

2022 Post-Midterm Election Report: What to Expect in Health Policy

An era of divided Congress with
Republicans controlling the House
and Democrats controlling the
Senate and White House.

29 November 2022

Contents

Chapter Title	Page
Overview	03
Congress' lame duck session health care agenda	04
House and Senate leadership for 2023	07
Health care priorities for 2023	10
In the states	15
Parting thoughts	16

Key takeaways

A divided Congress makes big health reforms less likely

With Republicans gaining control of the House and Democrats maintaining control of the Senate and the White House it is unlikely we will see more of the sweeping health care reforms and spending packages passed in 2022. Lawmakers in both the House and Senate will be looking to use their narrow majorities to investigate the health care industry, with House Republicans planning to shine a light on the Biden administration's handling of the COVID-19 pandemic and use of regulations to make health care changes. But there is room for compromise on some health care items, including mental health and substance use disorder, telehealth, workforce, pharmacy benefit managers, data privacy, and more.



1 Overview



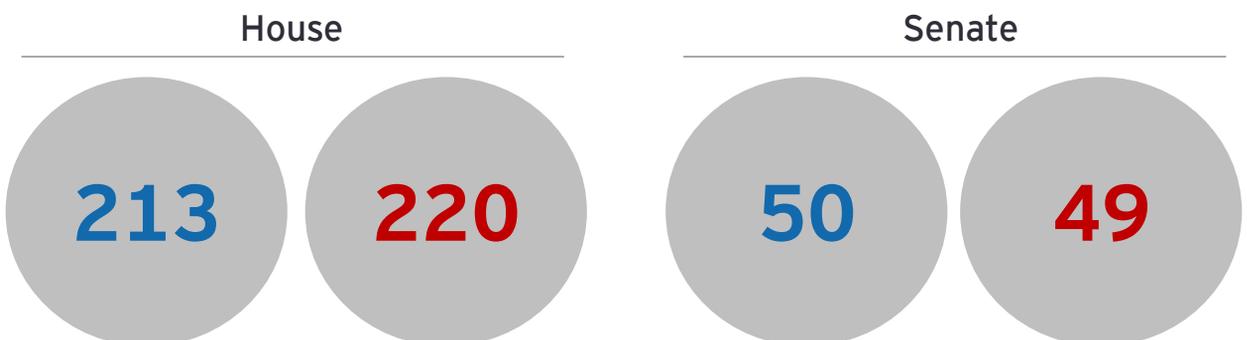
Congressional majorities secured

After more than a week of uncertainty, Republicans on November 16, 2022, secured the 218 seats needed to control the House of Representatives, ushering in a new era of divided government, with Republicans controlling the House and Democrats narrowly controlling the Senate and White House.

While the size of each party's majority may change as the remaining House races and the Dec. 6 Senate runoff in Georgia are called, the split chambers have implications for health policy in both the lame-duck session and the 118th Congress.

This alert will explore expected leadership of the U.S. House of Representatives, U.S. Senate leadership and key congressional committees with jurisdiction over health care, as well as health policies to watch for potential inclusion in a year-end spending package and possible health policy priorities going forward.

Congressional party ratios as of Nov. 29, 2022





Congress' lame duck session health care agenda

The 2022 lame duck session of Congress begins in earnest following the Thanksgiving recess and lawmakers are expected to focus most of their attention on extending government funding beyond the current December 16 deadline. Lawmakers have two main vehicle options; an omnibus funding bill or a continuing resolution that temporarily extends funding at current levels.

In either case, a year-end spending bill could also include some ride-along health items as Congress faces several looming deadlines that affect everything from provider payments, key health care and pharmaceutical program expiration dates, telehealth flexibilities, and more. But the Senate's current 50-50 split, the impending House leadership elections, and pressure to limit spending will set a high bar for inclusion in a year-end package and historically, health spending has been accompanied by health spending offsets.

