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POLICY BRIEF

TIME TO DELIVER: PREGNANCY AND THE AFFORDABLE CARE ACT





Introduction

This month marks the five-year anniversary of the Affordable Care Act (ACA)—President Obama’s signature health care law that has brought quality, affordable care to millions of Americans, while helping to bend the cost curve of health insurance across the country.

Nationwide, nearly ten million previously uninsured individuals have secured coverage.¹ Here in New York, the effects of the ACA have been nothing short of remarkable. Since its inception in 2013, over 2.1 million New Yorkers have secured insurance on our health exchange—New York State of Health, with 88 percent of these individuals reporting being previously uninsured.²

While there is much to celebrate in the ACA’s success, there are also several significant gaps in the law that jeopardize public health and the public fisc. This report by New York City Comptroller Scott M. Stringer focuses on one such gap: the inability for women who become pregnant to sign up for coverage outside of the open enrollment period.³

Under current law, many women are faced with the untenable choice of spending tens of thousands of dollars out of pocket to secure prenatal and maternity care, or proceeding to term without any care at all.

It doesn’t have to be this way. The ACA recognizes a list of “qualifying events” that trigger an individual’s right to access coverage outside of the open enrollment period.⁴ Pregnancy should be added to this list.

The U.S. Department of Health and Human Services (HHS) recently announced that it would not add pregnancy to the Federal Exchange as a qualifying event in 2015, despite the fact that 37 Senators and 54 Members of Congress urged them to do so in a joint letter.⁵ Signers included Senators Charles Schumer and Kirsten Gillibrand and Representatives Jerrold Nadler, Carolyn Maloney, Charles Rangel and Gregory Meeks.

While all Americans deserve access to affordable, high-quality prenatal care, New York State does not need to wait for the Federal Government to act. Indeed, several states, as well as the District of Columbia, have taken concrete steps to expand the number of qualifying events for special enrollment periods.

New York should join this group and also become the first state in the nation to designate pregnancy as a qualifying event outside of the open enrollment period, making all women immediately eligible for coverage as soon as they become pregnant. More immediately, the New York State Department of Health (DOH), which is responsible for operating the state’s health insurance exchange,⁶ should enact a regulation finding that pregnancy is an “exceptional circumstance” under the ACA, which would allow pregnant women to sign up for insurance during a special enrollment period.



Analysis

Qualifying Events

Individuals and businesses seeking health insurance on the exchange must enroll during an open enrollment period, as dictated by HHS.⁷ However, the Affordable Care Act also recognizes a series of “qualifying events” that trigger an individual’s right to enroll in coverage at other times outside of the set enrollment period.⁸

The list⁹ of qualifying events include:

- Having a baby or adopting a child (after which the parent can apply for family coverage);
- Getting married or divorced;
- Gaining citizenship or permanent status;
- Permanently moving outside one’s plan coverage area;
- Gaining or continuing status as a member of an Indian tribe or an Alaska Native shareholder;¹⁰
- Leaving incarceration;
- Having a change in income or household status that affects eligibility for premium tax credits or cost-sharing reductions (applies to individuals already enrolled in Marketplace coverage only);
- Paying a federal penalty for not having health insurance in 2014; and
- Losing “minimum essential coverage” for reasons other than non-payment of premium.¹¹

Noticeably absent from this list is pregnancy, one of the most important and costly events in the life of a woman and her family. Indeed, HHS found that in 2011, the costs associated with prenatal care and delivery averaged over \$20,000, even for uncomplicated births.¹²

As a result of this immense cost, women who become pregnant and do not have insurance are potentially faced with crippling hospital bills, or worse yet, with no care at all during their pregnancy.

These costs would be of grave concern under any circumstances, but they are particularly distressing to women whose pregnancies are unanticipated and who might not have signed up for insurance during the open enrollment period that covers the full costs of prenatal care.

