

THE LABYRINTH:  
LOSS OF MINIMAL ESSENTIAL COVERAGE  
AND  
ENROLLMENT IN A QUALIFIED HEALTH PLAN  
THROUGH A  
STATE – BASED HEALTH CARE EXCHANGE

I. Hypothetical.

John Doe and Sue Smith are single adults who live in a state with a health care exchange. Both are enrolled in the state’s Medicaid program and are households of one for program purposes. It’s time for John and Sue to renew their eligibility for Medicaid through the exchange. John receives his renewal application as well as a ten day notice prior to the time his eligibility ends but forgets to complete and file the application and his eligibility terminates. Sue receives her application and completes and files it on-line with the exchange prior to the time her eligibility terminates but the exchange has no record of her filing in its system, does nothing, and her coverage terminates. Due to changes in their situations both John and Sue are over income for Medicaid and the minimal essential coverage the state offers. However, they are eligible for a Qualified Health Plan (QHP) and may be eligible for Advance Premium Tax Credits (APTC), and Cost Sharing Reductions (CSR)<sup>1</sup> through the exchange. John and Sue file an application for health care coverage on –line with the exchange. What happens?

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<sup>1</sup> APTC and CSR are payment mechanisms designed to pay part of the cost of a QHP. In this hypothetical John and Sue must be entitled to select a QHP in order to qualify for any APTC/CSR for which they are eligible.

## II. John Doe.

### A. If John files his application during an open enrollment period, then:

(1). The exchange will process his application and notify him he is eligible for a QHP and APTCR/CSR. John must enroll in his QHP<sup>2</sup> during the open enrollment period and not afterwards. *45 CFR § 155.410(a)(1) and (2)*.

(2). If the exchange does not process John's application, does not notify John he qualifies for a QHP, or if John does not select his QHP on the exchange until after open enrollment ends he will be eligible for a QHP but cannot enroll in a QHP because he did not complete the process of enrolling in a QHP during the open enrollment period. The exchange will send John a notice denying his application. The notice will include a statement of John's appeal rights. John may file an appeal seeking a special enrollment period (SEP) to complete his enrollment. John is entitled to a special enrollment period if his nonenrollment was due to an error on the part of the exchange. *45 CFR § 155.420(d)(4)*. If John is entitled to an SEP to complete his enrollment he must select his QHP on the exchange within his 60 day SEP and his coverage effective date will be set based on the circumstances of his case. *45 CFR § 155.420(b)(2)(iii)*. In John's case the coverage effective date will most likely be the coverage effective date he would have had if he had enrolled in a QHP during the open enrollment period (see *45 CFR § 155.410 (f)(2)*). If John's appeal is not successful he will have to buy MEC on the open market or go without coverage.

(3). In either case John's coverage effective date under his QHP will be based on the date the exchange received his application. *45 CFR § 155.410(f)(2)*.<sup>3</sup> John may have a gap in his minimum essential coverage and may owe a penalty for failing to have minimum essential coverage (MEC) during the tax year when he files his federal income tax return. *26 USC § 5000A(b)(1)-(3)*.

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<sup>2</sup> The phrase "enroll in a QHP", "completed the process of enrolling in a QHP" or similar phrases mean a person who has filed an application for health care with the state exchange, whose application has been processed by the exchange, who has been determined to be a qualified individual as defined in *45 CFR § 155.20*, who has received notice from the exchange they are eligible to enroll in a QHP through the exchange, and who has selected a specific QHP on the exchange. An individual is enrolled in a QHP as of their coverage effective date. *45 CFR § 144.103*.

<sup>3</sup> For benefit years beginning on and after January 1, 2016 the coverage effective date for applications received on or before December 15<sup>th</sup> of the preceding calendar year is January 1<sup>st</sup> of the benefit year, the coverage effective date for applications received between December 16<sup>th</sup> of the preceding calendar year and January 15<sup>th</sup> of the benefit year is February 1<sup>st</sup> of the benefit year, and the coverage effective date for applications received between January 16<sup>th</sup> and January 31<sup>st</sup> of the benefit year is March 1<sup>st</sup> of the benefit year.

B. If John files his application outside of an open enrollment period but within 60 days of the date his eligibility for Medicaid terminated, then:

1. John has both a 60 day period in which to select a QHP and a SEP<sup>4</sup> which run concurrently. Both 60 day periods start with the last day John had Medicaid coverage. *45 CFR §§ 155.420(c) and (d)(1)*.

