

For Nebraska: A Work Requirement by Any Other Name ... Will Still Be Struck Down in Court

To date, the Centers for Medicare & Medicaid Services (CMS) has approved Medicaid work requirement waivers in 11 states, accepting states' various justifications for adding onerous requirements that likely lead to significant losses in coverage. However, lawsuits have been filed challenging CMS' approval of five states' work requirements.¹ Now, in an attempt to avoid litigation, states are getting creative and introducing work requirements that are supposedly less severe. But these burdensome requirements may still fail to pass legal muster and are vulnerable to lawsuits.

As outlined below, Nebraska's application for a work requirement includes many of the same justifications as other states' applications — justifications that have been challenged and refuted in court. Therefore, it is likely that Nebraska's attempt to impose a work requirement will meet the same fate as those other states, resulting in these onerous requirements being reviewed and struck down by the courts as a violation of the Medicaid statute.

Below are four of the justifications Nebraska relies on in its application, along with how similar application provisions in other states have been treated in the courts.

Justification 1: A work requirement will improve the health of beneficiaries.

Which state(s) used this justification?	Did the state(s) get sued?	What was the verdict?
<ul style="list-style-type: none"> • Kentucky² • New Hampshire³ • Indiana⁴ • Michigan⁵ 	Yes ^{6, 7, 8, 9}	<p>APPROVAL VACATED: Kentucky¹⁰ and New Hampshire¹¹</p> <p>FEDERAL COURT RULING ON KENTUCKY: “Even if health were [an objective of the Medicaid Act], approving Kentucky HEALTH on this basis would still be arbitrary and capricious. The Secretary, most significantly, did not weigh health gains against coverage losses in justifying the approval.”</p> <p>DECISION PENDING: Indiana and Michigan</p>
<ul style="list-style-type: none"> • Nebraska¹² 	TBD	TBD

Justification 2: A work requirement will ensure fiscal sustainability of the state's Medicaid program.

Which state(s) used this justification?	Did the state(s) get sued?	What was the verdict?
<ul style="list-style-type: none"> • Kentucky¹³ • Arkansas¹⁴ • New Hampshire¹⁵ 	Yes ^{16, 17, 18}	<p>APPROVAL VACATED: Kentucky,¹⁹ Arkansas,²⁰ and New Hampshire²¹</p> <p>FEDERAL COURT RULING ON KENTUCKY: “The Secretary [of DHHS] does not make entirely clear whether he interprets fiscal sustainability to be an independent objective of the Act [...] [E]ither way the argument is sliced, it cannot support the Secretary’s reapproval [of the waiver].”</p> <p>FEDERAL COURT RULING ON ARKANSAS: “If the explanation does not even justify affirmance of Kentucky’s project, it cannot support upholding [...] a different state’s project.”</p>
<ul style="list-style-type: none"> • Nebraska²² 	TBD	TBD

Justification 3: Even though a work requirement will cause individuals to lose their dental coverage, it will improve their overall health.

Which state(s) used this justification?	Did the state(s) get sued?	What was the verdict?
<ul style="list-style-type: none"> • Kentucky^{23, 24} 	Yes ²⁵ .	<p>APPROVAL VACATED: Kentucky²⁶</p> <p>FEDERAL COURT RULING ON KENTUCKY: “The Secretary’s analysis [...] is little more than a sleight of hand. [T]he Secretary impermissibly conflated ‘improv[ing] health and wellness’ [...] Put another way, this focus on health is no substitute for considering Medicaid’s central concern: covering health costs. While improving public health and health outcomes might be one consequence of ‘furnishing ... medical assistance,’ the Secretary cannot choose his own means to that end.”</p>
<ul style="list-style-type: none"> • Nebraska²⁷ 	TBD	TBD

Justification 4: SNAP and TANF already have work requirements, so Medicaid can too.

Which state(s) used this justification?	Did the state(s) get sued?	What was the verdict?
<ul style="list-style-type: none"> • Kentucky²⁸ • New Hampshire²⁹ 	Yes ^{30, 31}	<p>APPROVAL VACATED: Kentucky³² and New Hampshire³³</p> <p>FEDERAL COURT RULING ON KENTUCKY: “TANF has job preparation as one of its objectives and includes work requirements. That Congress allows for states to coordinate their administration of these two different programs does not transform the purposes of Medicaid.”</p> <p>“While other welfare programs — such as Temporary Assistance for Needy Families (TANF) and Supplemental Nutritional Assistance Program (SNAP) — condition benefits on working, [...] there is no equivalent for the Medicaid program.”</p>
<ul style="list-style-type: none"> • Nebraska³⁴ 	TBD	TBD

In reviewing how Nebraska’s work requirement justifications stack up against other states’ justifications, we see that Nebraska is not so different. Given that Nebraska makes the same justifications as other states, it is only a matter of time before Nebraska faces the same legal challenges, resulting in the same verdicts.