2022 health policy priorities

Telehealth

**Medicare
provider
payment cuts
and extenders**

**FDA User Fee
extenders and
policy riders**

**Other 2023
Democratic
priorities**

Telehealth

One of the most watched health care topics of the year has been whether Congress should further extend COVID-19 telehealth flexibilities, including flexibilities around Medicare's originating site and geographic requirements (e.g. allowing patients to receive telehealth at home); in-person visit requirements and audio-only limitations; payment for non-physician providers; and facility fees for new sites of care. Congress extended those Medicare telehealth flexibilities for 151 days beyond the end of the public health emergency (PHE) in the March 2022 omnibus package, but their longer term fate is uncertain. While there is no immediate deadline to address, there are several factors that could ease inclusion at year-end: the House already passed a two-year extension with bipartisan support, the PHE is widely expected to expire next year, and there is a financial advantage to passing those flexibilities sooner rather than later, due to the way the Congressional Budget Office would likely "score" the cost of the bill. Critics, however, along with many in Congress, are concerned about fraud, waste and abuse allegations, the cost of the provisions, and lack of sufficient data to prove value.

Another telehealth policy that allows people with high deductible health plans to access telehealth coverage before their deductible has a more immediate deadline of December 31, 2022. Advocates are hoping to include an extension of this policy in a year-end spending bill.

Medicare provider payment cuts and extenders

Another looming issue is a potential combined ~10% cut to physicians' 2023 Medicare reimbursements - cuts that most policymakers agree would be devastating as providers continue to deal with the reverberations of the COVID-19 pandemic and face other economic pressures, such as from rising staffing and input costs.

As it has done in the past, Congress is expected to avert a 4% statutory Pay-As-You-Go (PAYGO) Medicare cut. But there is less support for pausing the 2% statutory sequester Medicare cut that resumed June 30, 2022. Physicians and clinical laboratories also face cuts under their respective payment systems and hospital outpatient departments, ambulatory surgical centers, End Stage Renal Disease (ESRD) providers, and home health agencies argue that updates under their respective payment systems are insufficient. There is some bipartisan support in Congress to ameliorate cuts, but lawmakers still need to determine whether and how to address them.

In addition, Congress is expected to address payment adjustments for Medicare-dependent hospitals and low-volume hospitals, which are set to expire Dec. 16, as well as add-on payments for ambulances, which are set to expire Dec. 31, and soon-to-expire enhanced federal Medicaid matching rates for U.S. territories in a year-end spending package.

FDA User Fee extenders and policy riders

Congress may also work to pick up the policy riders left out of a “clean” bill to reauthorize the Food and Drug Administration’s (FDA) User Fee programs, which was passed as part of September’s continuing resolution. It’s widely expected that temporarily extended pharmaceutical programs, such as those for pediatric medicines and orphan drugs, will be fully funded for FY 2023, but there is less consensus on how to address the policy riders. There is potential for the bipartisan policies addressing clinical trial diversity, generic drug competition, and the FDA’s accelerated approval pathway to be included in a year-end package, but policies addressing research and development and supply chain, as well as other transparency efforts face a steeper climb to get the bipartisan votes needed to pass in the Senate.

Other 2023 Democratic priorities

Congressional committee members also will be looking to include their year-end priorities before leadership shifts take effect for next year. Those priorities include a wide range of a bills from the PASTEUR Act, which reforms the model for antimicrobial drugs; extending by two years the Centers for Medicare and Medicaid’s Acute Hospital Care at Home waiver; Medicare Advantage Prior Authorization reforms; and more. There’s also talk that lawmakers will look to capitalize on CBO scoring methodology to incorporate Medicaid continuous coverage proposals into a final package. In addition, the White House is seeking \$10 billion in public health funds to continue COVID-19 and other infectious disease response efforts, along with funding to support military and humanitarian efforts in Ukraine.

But as with all of the policy priorities, Congress will need to find some way to cover the costs - and in some cases, the costs may be too steep for lawmakers to address this cycle.

And while Senate Finance Committee Chair Ron Wyden (D-OR) has continued to speak optimistically about addressing mental health care in this legislative session and some narrower bipartisan pieces have gained support, time needed to achieve bicameral and bipartisan support may cause much of the discussion to extend into 2023.

3 House and Senate leadership for 2023

House and Senate Republicans moved forward with leadership elections on their first week back in session. Sen. Mitch McConnell (R-KY) secured enough votes to remain Senate minority leader and Rep. Kevin McCarthy (R-CA) won the Republican nomination for House speaker (although he must now win a majority in a public vote on the House floor – at least 218 votes - potentially requiring nearly unanimous consent from his caucus).

On the Democrats side, Speaker Nancy Pelosi (D-CA) announced Nov. 17 that she would not seek re-election as the top Democrat in the House but will remain in Congress. Majority Leader Steny Hoyer (D-MD) will also step down from his leadership post. Rep. Hakeem Jeffries (D-NY), chairman of the House Democratic Caucus, officially launched his bid for the top Democratic spot and has secured the backing of Hoyer. Democrats are not expected to hold leadership elections until December.