2. If John enrolls in a QHP within the 60 day period and selects his QHP between the first and fifteenth day of the month his coverage effective date is the first day of the following month. If John selects his QHP between the sixteenth day of the month and the last day of the month his coverage effective date is the first day of the second month following the month in which he made his selection. *45 CFR § 155.420(b)*. John is not entitled to a retroactive coverage effective date for his QHP.<sup>5</sup>

3. If John does not complete the process of enrolling in a QHP until more than 60 days have passed John is eligible for a QHP but is not entitled to enroll in a QHP. The exchange will send John a denial notice which will include a statement of his appeal rights. If John appeals and can show that his nonenrollment was the exchange's fault he will be given a SEP in which to enroll in a QHP. If John is granted a 60 day SEP to complete his enrollment he must do so and select his plan on the exchange within the 60 day SEP. *45 CFR §155.420(c)(1) and (3)*. His coverage effective date will be determined based on the circumstances of his case which will most likely no earlier than the date his coverage would have taken effect but for the exchange's error. John can choose the retroactive coverage effective date or have his coverage start prospectively.<sup>6</sup> If John chooses the retroactive coverage effective date he has to pay the premiums for all the retroactive months. If John's appeal is unsuccessful he will have to buy MEC on the open market or go without coverage.

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<sup>4</sup> Medicaid is MEC. *26 USC § 500A(f)(1)(A)(ii)*. The loss of MEC is a triggering event which entitles an individual to both a general 60 day period in which to enroll in a QHP under *45 CFR §155.420(c)* and a SEP under *45 CFR § 155.420(d)(1)*.

<sup>5</sup> John is not entitled an earlier coverage effective date because these coverage effective dates are only available when the exchange makes an error or mistake with respect to a person's enrollment or nonenrollment. *45 CFR § 155.420(d)(4) and (b)(2)(iii)*.

<sup>6</sup> A decision on appeal is generally implemented prospectively from the first day of the month following the month in which the decision is issued or, at the Appellant's option, retroactive to the coverage effective date the Appellant would have had but for an incorrect eligibility determination. *45 C.F.R. § 155.545(c)(1)*

4. In either case John will have a gap in his MEC and may owe a penalty for failing to have MEC during the tax year when he files his federal income tax return.

C. If John files his application outside of an open enrollment period and more than 60 days after his Medicaid coverage terminates both his 60 day general enrollment period and SEP will have run. John is eligible for a QHP and APTC/CSR but is not entitled to select a QHP because he did not do so within the 60 day period.

**NOTE:** There is nothing in statute which requires that the 10 day advance notice of termination or the notice that Medicaid coverage has terminated include a notice to the individual they have a general 60 day enrollment period or 60 day SEP in which to file an application for health care with their state exchange or the federal exchange and get MEC through their state or federal exchange. As a result persons who lose coverage under Medicaid and are otherwise eligible for QHP may not file an application for health care coverage at all or do so more than 60 days after their Medicaid coverage terminates. The Affordable Care Act (ACA) does not grant persons in this situation a SEP and they must either buy MEC through the open market or wait until the next open enrollment period to get health care coverage through their state or federal exchange. They are subject to a penalty for each month during the tax year they are without MEC. *See, generally, 26 USC § 5000A.*

### III. Sue Smith.

A. Sue can appeal the exchange's failure to process her original application and allow her to enroll in a QHP. Since the exchange has not taken any action on Sue's application it is unlikely her appeal will be untimely no matter when she files it. On appeal Sue will have the burden of showing she filed her application with the exchange<sup>7</sup> and when she did so. If Sue can show she filed her application with the exchange and the exchange has never acted on it she will be entitled to a 60 day SEP. Sue must enroll in a QHP during

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<sup>7</sup> Proof may take the form of screen shots of the application, a saved copy of the application, or testimony from Sue and any witnesses who can testify she filed her application. In any case the trier of fact will have to determine whether Sue and her witnesses are credible and how much weight to give their testimony. The trier of fact may also take judicial or official notice of any well-known problems the exchange has with its on-line systems in deciding whether the evidence shows Sue filed her application on-line even though there is no record of it in the system.

her SEP and not afterwards. Sue's coverage effective date may be retroactive to as early as the date she filed her application with the exchange. *45 C.F.R. § 155.420(d)(4) and (b)(2)(iii)*. Sue can choose to have her coverage begin retroactively or prospectively<sup>8</sup>. If Sue chooses the retroactive coverage effective date she will have to pay the premiums for all of the retroactive months. If Sue's coverage is retroactive to at least the date her Medicaid terminated she will not have any gap in her MEC. If Sue chooses prospective coverage she will have a gap in her MEC and may owe a penalty when she files her federal income tax return for the year. *26 USC § 5000A(b)(1)-(3)*. If Sue's appeal is unsuccessful and she is not otherwise entitled to enroll in a QHP she will have to buy MEC on the open market or go without coverage.

