates seeking to enact state-level protections may find allies among this diverse set of stakeholders.

# Conclusion

The ACA put in place strong protections for people with pre-existing conditions, guaranteeing access to comprehensive coverage that can't vary benefits and premiums based on health status. Those protections are at risk now in *Texas v. United States*, a federal court case in which a group of Republican attorneys general and governors and the Trump Administration are arguing that the ACA is unconstitutional. States can codify key ACA provisions into their own state statutes, ensuring those protections remain in effect with clear authority for states to enforce them, regardless of the outcome of the litigation.

Advocates can leverage broad public support for protecting people with pre-existing conditions and tap a broad swath of stakeholders to enact the ACA's three key pre-existing condition provisions, as well as other parts of the law critical to ensuring robust protection. Where advocates have strong support, they can go further to guarantee stable markets for comprehensive coverage by advocating for a state-level individual mandate, subsidies to make coverage more affordable, and a market closed to skimpy coverage that can cherry pick healthy individuals.

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## Endnotes

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<sup>3</sup>Dania Palanker et al, "Mental Health Parity at Risk: Deregulating the Individual Market and the Impact on Mental Health Coverage," May 2018. Accessed at: <https://www.nami.org/About-NAMI/Publications-Reports/Public-Policy-Reports/Parity-at-Risk/ParityatRisk.pdf>.

<sup>4</sup>National Women's Law Center, "Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act," Mar. 2012. Accessed at: [https://www.nwlc.org/sites/default/files/pdfs/nwlc\\_2012\\_turningtofairness\\_report.pdf](https://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf).

<sup>5</sup>Joanne Fontana, Thomas Murawski and Sean Hilton, "Impact of Changing ACA Age Rating Structure: An Analysis of Premiums and Enrollment by Age Band," Ja. 31, 2017. Accessed at: [http://us.milliman.com/uploadedFiles/insight/2017/MillimanACAAgeBands\\_0131\\_Final.pdf](http://us.milliman.com/uploadedFiles/insight/2017/MillimanACAAgeBands_0131_Final.pdf).

<sup>6</sup>Gary Claxton et al, "Pre-existing Conditions and Medical Underwriting in the Individual Insurance Market Prior to the ACA," Dec. 12, 2016. Accessed at: <https://www.kff.org/health-reform/issue-brief/pre-existing-conditions-and-medical-underwriting-in-the-individual-insurance-market-prior-to-the-aca/>.

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<sup>8</sup>Rachel Schwab, "Coverage That (Doesn't) Count: How the Short-Term, Limited Duration Rule Could Lead to Underinsurance," Jul. 25, 2018. Accessed at: <http://chirblog.org/coverage-doesnt-count-short-term-limited-duration-rule-lead-underinsurance/>.

<sup>9</sup>Michelle M. Doty et al, "Failure to Protect: Why the Individual Insurance Market Is Not a Viable Option for Most U.S. Families," Jul. 21, 2009. Accessed at: <https://www.commonwealthfund.org/publications/issue-briefs/2009/jul/failure-protect-why-individual-insurance-market-not-viable>.

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# Endnotes Continued

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- <sup>13</sup> Congressional Budget Office, Cost Estimate for H.R. 1628, American Health Care Act of 2017, May 24, 2017. Accessed at: <https://www.cbo.gov/publication/52752>.
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- <sup>15</sup> States are preempted under federal law from exercising the same jurisdiction over self-funded employer plans. See 29 U.S. Code § 1144.
- <sup>16</sup> 42 U.S.C. 300gg-1, 300gg-4(a)
- <sup>17</sup> 42 U.S.C. 300gg(a)(1), 300gg-4(b)
- <sup>18</sup> 42 U.S.C. 300gg-3
- <sup>19</sup> Corlette et al.
- <sup>20</sup> Mike DeBonis, “McCarthy Blames Republican Loss of House Majority on GOP Health Care Bill,” Washington Post, Feb. 12, 2019. Accessed at: [https://www.washingtonpost.com/powerpost/mccarthy-blames-republican-loss-of-house-majority-on-gop-health-care-bill/2019/02/12/651e967a-2eed-11e9-813a-0ab2f17e305b\\_story.html?noredirect=on&utm\\_term=.81d131e12dcb](https://www.washingtonpost.com/powerpost/mccarthy-blames-republican-loss-of-house-majority-on-gop-health-care-bill/2019/02/12/651e967a-2eed-11e9-813a-0ab2f17e305b_story.html?noredirect=on&utm_term=.81d131e12dcb).
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