

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

July 31, 2015

**SUBJECT:** Medicaid Expansion (Work Order No. 29-LS1040)

**TO:** Representative Andy Josephson  
Attn: Johnathan Church

**FROM:** Megan A. Wallace  
Legislative Counsel *MAW*

You have asked whether the governor's unilateral Medicaid expansion efforts are within his statutory authority. In this regard, the governor submitted two Legislative Revised Programs (RPLs) to the Legislative Budget and Audit Committee (LB&A) for Medicaid expansion.<sup>1</sup>

Under AS 47.07.020(a), "[a]ll residents of the state for whom the Social Security Act requires Medicaid coverage are eligible to receive medical assistance under 42 U.S.C. 1396 - 1396p (Title XIX, Social Security Act)." The newly eligible individuals get coverage for medical assistance under 42 U.S.C. 1396a(a)(10)(A)(i)(VIII), as part of the Affordable Care Act (ACA).

Although the express language of the ACA makes coverage of these newly eligible individuals mandatory, many states have construed this category to be an optional category following the United States Supreme Court decision in *Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_, 132 S. Ct. 2566 (2012). In that case, the United States Supreme Court found that the penalty provided in the ACA, withdrawal of all federal Medicaid funding for noncompliance, exceeded Congress' authority under the Spending Clause of the federal constitution. The practical result is that the penalty for a state that does not comply with the ACA's mandate to provide coverage for newly eligible individuals is limited to the loss of enhanced federal funding provided under the ACA to fund coverage for these individuals.

Whether coverage for newly eligible individuals is mandatory or optional is important in addressing the scope of the governor's authority because, if the category is mandatory, no new state legislation is necessary to provide coverage for these individuals. All residents of the state for whom federal law *requires* Medicaid coverage are eligible for medical

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<sup>1</sup> On July 16, 2015, the governor submitted RPL #06-6-0056, in the amount of \$145,438,400, and RPL #06-6-0057, in the amount of \$3,181,300, to LB&A for Medicaid expansion.

assistance under AS 47.07.020(a). State law also provides coverage for optional categories of individuals who meet specified eligibility criteria, including varying income limits and conditions.<sup>2</sup> No additional eligibility groups may be added without legislative action.<sup>3</sup> Although the ACA expressly mandates coverage of newly eligible individuals, coverage of those individuals is not clearly a "required" eligibility category after the *Sebelius* decision limiting the penalty and allowing states to choose whether to provide coverage or lose the federal funding. If the category is construed as mandatory, then the governor can unilaterally, without any statutory changes, take the necessary executive actions to expand Medicaid as long as there are no funding hurdles.

*Statutory authority to submit RPLs to LB&A for Medicaid expansion*

While recognizing the fact that it is not always possible to predict exactly how much federal funding the state will receive, AS 37.07.080(h) nevertheless authorizes the governor to "increase . . . an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature." The governor is required to submit a RPL to LB&A before expending the funds.<sup>4</sup> This provision applies only to the "increase of an appropriation item;" it does not allow the governor to create a new appropriation. To ensure that unanticipated program receipts, including federal funds, can be used for the purpose for which they are received, the legislature typically includes a provision in the operating budget appropriating these receipts. In the operating budget for FY 2016, the legislature specified: "Federal receipts . . . that are received during the fiscal year ending June 30, 2016, and that exceed the amounts appropriated by this Act, are appropriated conditioned on compliance with the program review provisions of AS 37.07.080(h)."<sup>5</sup> This provision of the budget authorizes the governor to accept unanticipated federal funds, as long as the funds received are designated for an existing appropriation item in the budget. Therefore, if legislative language included in the FY 2016 budget to appropriate funding for Medicaid is broad enough to encompass "Medicaid Services" for the category of newly eligible individuals, then the governor is authorized to accept and spend the funds.

In addition, under AS 47.07.060, the Department of Administration (department) is

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<sup>2</sup> AS 47.07.020(b). The statute enumerates several categories of individuals for whom the state has elected to provide Medicaid coverage, although coverage is optional under federal law. It also provides specifically that "[a]dditional groups may not be added unless approved by the legislature." AS 47.07.020(d).

<sup>3</sup> AS 47.07.020(d).

<sup>4</sup> The committee has an opportunity to object, but the governor can proceed despite their objection. AS 37.07.080(h).

<sup>5</sup> Sec. 24(a), ch. 23, SLA 2015.

directed to "accept and receive all grants of money awarded to the state under 42 U.S.C. 1396 - 1396p (Title XIX, Social Security Act, Medical Assistance)." These funds are deposited in a special account in the general fund and can only be used for medical assistance under AS 47.07. Combined with the authorization provided in AS 37.07.080(h), this appears to provide sufficient authority for the governor and the department to accept federal funding for Medicaid expansion.

With respect to any state funds required for administrative or implementation costs, or for a state match after the federal percentage decreases, the governor and the department have some flexibility in the use of state funds that have been appropriated for Medicaid services. The operating budget includes both appropriations and allocations. Under AS 37.07.080(e), agencies have discretion to transfer funds among allocations within a single appropriation: "Transfers or changes between objects of expenditures or between allocations may be made by the head of an agency upon approval of the office [of Management and Budget]." If the FY 2016 budget includes sufficient appropriations for Medicaid, the governor may be able to use some of that funding to provide expanded coverage.

The FY 2016 operating budget does include language purporting to limit the governor's authority to use funds to cover the expansion population: "No money appropriated in this appropriation may be expended for services to persons who are eligible pursuant to 42 U.S.C. 1396a(a)(10)A(i)(VIII) and whose household modified adjusted gross income is less than or equal to one hundred thirty-three percent of the federal poverty guidelines."<sup>6</sup> It is my opinion, however, that this is legislative intent language that is likely unenforceable.<sup>7</sup>

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<sup>6</sup> Sec. 1, ch. 23, SLA 2015, page 23, lines 24 - 27.

<sup>7</sup> Under art. II, sec. 13, Constitution of the State of Alaska, "bills for appropriations shall be confined to appropriations." The legislature's power to attach intent or qualifying language to an appropriation has significant limits. In *Alaska Legislative Council v. Knowles*, 21 P.3d 367 (Alaska 2001), the Alaska Supreme Court established a five-part test for substantive contingencies related to appropriations:

[T]he qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.

Language that falls outside this standard is unenforceable because it violates the confinement clause of the Alaska Constitution. The intent language in the FY 2016 operating budget may be beyond what a court would allow in an appropriation bill because it arguably attempts to "administer the program of expenditures." For the same

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For the above reasons, the governor likely has authority to accept additional federal funding to provide expanded Medicaid coverage. If insufficient state funds are available, he could also request supplemental state funding.<sup>8</sup> A request for supplemental appropriations would be subject to legislative action.<sup>9</sup>

If you have any further questions, please let me know.

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reasons, the language in sec. 24(b), ch. 23, SLA 2015, is likely unenforceable. That language states "[f]ederal designated program receipts under AS 47.07.060 for the proposed expansion of the state's Medicaid program may not be accepted or expended without an acceptable reformation plan and appropriation approved by the legislature."

<sup>8</sup> See AS 37.07.070, 37.07.100.

<sup>9</sup> The federal medical assistance percentage for the newly eligible individuals will be reduced over time, beginning at the end of calendar year 2017, requiring additional state funding.