B. If Sue files a new application during an open enrollment period, then:

1. The exchange will process Sue's application and notify her she is eligible for a QHP and APTC/CSR. Sue must enroll in a QHP during the open enrollment period and not after. *45 CFR § 155.410(a)(1) and (2)*.

2. If the exchange does not process Sue's application, does not notify Sue she qualifies for a QHP, or if Sue does not select her QHP on the exchange until after open enrollment ends Sue will be eligible for a QHP but cannot enroll in a QHP because she did not complete the process of enrolling in a QHP during the open enrollment period. The exchange will send Sue a notice denying her application. The notice will include a statement of Sue's appeal rights. Sue may file an appeal seeking a special enrollment period (SEP) to complete her enrollment. Sue is entitled to a special enrollment period if her nonenrollment was due to an error on the part of the exchange. *45 CFR § 155.420(d)(4)*. If Sue is entitled to an SEP to complete her enrollment she must select her QHP on the exchange within the 60 day SEP. Sue's coverage effective date will be set based on the circumstances of his case. *45 CFR § 155.420(b)(2)(iii)*. In Sue's case the coverage effective date will most likely be set as though she had enrolled in a QHP during the open enrollment period (see *45 CFR § 155.410 (f)(2)*). Sue can choose whether to have her coverage effective date begin retroactive to that date or prospectively.<sup>9</sup> If Sue chooses the retroactive coverage effective date she will have to pay the premiums for all of the retroactive months. If Sue's appeal is unsuccessful and she is not otherwise entitled to enroll in a QHP she will have to buy coverage on the open market or go without coverage.

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<sup>8</sup> See footnote 6

<sup>9</sup> See footnote 6.

3. In either case Sue's coverage effective date under her QHP will be based on the date the exchange received her application. *45 CFR § 155.410(f)(2) and footnote 3, supra*. Sue may have a gap in her minimum essential coverage and may owe a penalty for failing to have minimum essential coverage (MEC) during the tax year when she files her federal income tax return. *26 USC § 5000A(b)(1)-(3)*.

C. If Sue files a new application outside of an open enrollment period and within 60 days after her Medicaid terminated, then:

1. Sue has both a 60 day period in which to select a QHP and a SEP<sup>10</sup> which run concurrently. Both 60 day periods start with the last day Sue had Medicaid coverage. *45 CFR §§ 155.420(c) and (d)(1)*.

2. If Sue enrolls in a QHP during the 60 day period and selects her QHP between the first and fifteenth day of the month her coverage effective date is the first day of the following month. If Sue selects her QHP between the sixteenth day of the month and the last day of the month her coverage effective date is the first day of the second month following the month in which she made his selection. *45 CFR § 155.420(b)*.<sup>11</sup>

3. If Sue does not complete the process of enrolling in a QHP until more than 60 days have passed she is eligible for a QHP but is not entitled to enroll in a QHP. The exchange will send Sue a denial notice which will include a statement of her appeal rights. If Sue appeals and can show that her nonenrollment was the exchange's fault she will be given a SEP in which to enroll in a QHP. If Sue is granted a 60 day SEP to complete her enrollment she must do so and select her plan on the exchange within the 60 day SEP. *45 CFR §155.420(c)(1) and (3)*. Sue's coverage effective date will be determined based on the circumstances of her case which will most likely no earlier than the date his coverage would have taken effect but for the exchange's error. Sue can choose the retroactive coverage effective date or have her coverage start prospectively.<sup>12</sup> If Sue choses the retroactive coverage effective date she has to pay the premiums for all the retroactive months. If Sue's appeal is unsuccessful she will have to buy MEC on the open market or go without coverage.

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<sup>10</sup> See footnote 4.

<sup>11</sup> See footnote 5

<sup>12</sup> See footnote 6.

4. In either case Sue will have a gap in her MEC and may owe a penalty for failing to have MEC during the tax year when she files his federal income tax return.

D. If Sue files a new application outside of an open enrollment period and more than 60 days after her Medicaid coverage terminates both her 60 day general enrollment period and SEP will have run. Sue will be eligible for a QHP and may be eligible for APTC/CSR but is not entitled to select a QHP because she did not do so within the 60 day period.

IV. How to Avoid the Labyrinth. Persons who lose their MEC can enroll in a QHP 60 days before as well as 60 days after their Medicaid coverage terminates. File and choose a QHP as soon as possible after learning about the impending loss of MEC. *45 CFR §155.420(c)(2)*.