Endnotes

¹ These lawsuits include the four states (KY, AR, NH, IN,) that have attempted to implement work requirements after approval, plus one state (MI) that has yet to implement. In three of those states (KY, AR, and NH) the court has ruled to vacate their approval, finding that the justifications for approving these work requirements are inadequate. In the two other states (IN and MI), the cases have yet to be heard in court.

² “Kentucky HEALTH is an innovative, transformative healthcare program designed to not only stabilize the program financially, but to also improve the health outcomes and overall quality of life for all members.”

“The cornerstone of the Kentucky HEALTH program is the introduction of a community engagement and employment initiative aimed at increasing workforce participation rates in Kentucky, which is critical to improving the health status of Kentuckians”

“Kentucky HEALTH seeks to comprehensively transform Medicaid and accomplish the following goals: 1. Improve members’ health and help them be responsible for their health;”

U.S. Centers for Medicare & Medicaid Services, *KY HEALTH State Demonstration Application*, 2018, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ky/ky-health-pa3.pdf>.

³ “The State seeks approval to empower individuals in our Premium Assistance Program to improve their health by taking an active role in engaging in their communities and by working to gain the skills necessary for long term independence and success.”

U.S. Centers for Medicare & Medicaid Services, *New Hampshire Granite Advantage Health Care Program Pending Application*, 2017, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/nh/nh-health-protection-program-premium-assistance-pa3.pdf>.

⁴ “Due to the strong connection between employment and overall health, our proposed approach is inherently aligned with the overall goals of the Medicaid program.”

U.S. Centers for Medicare & Medicaid Services, *Healthy Indiana Plan Demonstration Application - Amendment*, 2017, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/in/Healthy-Indiana-Plan-2/in-healthy-indiana-plan-support-20-demo-app-07202017.pdf>.

⁵ “In furtherance of Medicaid program objectives, Michigan seeks to promote work and community engagement and provide incentives to beneficiaries to increase their sense of purpose, build a healthy lifestyle, and further the positive physical and mental health benefits associated with work.”

U.S. Centers for Medicare & Medicaid Services, *Healthy Michigan State Amendment Application*, 2018, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mi/mi-healthy-michigan-pa3.pdf>.

⁶ United States District Court for the District of Columbia, *Civil Action No. 1:18-cv-152 (JEB) First Amended Class Action Complaint for Declaratory and Injunctive Relief*, 2019, https://healthlaw.org/wp-content/uploads/2019/01/88.-Amended-Complaint_Redacted.pdf.

⁷ United States District Court for the District of Columbia, *Civil Action No. 1:19-cv-773 (JEB) Class Action Complaint for Declaratory and Injunctive Relief*, 2019, https://healthlaw.org/wp-content/uploads/2019/03/NH-Medicaid-Waiver-Complaint-FINAL_Redacted.pdf.

⁸ United States District Court for the District of Columbia, *Civil Action No. 1:19-cv-3526 Class Action Complaint for Declaratory and Injunctive Relief*, 2019, <https://healthlaw.org/wp-content/uploads/2019/11/Michigan-1115-Complaint-Redacted.pdf>.

⁹ United States District Court for the District of Columbia, *Civil Action No. 1:19-cv-2848 Complaint for Declaratory and Injunctive Relief*, 2019, https://healthlaw.org/wp-content/uploads/2019/09/Complaint_Rose-v-Azar-REDACTED.pdf.

¹⁰ “[H]olding health to be a freestanding objective of the [Medicaid] Act would have bizarre results. Were that the case, nothing would prevent the Secretary from conditioning coverage on a special diet or certain exercise regime.”

“Even if health were such an objective, approving Kentucky HEALTH on this basis would still be arbitrary and capricious. The Secretary, most significantly, did not weigh health gains against coverage losses in justifying the approval.”

United States District Court for the District of Columbia, *Civil Action No. 18-152 (JEB) Memorandum Opinion*, 2019, https://www.courtlistener.com/recap/gov.uscourts.dcd.192935/gov.uscourts.dcd.192935.132.0_2.pdf.