Expected House leadership for 2023	Democrats	Republicans
	Minority Leader Hakeem Jeffries (D-NY)	House Speaker Kevin McCarthy (R-CA)
	Minority Whip Katherine Clark (D-MA)	House Whip Tom Emmer (R-MN)
Expected Senate leadership for 2023	Democrats	Republicans
	Majority Leader Chuck Schumer (D-NY)	Minority Leader Mitch McConnell (R-KY)
	Majority Whip Dick Durbin (D-IL)	Minority Whip John Thune (R-SD)

Chairmanships and ranking members with health jurisdiction

Republicans' win in the House means several key committees overseeing health care will get new leaders in 2023. While Democrats will retain control over the Senate, lawmakers in the past week have announced plans for leadership shifts on some of the top health care committees.

Expected leadership of House committees with health care oversight

House Committee	Chair	Ranking Member
Appropriations	Kay Granger (R-TX)	Rosa DeLauro (D-CT)
Budget	Jason Smith (R-MO), the current ranking member, would likely become chair if not selected to chair Ways & Means. If Smith moves, Jodey Arrington (R-TX), Earl "Buddy" Carter (R-GA) and Lloyd Smucker (R-PA) will compete for the post.	Brian Higgins (D-NY) or Brendan Boyle (D-PA), presuming Hakeem Jeffries (D-NY) remains in leadership
Education & Labor	Virginia Foxx (R-NC) is term-limited but plans to seek a waiver to remain. Jim Banks (R-IN), if not selected as Majority Whip, and Tim Walberg (R-MI) are also viewed as possibilities.	Bobby Scott (D-VA)
Energy & Commerce	Cathy McMorris Rodgers (R-WA)	Frank Pallone (D-NJ)
Financial Services	Patrick McHenry (R-NC)	Maxine Waters (D-CA)
Oversight & Gov't. Reform	James Comer (R-KY)	Three-way contest among Stephen Lynch (D-MA), Gerry Connolly (D-VA) and Jamie Raskin (D-MD)
Ways & Means	With Kevin Brady (R-TX) retiring, three-way contest between Vern Buchanan (R-FL), Adrian Smith (R-NE), Jason Smith (R-MO)	Richard Neal (D-MA)

Expected leadership of Senate committees with health care oversight

Senate Committee	Chair	Ranking Member
Appropriations	With Pat Leahy (D-VT) retiring, Sen. Patty Murray (D-WA) is next in line and announced her intention to pursue the leadership role	With current Ranking Member Richard Shelby (R-AL), retiring Sen. Susan Collins (R-ME) is next in line
Budget	With Sen. Murray poised to move to Appropriations and Sen. Bernie Sanders (I-VT) poised to lead the HELP Committee, Sheldon Whitehouse (D-RI) is likely next	Lindsey Graham (R-SC)
Finance	Ron Wyden (D-OR)	Mike Crapo (R-ID)
HELP	Sen. Sanders will lead HELP as Sen. Murray moves to Appropriations.	With Richard Burr (R-NC) retiring and Sen. Rand Paul (R-KY) poised to lead Homeland Security, Sen. Bill Cassidy (R-LA) is next in line



Health care priorities for 2023

Leadership changes among House and Senate health care committees will have significant implications for the health policies and health care topics that are examined and discussed during the 118th Congress.

House Republicans

In the House, Republicans are expected to use their oversight authority to investigate the Biden administration's approach to health care consolidation, regulatory expansion of Affordable Care Act marketplace eligibility for families, COVID-19 origin and response efforts, and the Inflation Reduction Act's (IRA) drug pricing provisions. In addition, House Republicans have signaled their intent to investigate nursing homes and policies that may have contributed to high mortality rates.

The Republican Healthy Futures Task Force and Republican Study Committee have said Republicans will use their majority to focus on policies to lower health care costs, such as reforming the inpatient only list, examining inappropriate hospital billing practices, and expanding Medicare site neutrality rules, and promote consumer driven care, such as codifying Trump-era price transparency regulations, bolstering Medicare Advantage, and increasing access to health savings accounts and association health plans.