The Costs of No Coverage

Lack of prenatal care has been shown to have significant adverse effects on public health. In the United States, babies born to mothers who received no prenatal care are three times more likely to be born at low birth weight than those whose mothers received prenatal care.¹³ And infants born to mothers who received no prenatal care have an infant mortality rate five times that of mothers who received appropriate/recommended care in the first trimester of pregnancy.¹⁴ As a result, it is no surprise that lack of prenatal care is listed on the New York State Department of Health’s website as a risk factor for poor pregnancy outcomes.¹⁵

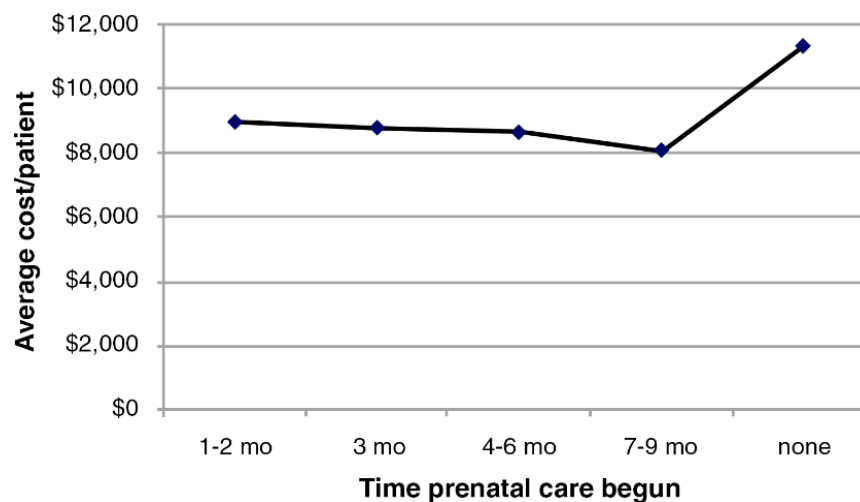


Access to prenatal care varies widely based on the race and age of the prospective mother. Black, Hispanic, and Native American mothers are more than twice as likely as white mothers to receive either late or no prenatal care, while women in their teens are by far the least likely to receive timely prenatal care.¹⁶

Many in the insurance industry argue that adding pregnancy to the list of qualifying events would create an “adverse selection” problem whereby women would wait until they got pregnant to secure coverage. However, there are many reasons to question this argument. First, women who qualify for Medicaid can enroll at any time. In addition, for most women, securing health insurance will still be a prudent financial decision even if they are not pregnant and do not become pregnant during the duration of their coverage.

Most importantly, even if some women choose to wait until pregnancy to sign up, the long-term benefits that accrue to both mothers and children from prenatal care may well generate cost savings over the long term. As Larry Levitt, a senior vice president at the non-profit Kaiser Family Foundation noted, “If you can avoid some of those costs by getting pregnant women into care earlier, you potentially balance off the effects of the adverse risk selection that results from allowing women to wait.”¹⁷

Cost of Pregnancy and Early Newborn Care



Indeed, research suggests that prenatal care, especially for younger mothers, can save significant money over the long-term. A recent study in the *Journal of the American Board of Family Medicine* found that prenatal care for teen mothers—who often give birth to children with low birth weights—would save between \$2,369 and \$3,242 per pregnancy.¹⁸

Other studies have shown that every dollar of counseling and nutrition advice provided to pregnant women through the WIC program saves between \$1.77 and \$3.33 in medical care for newborns and their mothers in the first 60 days after birth. Intensive prenatal care also reduces the likelihood of hospitalization and neo-natal intensive care unit admissions, further reducing costs.¹⁹

Moreover, data suggests that not only does prenatal care save money in the short/intermediate-term by fostering healthier children, it also provides long-term benefits to mothers. For instance,



women who receive prenatal care are less likely to require long hospitalizations after birth and are more likely to avoid future obesity.²⁰

Pregnancy Precedents

To date, no state has added pregnancy to the list of qualifying events under the ACA. However, a recent change in federal regulations provides a special enrollment period to certain women facing a gap in prenatal coverage, further bolstering the argument that consistent access to prenatal care is a critical public health issue. Today, women who lose pregnancy-related Medicaid coverage have access to a special open enrollment period.

