NATIONAL TAXPAYERS UNION

Issue Brief

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Health Policy Options Congress and State Lawmakers Should Consider to Combat COVID-19

Federal and state policymakers have been consumed with responses to the COVID-19 (coronavirus) pandemic over the last several weeks. NTU Foundation's Nicole Kaeding has written extensively on the fiscal policy responses lawmakers should consider as they debate economic stimulus packages that will cost hundreds of billions of dollars.

There are several steps lawmakers can take from a health policy perspective as well, both at the federal and the state level. Every part of the health care sector is facing significant supply constraints at this time, and federal and state governments can take action right now that makes it easier for the health care workforce to ramp up its supply of both *products* and *services* that reduce unnecessary hospitalizations, help care for the sick, and avoid spreading the disease as much as possible.

These options are by no means an exhaustive menu for policymakers, but would represent a strong start to combatting the pandemic. Indeed, federal agencies and state leaders are already taking some of these steps.

Key Facts:

The COVID-19 (coronavirus) epidemic has created significant supply constraints across the health care sector.

Federal and state policymakers can do more to loosen existing laws and regulations that restrict health care professionals.

Policymakers can also work on protecting consumers tested or treated for COVID-19 from surprise bills and high out-of-pocket burdens.

• **Loosen state certificate of need (CON) laws**: Recently, the Mackinac Center's Lindsay Killen and the Goldwater Institute's Naomi Lopez pointed out the absurdity of state "certificate of need" (CON) laws for hospitals: "Rather than allowing a hospital to be built, adding beds to an existing hospital, or offering some types of new technologies, many states require that these additions be approved by a board of existing competitors with every incentive to restrict new competition from opening or expanding." According to the National Conference of State Legislatures (NCSL), 38 states and the District of Columbia have a CON program (or some variant) in place. Fourteen of these states have specific restrictions for expanding items like hospital beds, long-term care beds, and nursing home beds. Now is the worst time to be artificially limiting the supply of health care items and services, and state policymakers should relax or repeal these laws now.

• **Expand telemedicine: Increased utilization of telemedicine could have at least two major positive effects on public health systems during the pandemic**: 1) telemedicine enables providers to care for more patients over the same number of hours, reducing capacity concerns as many more people require care than usual, and 2) telemedicine avoids unnecessary hospitalizations that could both strain hospital capacity and spread COVID-19 faster and wider. NTU Foundation recently wrote an Issue Brief on some of the legal barriers to increased utilization of telemedicine. One recently introduced piece of legislation, the Reducing Unnecessary Senior Hospitalizations (RUSH) Act of 2020, could help by making it easier for providers at skilled nursing facilities (SNFs) to provide telehealth care to seniors on Medicare. The less time seniors spend in unnecessary hospitalizations, the less likely they are to catch and spread COVID-19.

• **Loosen health professional licensing restrictions across states and for retired workers**: A few states are leading the way on removing licensing restrictions for nurses and other medical professionals, but they could use positive reinforcement from federal policymakers and regulators. They just may have received that reinforcement, with Vice President Mike Pence announcing that the Department of Health and Human Services (HHS) will allow doctors to practice across state lines. Gov. Charlie Baker (R-MA) recently made it "possible for licensed out-of-state medical professionals and nurses to get licensed here in Massachusetts in one day," and Gov. Jared Polis (D-CO) asked his Department of Regulatory Agencies (DORA) "to cut through red tape on licensing medical professionals so that medical professionals with licenses in other states can be licensed in Colorado as quickly as possible." Legislation like the Physician Pro Bono Care Act (H.R. 856), which NTU supports, could help by allowing doctors to avoid the administrative burdens of Medicaid and CHIP when caring for low-income patients, while lawmakers could also look at responsibly limiting the liability of health care professionals who volunteer their services during the pandemic.

• **Expand testing capacity**: According to the American Enterprise Institute, the U.S. currently has the capacity to test about 37,000 people for COVID-19 per day. Unfortunately, that is not enough, especially when compared to nations like South Korea that have succeeded in testing a large number of people very quickly. The Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA) need to work with states, municipalities, and private-sector partners every day to approve additional testing sites. Gov. Baker recently told reporters that "several requirements and authorizations from the feds" were interfering with the ability to scale up testing.