Republicans also are likely to explore new ways for employers and individuals to pool health risk. Notably, after the failed attempts in 2017 to repeal the Affordable Care Act (ACA), Republicans have dropped calls to repeal and replace the ACA, and instead, would focus on policies to ease the law's administrative burdens. In addition, Rep. Kevin Brady (R-TX) and other House Republicans have voiced their support for repealing the IRA's Medicare drug price negotiation provisions - a move that would require 60 Senate votes, which would be unlikely in a Democrat-controlled Senate or while President Biden is in office. Meanwhile, Rep. James Comer (R-KY), who is expected to chair the House Oversight Committee, has said he wants to examine potential conflicts of interest at pharmacy benefit managers (PBMs).

The House Energy & Commerce Committee's 2023 health care agenda is expected to focus on health care prices and flexing its oversight authority. For example, the House E&C Committee will play a key role in overseeing implementation of the IRA's drug pricing provisions, including inflation-tied drugmaker rebates that go into effect in 2023. In addition, the House E&C Committee is expected to examine hospital price transparency and examine options for permanent telehealth coverage. The House E&C Committee also is expected to use its oversight authority to hold hearings on COVID-19 response efforts under the Biden administration and other health care topics.

The House Ways & Means Committee, which is the primary committee responsible for overseeing the Medicare program, is expected to examine ways to change Medicare provider reimbursement policies and processes. All three candidates to lead the House Ways and Means Committee have expressed a desire to address looming Medicare and Social Security insolvency, as well as ways to improve health care affordability. In addition, telehealth is expected to be a top priority for the committee. Similar to the House Energy & Commerce Committee, the House Ways & Means Committee is expected to use its oversight authority to investigate the origins of COVID-19 and look deeper at the Medicare Advantage program, and the 340B drug discount program.

Senate Democrats

In the Senate, Democrats are likely to use their narrow majority to continue pursuing legislation to advance mental health, climate and health equity, as well as protecting, building on, and overseeing implementation of the drug pricing policies in the IRA. Sen. Patty Murray (D-WA) is expected to move from Senate Health, Education, Labor and Pensions (HELP) Committee to Appropriations.

As next in line to lead the HELP Committee, Sen. Bernie Sanders (I-VT) is likely to focus on health care coverage expansions, including his Medicare for All proposals, as well as policies, such as drug importation, to reduce the price of prescription drugs. The HELP Committee under Sanders also likely would continue Sen. Murray's work on investing in the health care workforce, public health infrastructure, and health equity. Sen. Bill Cassidy (R-LA), who is expected to be ranking member on the committee, also plans to focus on surprise billing and the 340B program. Sen. Cassidy has expressed an openness to working across the aisle on policies to improve the health care system.

Sen. Ron Wyden (D-OR) who is poised to re-assume the top spot on the Senate Finance Committee, is expected to continue to focus on efforts to strengthen the Medicare program, which could include oversight of Medicare Advantage, and advance a bipartisan mental health package as well as focusing on continued health system transparency, competition, choice and access. Sen. Mike Crapo (R-ID) is expected to remain the ranking member on the Senate Finance Committee and has said he plans to focus on PBM reform.

Bipartisan policies to watch in a divided Congress

While Republicans and Democrats in recent years have struggled to come together on certain health care topics, there is potential for bipartisan compromise in some areas, such as data privacy, PBMs, and veterans' health. Lawmakers have already laid the groundwork for bipartisan packages to address the country's mental health and substance use crisis, the health care workforce shortage, reducing the cost of insulin, and Medicare telehealth waivers granted during the PHE. We expect to see congressional committees in both chambers continue their work on those efforts in 2023.

Other bipartisan policies that could be on the table in 2023 include expanding value-based care, price transparency, reducing health care costs for dual-eligible and lower income beneficiaries, and preparing for the next pandemic. In addition, lawmakers will face a list of Medicare and Medicaid programs set to expire in 2023, including funding for community health centers, as well as an Oct. 1, 2024, deadline to address delayed Medicaid disproportionate share hospital payment cuts.

Lawmakers also will face pressure to address rising Medicare costs and the 2028 Trust Fund insolvency date. While they may not reach a consensus in the next Congress, expect to see committee hearings and proposals on both short- and long-term solutions to the Trust Fund debate.

Regulatory action for 2023

A divided Congress means we're less likely to see major health care reforms in 2023, but this may empower the administration to take bolder steps during President Biden's next two years in office.

