

# LEGAL SERVICES

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## MEMORANDUM

December 6, 2018

**SUBJECT:** Medicaid Expansion (Work Order No. 31-LS0195)

**TO:** Representative-Elect Zack Fields  
Attn: Tristan Walsh

**FROM:** Megan A. Wallace   
Director

You have asked about Medicaid expansion.

As you know, the Medicaid provisions of the Affordable Care Act (ACA) required states to expand their Medicaid programs to cover all uninsured individuals under the age of 65 with incomes up to 133 percent of the federal poverty line.<sup>1</sup> The Act also established a new "essential health benefits" package, which states must provide to all new Medicaid recipients.<sup>2</sup> Initially, the federal government paid 100 percent of the costs of covering these newly eligible individuals, but the state reimbursement rate drops to 93 percent in 2019.<sup>3</sup>

AS 47.07.020(a) currently provides that all residents of the state for whom federal law *requires* Medicaid coverage are also eligible for coverage in the state. In *Alaska Legislative Council v. Governor Bill Walker and Commissioner Valerie Davidson*,

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<sup>1</sup> 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).

<sup>2</sup> 42 U.S.C. 1396a(k)(1) and 1396u - 7(b)(5).

<sup>3</sup> 42 U.S.C. 1396d(y)(1) establishes federal medical assistance (FMAP) percentages for newly eligible mandatory individuals as follows:

(1) Amount of increase. Notwithstanding subsection (b), the Federal medical assistance percentage for a State that is one of the 50 States or the District of Columbia, with respect to amounts expended by such State for medical assistance for newly eligible individuals described in subclause (VIII) of section 1902(a)(10)(A)(i), shall be equal to --

- (A) 100 percent for calendar quarters in 2014, 2015, and 2016;
- (B) 95 percent for calendar quarters in 2017;
- (C) 94 percent for calendar quarters in 2018;
- (D) 93 percent for calendar quarters in 2019; and
- (E) 90 percent for calendar quarters in 2020 and each year thereafter.

3AN-15-09208, challenging the governor's authority to unilaterally expand Medicaid, the Superior Court held:

The operative phrase in AS 47.07.020(a) asks whether the Social Security Act commands states to provide Medicaid to a group. The Social Security Act does so in this case with respect to the Medicaid expansion group. Since it does, the group is "required" under state law, and members of the group are eligible for Medicaid services in Alaska.<sup>4</sup>

1. Would it be legal for the governor to refuse to receive all or part of the federal funds for Medicaid Expansion?

In my opinion, given the precedent in Alaska, without a substantive law change, if the governor refused to accept all or part of the federal funding for Medicaid expansion, that act alone would not be enough to reverse Medicaid expansion.<sup>5</sup> When Governor Walker first accepted funding for Medicaid expansion, he did so under the statutory authority of AS 37.07.080(h).<sup>6</sup> 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) authorizes the governor to "increase . . . an appropriation item based on additional federal or other program receipts not specifically appropriated by the full legislature."

In order to do so, the governor is required to submit a revised program to the Legislative Budget and Audit Committee (LB&A) before expending the funds. 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

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<sup>4</sup> *Alaska Legislative Council v. Governor Bill Walker and Commissioner Valerie Davidson*, 3AN-15-09208, Decision and Order, March 1, 2016. The Superior Court also held that the United States Supreme Court decision in *Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), did not alter the requirement that states cover the expansion group. In that case, the United State Supreme Court found that the penalty provided in the ACA, withdrawal of all federal Medicaid funding for noncompliance, exceeded Congress's authority under the Spending Clause of the federal constitution. The practical result is that the penalty for noncompliance with the ACA's mandatory coverage of the newly eligible individuals by a state is limited to the loss of enhanced federal funding percentages provided under the ACA for the coverage.

<sup>5</sup> It is not clear whether the governor could even refuse federal funding without the consent of the legislature.

<sup>6</sup> Medicaid expansion as a matter of substantive law was authorized under AS 47.07.020(a), as described above.

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>7</sup> This provision of the FY 2016 budget authorized the governor to accept unanticipated federal funds, as long as the funds received are designated for an existing appropriation item in the budget. Because the funding for Medicaid in the operating budget was broad enough to encompass "Medicaid Services" for the category of newly eligible individuals, the governor was authorized to accept and spend the funds for Medicaid expansion. This mechanism was upheld by the court in *Alaska Legislative Council v. Governor Bill Walker and Commissioner Valerie Davidson*.

Regardless of the mechanism used to establish Medicaid expansion in Alaska, in my opinion, failing to accept federal funds or appropriate the additional state funds necessary to provide for the coverage of the expansion group will not be sufficient to reverse Medicaid expansion.<sup>8</sup> While the Alaska Supreme Court has not yet weighed in on this issue, the Superior Court decision in *Alaska Legislative Council v. Governor Bill Walker and Commissioner Valerie Davidson* specifically found that the Medicaid expansion group is "required" under AS 47.07.020(a). Any other interpretation would almost certainly face legal challenge. Therefore, if insufficient funds were available to cover both traditional and Medicaid expansion recipients, or if the governor refused to accept the funds for Medicaid expansion, AS 47.07.036 would control, which provides how the department is expected to address budget shortfalls. In other words, Medicaid expansion cannot be stopped through the failure to accept or appropriate full funding, it would instead impact all Medicaid services, as provided under AS 47.07.036.

For these reasons, the governor cannot simply eliminate funding for Medicaid expansion by refusing to receive federal funds. Instead, any restriction on how Medicaid funds are to be spent must be made by statute—not in the budget. In this regard, under art. II, sec. 13, Constitution of the State of Alaska, "bills for appropriations shall be confined to appropriations." Accordingly, the legislature's power to attach conditional or qualifying language to an appropriation has significant limits. In *Alaska Legislative Council v. Knowles*, 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

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<sup>7</sup> Sec. 24(a), ch. 23, SLA 2015.

<sup>8</sup> The legislature appropriates the federal funds needed to pay for Medicaid Expansion. However, the governor could veto the appropriation for Medicaid Expansion funds (and it would be subject to legislative veto override procedures).

appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.<sup>9</sup>

Language that falls outside this standard is unenforceable because it violates the confinement clause of the Alaska Constitution. Therefore, language in an appropriation bill that attempted to eliminate Medicaid expansion or was inconsistent with existing AS 47.07.020(a) would likely be deemed to have the effect of amending existing law and go beyond what a court might allow under *Knowles*.

2. Could the legislature render those eligible for Medicaid expansion ineligible?

Yes. The legislature could reverse Medicaid expansion by amending state law to expressly (1) deny the coverage of newly eligible individuals; and (2) limit the authority of the executive branch to amend the state plan, apply for the enhanced federal funding, or implement the expanded coverage in the future.<sup>10</sup> If the governor vetoes a bill reversing Medicaid expansion, the legislature could override a veto by a two-thirds vote.

If I may be of further assistance, please advise.

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<sup>9</sup> 21 P.3d 367 (Alaska 2001).

<sup>10</sup> As noted above, because of the ruling in *Federation of Independent Business v. Sebelius*, there is no real penalty to states for noncompliance with the ACA's mandatory coverage of the newly eligible individuals.