As the Department of Health and Human Services stated:

In order to ensure that women losing eligibility for coverage of pregnancy-related services as described above are not left without an option to enroll in a QHP [Qualified Health Plan] after the conclusion of Medicaid eligibility...we proposed that the Exchange permit qualified individuals and their dependents to enroll in a new QHP if they lose eligibility for such pregnancy-related services.²¹

Given the importance of pregnancy-related services, it is imperative that New York extend a special enrollment period to *all* women in need of care who become pregnant, not just those who lose pregnancy-related Medicaid coverage. The recommendations that follow are designed to achieve that goal.

Recommendations

Comptroller Stringer believes that all pregnant women should have access to quality, affordable prenatal and maternity care.

To that end, this report makes two recommendations.

1. New York State Should Adopt Legislation Designating Pregnancy as a Qualifying Event

The Comptroller is working with State legislators to introduce a bill that would codify pregnancy as a “qualifying event” under New York State Law.

The ACA requires health insurance issuers in the group and individual markets to establish special enrollment periods for qualifying events as defined under section 603 of the Employee Retirement Income Security Act of 1974. However, the law also states that “[t]hese special enrollment periods are in addition to any other special enrollment periods that are required under federal and state law.”²²



A number of states, including California and Washington, have expanded the list of qualifying events under state law.²³ For instance, California law allows its residents to enroll in a SEP under the following circumstances:

- When a court order requires an individual to provide dependent coverage;
- When an individual's provider leaves a health plan during a course of treatment for a serious medical condition; and
- When an individual returns from active duty from a military reserve or the California National Guard.

Likewise, Washington law provides access to an SEP for individuals who become newly eligible or ineligible for financial assistance.

New York should follow suit by passing a state law creating a special enrollment period for women who become pregnant, enshrining our commitment to promoting prenatal care.

2. New York State DOH Should Adopt a Regulation Defining Pregnancy as an “Exceptional Circumstance” under the ACA

While passage of a state law establishing pregnancy as a qualifying event for healthcare coverage is a necessary and preferable long-term solution, there are other steps New York State could take in the short-term to protect women and children.

To that end, the Comptroller calls upon the New York State Department of Health to adopt a regulation defining pregnancy as an “exceptional circumstance” under the Affordable Care Act, permitting pregnant women to sign up for coverage during a special enrollment period.

HHS has previously issued guidance²⁴ listing the following examples as “exceptional circumstances”:

- A natural disaster, such as an earthquake, massive flooding, or hurricane;
- A serious medical condition, such as an unexpected hospitalization or a temporary cognitive disability;
- A planned Marketplace system outage, such as a Social Security Administration system outage; and
- When individuals lose coverage through the Pre-Existing Condition Insurance Program (PCIP).²⁵

Notably, HHS has used the “exceptional circumstances” clause to extend SEPs to broad categories of persons, including survivors of domestic abuse, who were eligible for a limited duration special enrollment period in 2014 as a result of guidance released by the Internal Revenue Service.²⁶

States that operate their own exchanges are free to make their own determination about what constitutes an “exceptional circumstance.” As HHS recently stated, “Exchanges retain the flexibility... [to] provide special enrollment periods for exceptional circumstances...as determined appropriate by the Exchange.”²⁷

Last year, the District of Columbia did precisely that, using regulation²⁸ to expand the eligibility for SEP via the “exceptional circumstances” clause under the following scenarios:



- Victims of domestic violence;
- The beginning or end of a domestic partnership;
- A court order to provide health insurance;
- A serious medical condition or natural disaster during another qualifying event affecting an individual's ability to enroll; and
- Employer denial into the Small Business Health Options Program.

This year, consistent with HHS guidance, New York State added a one-time special enrollment period for individuals and families who had to pay a federal penalty for not having health insurance in 2014, and who were unaware or had otherwise not understood that they would have to pay such a penalty.²⁹ Because the penalty can further stress the budgets of lower income individuals or families, this SEP will help many New Yorkers make ends meet.

Given that the costs of prenatal care dwarf the penalties assessed for failure to secure insurance, it stands to reason that if paying a tax penalty is a significant enough hardship to allow for a SEP, surely pregnancy should be as well.

