



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

November 7, 2017

The Honorable Lawrence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

RE: Certificate of Review
Proposed Initiative to Add a New Statute Requiring Idaho Expand Medicaid Eligibility

Dear Secretary of State Denney:

An initiative petition was filed with your office on October 18, 2017. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion regarding the policy issues raised by the proposed initiative, nor the potential revenue or expense impact to the state budget.

BALLOT TITLE

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTER OF FORM

The proposed initiative is for the most part in proper legislative format, although there is a small error in Section 2. It is not necessary to underline Section 1's newly proposed Idaho Code section because it is not amending an existing section of the Idaho Code. Section 2 has a minor error in that it fails to show amendments to the existing statute by striking out deleted words and

underlining added words and should read as follows:

56-262. DEFINITIONS. The definitions contained in section 56-252, Idaho Code, shall apply to sections 56-260 through ~~56-266~~ 56-267, Idaho Code.

The remaining two sections of the proposed measure will appear only in the Session Laws and will not themselves be codified in Idaho Code.

The enactment clause and the emergency clause are consistent with the form those items take in standard legislation. Due to the unique statutory framework governing the passage and implementation of initiatives, the proponents may want to rework those portions of the petition to reflect the initiative process rather than the standard legislative process. Specifically, the enactment clause should read, "Be it Enacted by the Voters of the State of Idaho". The emergency clause is discussed in greater detail below.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative does the following:

Section 1 enacts a new Idaho Code § 56-267 to be added to the chapter on Public Assistance Law. This new section mandates that the state expand its Medicaid eligibility criteria to include all individuals under age sixty-five (65) whose modified adjusted gross income is less than or equal to the one hundred thirty-three percent (133%) of the federal poverty level who are not otherwise eligible for Medicaid coverage.

Section 2 amends Idaho Code § 56-262 in the chapter on Public Assistance Law to specify that definitions found in Idaho Code § 56-252 will apply to the new Idaho Code § 56-267.

Section 3 contains an emergency clause specifying that the provisions of the initiative will take full force and effect following passage and approval.

Section 4 is a version of a sunset clause, but instead of being tied to a specific date it is tied to a contingent condition. It declares that the expansion provision shall become null and void if the level of federal financial contribution for the expansion population is reduced below ninety percent (90%).

Section 1

This section represents the substantive portion of the initiative. As stated above, this section requires the state Medicaid program expand its eligibility criteria to include individuals under age sixty-five (65) with modified adjusted gross incomes less than or equal to the one hundred thirty-three percent (133%) of the federal poverty level who are not otherwise eligible for Medicaid coverage. The proposed expansion population tracks exactly with the proposed expansion population initially required by the Affordable Care Act (ACA). This definition for the

expansion population also coincides with the population for which current federal law provides a ninety/ten federal/state financial match rate.

The implementation of this section will require the Idaho Medicaid program to develop and submit a state plan amendment to the federal Centers for Medicare & Medicaid Services (CMS). Until that state plan amendment is reviewed and approved by CMS, the Idaho Medicaid program cannot implement or administer Medicaid benefits for that expansion population as contemplated by the initiative. The typical timeframe required to draft and submit a state plan amendment to CMS is anywhere between sixty (60) and ninety (90) days. Following the submission of a proposed state plan amendment, CMS has up to ninety (90) days to evaluate the proposed amendment and issue its decision. Following receipt of the decision from CMS, the Medicaid program could then begin the process of implementing the amendment including the significant IT investment that would be required to update the electronic eligibility and management systems.

As stated above, the language of this section tracks with provisions of the ACA. Those basic provisions of the ACA were upheld by the United States Supreme Court against constitutional challenge in National Federation of Independent Business v. Sebelius, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

Section 2

Section 2 presents no significant legal or policy issues.

Section 3

As stated above, Section 3 is an emergency clause which would be consistent with a piece of legislation that had been passed by the legislature. However, given the different statutory framework surrounding the initiative process, this clause is inappropriate. The effective date for a law resulting from an initiative election is set forth in Idaho Code § 34-1813. Based upon the provisions of section 34-1813, a successful initiative obtains the full force and effect of law from the date of the proclamation issued by the governor declaring the initiative has been approved by a majority of the votes cast. The emergency clause will not impact the date the initiative obtains the force and effect of law as initiatives do not wait for the same July 1 effective date that applies to legislation passed by the legislature. Since the effective date of the initiative would impact only the date on which the Idaho Medicaid program would be directed to seek the amendment of the Idaho Medicaid state plan, and not the date on which the proposed state plan amendment is to take effect, the statutory effective date does not pose a significant burden upon the Idaho Medicaid program.

Section 4

The sunset clause set forth in Section 4 of the proposed initiative presents a unique issue. As stated in the discussion of Section 1, the operation of the Medicaid program is governed by an approved state plan and until the program could get an amendment approved by CMS, the program

would be required to continue providing the services resulting from Section 1 of the initiative even if the sunset clause in Section 4 was triggered. The same amendment process outlined in the analysis of Section 1 would apply including the anticipated timelines for the submission approval and implementation of a state plan amendment arising because of the sunset clause in Section 4.

Although the program is not aware of CMS ever refusing to allow a state to discontinue an optional service, there is a possibility that the amendment to remove this service could be delayed or even denied, either of which could limit the application of the Section 4 sunset clause. If CMS outright denies the proposed amendment to return to the current eligibility criteria, the Medicaid program would have the opportunity to challenge that both administratively and if necessary through the courts; however, the program would be required to continue providing those services with a higher percentage of state funds until a final decision could be obtained. The time that the state would have to continue providing services could be anywhere from a few months to several years.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to Emily Strizich, 225 N. Adams, Moscow, Idaho 83843.

Sincerely,

A handwritten signature in black ink, appearing to read "Lawrence G. Wasden", written in a cursive style.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

M. Scott Keim
Deputy Attorney General