• **Create an expedited approval path for treatment and devices already used in other developed countries**: Sens. Ted Cruz (R-TX) and Mike Lee (R-UT), along with Rep. Chip Roy (R-TX), recently introduced legislation that would provide for expedited FDA approval of prescription drugs, biological products, and medical devices approved for use and marketing in other developed countries. By putting any approved drugs or devices on a 30-day track for approval in the United States, the Reciprocity Ensures Streamlined Use of Lifesaving Treatments (RESULTS) for Coronavirus Patients Act of 2020 would promote global competition to find treatments and cures for the pandemic and expand patient options, without compromising the free-market structure that supports innovative products.

• **Loosen the Affordable Care Act (ACA)'s ban on referrals to physician-owned hospitals**: At a time when hospitals are expected to experience significant restraint due to an influx of COVID-19 patients, policymakers should look at loosening up the Affordable Care Act (ACA)'s restrictions on physician-owned hospitals (POHs). The ACA effectively halted the construction of new POHs and "generally prohibited [existing POHs] from expanding facility capacity." The Trump administration has called for repealing the rules, writing that according to the Physician Hospitals of America "37 planned hospitals have not been constructed, and over 30,000 planned healthcare jobs have gone uncreated" because of these restrictions. The Hospital Competition Act of 2019 (H.R. 506) from Rep. Jim Banks (R-IN) would repeal the physician self-referral provisions of the ACA. For parties concerned about potential repeal, a possible middle ground could be a temporary suspension of the provision, with either a specific sunset date or a sunset for a given amount of time after the national emergency is over.

• **Loosen scope of practice laws and regulations**: States like Maryland have led the way in ensuring registered nurses (RNs), nurse practitioners (NPs), and physician assistants (PAs) can offer services beyond their traditional scope of practice, as long as they are supervised by qualified personnel (such as a doctor) and those qualified personnel certify that those RNs, NPs, and PAs can competently perform those services. While scope of practice laws and regulations have been a hot-button issue over the last several years, especially among doctors, now is not the time to tie the hands of health care professionals in the name of guarding favorable reimbursement policies. Where federal and state health officials determine expanding a professional's scope of practice is safe and appropriate, those officials should consider doing so - if only on a temporary basis.

• **Protect patients from surprise medical bills**: It's possible, even likely, that during this pandemic many Americans will face unexpected medical bills. Patients should not have to fear unaffordable shock bills at this time, so Congress should ban the practice of balance billing for COVID-19 testing and treatment. Beyond that, while a short-term, narrowly-tailored solution may be appropriate, the federal government should not implement permanent surprise billing policies during this crisis. NTU believes the most prudent and expeditious path forward is to ensure that hospitals receiving federal or state funding to test and treat COVID-19 guarantee that all providers are considered in-network for patients receiving COVID-19 testing or treatment. The Manhattan Institute's Chris Pope proposed this in a *Hill* op-ed recently: "Hospitals should bear the responsibility of prohibiting "surprise billing" at their facilities by ensuring that all associated providers are in the same networks as the hospital itself." NTU has also written about this contract-based alternative for surprise billing (sometimes referred to as "network matching" or the "in-network guarantee") at length. After the crisis has subsided, policymakers should re-engage the debate over the best way to address the problem of surprise medical bills.

• **Clarify that health savings account (HSA) and flexible spending account (FSA) funds can be used for all COVID-19 expenses not covered by insurance**: Any person with an HSA or flexible spending account (FSA) can use those funds on certain qualified medical expenses specified by the Internal Revenue Service (IRS). While items like prescribed medicines and fees for services like laboratory services are considered qualified medical expenses, people using HSA or FSA dollars to test for or treat COVID-19 (and the providers serving them) could have clarity and peace of mind if either lawmakers, the IRS, or both clarify that *all* medical expenses for testing or treating COVID-19 are considered qualified medical expenses (including OTC medications that are currently ineligible for HSA spending). The IRS deserves praise for already issuing a clarification that high-deductible health plans (HDHPs) that test and treat for COVID-19 *before* a plan's deductible is met will *still* count as HSA-eligible. This way, no current HSA contributor loses their eligibility solely for getting zero-cost sharing testing or treatment for COVID-19.

NTU will have more in the coming days, including policy options to help health care workers who require child care services and options to rapidly increase the supply of hospital beds (a problem ProPublica and the Harvard Global Health Institute are warning Americans about right now). Congress can start with some of these reforms in a legislative package to combat the pandemic, and state governors and legislatures can also get to work on responses right away.

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