Drug pricing

Drug pricing already is set to be a big topic in 2023. Biden on Oct. 14, signed an executive order (EO) that directs HHS to use administrative tools to lower drug prices - this came a week after HHS Secretary Xavier Becerra suggested HHS isn't ruling out using its so-called "march-in rights" authority to rein in drug prices and looking for other ways to cap drug prices for seniors. Center for Medicare and Medicaid Innovation (CMMI) Director Elizabeth Fowler also has said her agency would consider creating drug pricing demonstrations and CMMI is working across the agency to identify areas to test efforts to increase access and affordability of drugs and novel therapies.

Value-based care

Beyond drug pricing, in 2023 CMMI is expected to continue to implement its strategy refresh by retooling existing programs with an emphasis on accountable care, health equity, innovation, affordability, and partnerships. 2023 also could be the year we see new models proposed, as CMMI spent most of 2022 carrying out its strategic vision and redesigning the Global and Professional Direct Contracting Model (GPDC) as the ACO Reach model. For example, the Biden Administration has indicated it intends to test ways to integrate nutrition and health through expanded coverage in Medicare and Medicaid. CMMI also plans to focus on the role of specialty care in the delivery of high-quality accountable care and is expected to test new mandatory episode payment models.

Public health emergency

It also is expected that the Biden administration will allow the COVID-19 public health emergency to end in 2023. The Biden administration has signaled its intent to give states at least 60 days' notice before the PHE expires, suggesting the PHE will be renewed at least once more beyond its current January expiration date.

The eventual end date will bring new challenges for industry stakeholders as states begin Medicaid redeterminations and HHS and related agencies begin to unwind federal waivers that providers have been operating under for more than two years. While some waivers have been extended by the administration and Congress, others will end with the PHE. The complexity of this future regulatory environment has prompted the National Association of Medicaid Directors to ask for more clarity on the PHE end date by setting in statute when Medicaid renewals can begin.

Other topics

HHS and other federal agencies in 2023 also are likely to take actions related to Biden's EOs to expand access to affordable, quality health coverage and to create a plan to bolster domestic biomanufacturing capacity and accelerate the United States' ability to detect diseases and manufacture vaccines. Newly appointed Dr. Renee Wegrzyn will spend most of 2023 launching the Advanced Research Projects Agency for Health (ARPA-H) and the Biden administration through the DOJ and FTC has also signaled it will continue scrutinizing health care mergers for antitrust and anticompetitive motives.



In the states

The midterm election results suggest states will continue to serve as battleground areas for health care policies in 2023. Several states had health care on the ballot and their successes or failures could set the stage for similar measures in other states. In a significant turnaround, South Dakota voters became the seventh - and potentially last - GOP-controlled state to expand Medicaid via a ballot initiative.

Additionally, voters in five states weighed in on reproductive rights, with voters in California, Michigan, and Vermont adding abortion protections to their state constitutions and voters in Kentucky and Montana rejecting measures to restrict access as was seen in Kansas in August. Other health care initiatives included Arizona voters passing Proposition 209 to prevent creditors from charging high interest rates on medical debt and Massachusetts voters approving a ballot measure that would require dental insurers to spend 83% of premium dollars on patient care.

With a divided Congress and limitations for what the Biden Administration can do regulatorily, state action will continue to serve as an incubator and indicator for what is possible at the federal level.



Parting thoughts

While we're less likely to see sweeping health care reforms during the lame duck session and in 2023, health care will still be a prominent topic. Expect more debate on fiscal issues related to Medicare and Social Security; examinations into popular - and growing - programs, such as Medicare Advantage and the 340B program; and policy proposals to address some of the health care industry's most pressing needs related to workforce, telehealth, reimbursement, and the mental health and opioid misuse crises.

EY's Washington Council looks forward to working with you and your organizations to navigate the path ahead. For more information about working with Washington Council EY [click HERE](#).

For questions about this piece or WCEY please reach out to Heather Bell at Heather.Bell@ey.com.

EY | Assurance | Tax | Strategy and Transactions | Consulting

About EY

EY is a global leader in assurance, tax, Strategy and Transactions, Consulting services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Information about how EY collects and uses personal data and a description of the rights individuals have under data protection legislation are available via ey.com/privacy. For more information about our organization, please visit ey.com.

Ernst & Young LLP is a client-serving member firm of Ernst & Young Global Limited operating in the US.

© 2022 Ernst & Young LLP.
All Rights Reserved.

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax or other professional advice. Please refer to your advisors for specific advice.

ey.com