Conclusion

In 1974, the Supreme Court of the United States held that a disability insurance program that excluded pregnancy-related disabilities from eligibility did *not* constitute sex discrimination. Rather, the Court declared, the rule merely differentiated between “pregnant and non-pregnant persons.”³⁰

That ruling, and subsequent findings by the Supreme Court in the years that followed,³¹ led Congress to pass the Pregnancy Discrimination Act of 1978 (PDA) which amended Title VII of the Civil Rights Act of 1964 to prohibit discrimination on the basis of pregnancy.³² As Representative Augustus Hawkins (D-CA) declared during the floor debates on the PDA,

*[It] seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy.*³³

While the parameters of the Pregnancy Discrimination Act continue to be litigated today,³⁴ there is no debating that the PDA has had a profound effect on women's rights in America and our economy as a whole.

A recent study found that the Act increased the labor force participation rate of pregnant women by 8.2 percentage points.³⁵ As detailed in a report from the Center for American Progress and the Center for Economic and Policy Research, if women's employment patterns had remained



unchanged over the last 30 years, the economy would be about 11 percent smaller, equaling \$1.7 trillion in lost economic output in 2012.³⁶

Despite the benefits that have accrued to women, families, and our economy as a whole from the PDA, its fundamental premise continues to be undermined by laws and regulations that make it more difficult for women to secure the care they need.

By not recognizing pregnancy as a qualifying event triggering a special enrollment period, more women will go without prenatal care, weakening public health and our economy.

New York State should not wait for Washington to act. Instead, the Empire State should be a national leader by becoming the first state in the nation to allow women who become pregnant to sign up for health insurance during a special enrollment period.

The economic and health benefits of proper healthcare during pregnancy and in the early stages of a child's life are well documented. A woman should not have to wait until her baby is born to receive the services she needs from our state's insurance marketplace. Through this action, we will show our commitment to the health and wellbeing of mothers and their children, as well as the principle of access to healthcare for all.