¹¹ “Congress therefore designed a scheme to address not health

generally but the provision of care to needy populations. The Secretary cannot “extrapolate the objectives of the statute to a higher level of generality and pursue that aim in the way he prefers.”

United States District Court for the District of Columbia, *Civil Action No. 19-773 (JEB) Memorandum Opinion*, 2019, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2019cv0773-47.

¹² “Implement Medicaid expansion through a tiered benefit package designed to improve health outcomes and encourage life successes using wellness initiatives, community engagement activities, and personal responsibility activities.”

“Goal #1: Improve the health of the Heritage Health Adult population through beneficiary engagement”

Nebraska Department of Health and Human Services, *Heritage Health Adult Demonstration Final Waiver Application*, 2019, http://dhhs.ne.gov/Documents/1115_HHA_Application.PDF.

¹³ “Kentucky HEALTH is an innovative, transformative healthcare program designed to not only stabilize the program financially, but to also improve the health outcomes and overall quality of life for all members.”

“Kentucky HEALTH’s design saves taxpayer dollars, critical to ensuring the program’s long-term financial viability”

“Kentucky HEALTH seeks to comprehensively transform Medicaid and accomplish the following goals: [...] 5. Ensure long-term fiscal sustainability.”

U.S. Centers for Medicare & Medicaid Services, *Healthy Michigan State Amendment Application*, 2018, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/mi/mi-healthy-michigan-pa3.pdf>.

¹⁴ “The proposed changes to Arkansas Works are intended to strengthen Arkansas’ program to ensure that it remains sustainable”

“Arkansas is working with its vendors to enact in the most cost-effective way possible the systems changes necessary to operationalize features of the waiver amendment”

“DHS is collaborating with carriers to develop strategies promoting continuity of coverage as the State implements the Arkansas Works waiver amendment”

U.S. Centers for Medicare & Medicaid Services, *Arkansas Works Amendment Request*, 2017, <https://www.medicaid.gov/Medicaid->

[CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/ar-works-pa2.pdf](https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ar/ar-works-pa2.pdf).

¹⁵ “It is in New Hampshire’s economic and financial interests to facilitate sustained employment or a return to sustained employment for as many participants as possible [...] This trajectory provides flexibility to the state in future years to focus tax payer dollars on other vitally needed services”

U.S. Centers for Medicare & Medicaid Services, *New Hampshire Granite Advantage Health Care Program Pending Application*, 2017, <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/nh/nh-health-protection-program-premium-assistance-pa3.pdf>.

¹⁶ United States District Court for the District of Columbia, *Civil Action No. 1:18-cv-152 (JEB) First Amended Class Action Complaint for Declaratory and Injunctive Relief*, 2019, https://healthlaw.org/wp-content/uploads/2019/01/88.-Amended-Complaint_Redacted.pdf.

¹⁷ United States District Court for the District of Columbia, *Civil Action No. 1:18-cv-01900 First Amended Complaint for Declaratory and Injunctive Relief*, 2018, <https://healthlaw.org/wp-content/uploads/2018/08/Gresham-v.-Azar-Amended-Complaint-Redacted-Nov-2018.pdf>.

¹⁸ United States District Court for the District of Columbia, *Civil Action No. 1:19-cv-773 (JEB) Class Action Complaint for Declaratory and Injunctive Relief*, 2019, https://healthlaw.org/wp-content/uploads/2019/03/NH-Medicaid-Waiver-Complaint-FINAL_Redacted.pdf.

¹⁹ “In this explanation, the Secretary does not make entirely clear whether he interprets fiscal sustainability to be an independent objective of the Act, or whether making the program more fiscally sustainable is essentially a point about coverage promotion — that is, whether saving money by covering fewer people is ultimately coverage promoting because any number of people Kentucky still covers under the demonstration would be greater than the number of people covered if it terminated the ACA expansion. Based on federal Defendants’ representations during oral argument, it seems that the Government primarily presses the latter iteration. The Court, nevertheless, will address each in turn, finding that either way the argument is sliced, it cannot support the Secretary’s reapproval here”

United States District Court for the District of Columbia, *Civil Action No. 18-152 (JEB) Memorandum Opinion*, 2019, https://www.courtlistener.com/recap/gov.uscourts.dcd.192935/gov.uscourts.dcd.192935.132.0_2.pdf.

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