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Endnotes

- 1 <http://www.nytimes.com/interactive/2014/10/29/upshot/obamacare-who-was-helped-most.html>.
- 2 https://www.health.ny.gov/press/releases/2015/2015-02-18_close_of_open_enrollment.htm.
- 3 The Affordable Care Act creates open enrollment periods for individuals and businesses to access coverage on the Exchange. The 2015 open enrollment period closed on February 15, 2015. The 2016 open enrollment period does not open until October 1, 2015.
- 4 Medicaid (which covers 40 percent of all births in the U.S.) and the Children's Health Insurance Program (CHIP) offer year-round enrollment. Those plans cover both maternity/pregnancy care and childbirth. In New York State, CHIP is known as "Child Health Plus." See: <https://www.healthcare.gov/what-if-im-pregnant-or-plan-to-get-pregnant/>; <http://info.nystateofhealth.ny.gov/SpecialEnrollmentPeriods>; <http://www.vox.com/2015/2/19/8064899/special-enrollment-period-pregnancy>.
- 5 http://www.help.senate.gov/imo/media/03022015-Honorable_Sylvia_Matthews_Burwell-Affordable_Care_Act.pdf; <http://watsoncoleman.house.gov/sites/watsoncoleman.house.gov/files/documents/Rep.%20Watson%20Coleman%20Pregnancy%20SEP%20Letter%20to%20HHS.pdf>
- 6 N.Y. Exec. Order #42 (Apr. 12, 2012), "Establishing the New York Health Benefit Exchange," available: <http://info.nystateofhealth.ny.gov/sites/default/files/Exchange%20EO42.pdf>; New York's health benefit exchange is NY State of Health. See: <https://nystateofhealth.ny.gov/>.
- 7 During the 2015 enrollment period, which ran from November 15, 2014 to February 15, 2015, 37 states used the federally-operated exchange at www.healthcare.gov, while 13 states operated their own exchanges, including New York's NY State of Health. See: <http://www.nytimes.com/2014/11/12/us/obamacare-states-exchanges-for-health-insurance-facing-a-new-enrollment-period-try-to-fix-flaws.html>.
- 8 Medicaid and the Children's Health Insurance Program (CHIP) offer year-round enrollment. Those plans cover both maternity/pregnancy care and childbirth. See: <https://www.healthcare.gov/what-if-im-pregnant-or-plan-to-get-pregnant/>; <http://info.nystateofhealth.ny.gov/SpecialEnrollmentPeriods>.
- 9 <https://www.healthcare.gov/coverage-outside-open-enrollment/special-enrollment-period/>.
- 10 Members of federally recognized tribes and ANCSA shareholders can enroll in Marketplace coverage any time of year. There's no limited enrollment period for these individuals, and they can change plans up to once a month. See: <https://www.healthcare.gov/american-indians-alaska-natives/>.
- 11 Losing coverage that doesn't qualify as "minimum essential coverage" does not qualify individuals for a SEP. As noted, *infra*, p.4-5, coverage of pregnancy-related services is not considered "minimum essential coverage."
- 12 <http://www.hhs.gov/healthcare/facts/factsheets/2012/03/women03202012a.html>.
- 13 <http://mchb.hrsa.gov/programs/womeninfants/prenatal.html>.
- 14 <http://www.hrsa.gov/quality/toolbox/measures/prenatalfirsttrimester/>.
- 15 https://www.health.ny.gov/community/pregnancy/health_care/prenatal/#about.
- 16 http://www.childtrends.org/wp-content/uploads/2014/07/25_Prenatal_Care.pdf.
- 17 <http://www.vox.com/2015/2/19/8064899/special-enrollment-period-pregnancy>.
- 18 <http://www.jabfm.org/content/21/3/184.long>.
- 19 http://www.marchofdimes.org/materials/Prevention-in-Maternal-Child-Health-Fact-Sheet_February2012.pdf.
- 20 <http://www.ncbi.nlm.nih.gov/pubmed/16518834?dopt=Abstract>.
- 21 <http://www.gpo.gov/fdsys/pkg/FR-2014-05-27/pdf/2014-11657.pdf>; Note that in the public comment period that followed the publication of the draft regulation, commenters requested special enrollment periods for a variety of triggering events, including pregnancy.
- 22 45 CFR § 147.104(b)(3).
- 23 <http://www.urban.org/UploadedPDF/2000122-Special-Enrollment-Periods-in-2014.pdf>.
- 24 <http://www.cms.gov/ccio/Resources/Regulations-and-Guidance/Downloads/complex-cases-SEP-3-26-2014.pdf>.
- 25 <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/PCIP-bulletin-4-24-14.pdf>.
- 26 <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/victims-domestic-violence-guidance-3-31-2014.pdf>; The IRS clarified that, "a married individual who is living apart from his or her spouse at the time of filing an income tax return for 2014, and is unable to file a joint return as a result of domestic abuse, will be permitted to claim a premium tax credit while filing a tax return with a filing status of married filing separately." As a result of this clarification, HHS declared that, "an eligible individual who is married and is a victim of domestic abuse, and his or her dependents, as described in 45 CFR 155.420(a)(2), have met "exceptional circumstances" qualifying them for a special enrollment period under 45 CFR 155.420(d)(9)."
- 27 <http://www.gpo.gov/fdsys/pkg/FR-2014-05-27/pdf/2014-11657.pdf>; see 45 CFR § 155.420(d)(9).
- 28 <http://hbx.dc.gov/sites/default/files/dc/sites/hbx/publication/attachments/Resolution-SpecialEnrollmentPeriodsAdopted6-11-14b.pdf>; <http://hbx.dc.gov/sites/default/files/dc/sites/hbx/publication/attachments/Resolution-SpecialEnrollmentPeriodsAdopted%207-9-14.pdf>.
- 29 <http://www.cms.gov/Newsroom/MediaReleaseDatabase/Press-releases/2015-Press-releases-items/2015-02-20.html>; <http://info.nystateofhealth.ny.gov/news/press-release-ny-state-health-announces-special-enrollment-period-uninsured-new-yorkers-facing>; The special SEP runs from March 1 through April 30, 2015.
- 30 *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).
- 31 See generally *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).
- 32 42 USCS § 2000e.
- 33 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins).
- 34 The Supreme Court of the United States is expected to issue a ruling in the case of *Young v. United Parcel Service* this term. The question presented in *Young* is whether, and under what circumstances, the PDA requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work."
- 35 http://business.unr.edu/faculty/sankarm/lawpaper_rev.pdf.
- 36 <https://cdn.americanprogress.org/wp-content/uploads/2014/04/WomensRisingWorkv2.pdf>.



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