

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HJR 37 Health Care Services

SPONSOR(S): Plakon and others

TIED BILLS: **IDEN./SIM. BILLS:** SJR 72

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	<u>Health Care Regulation Policy Committee</u>	<u></u>	<u>Guy</u>	<u>Calamas</u>
2)	<u>Criminal & Civil Justice Policy Council</u>	<u></u>	<u></u>	<u></u>
3)	<u>Health & Family Services Policy Council</u>	<u></u>	<u></u>	<u></u>
4)	<u>Rules & Calendar Council</u>	<u></u>	<u></u>	<u></u>
5)	<u></u>	<u></u>	<u></u>	<u></u>

SUMMARY ANALYSIS

House Joint Resolution 37 proposes the creation of Section 28 of Article X of the Florida Constitution relating to health care. Specifically the constitutional amendment:

- prohibits persons and employers from compelled participation in a health care system;
- allows direct payment of health care services and prohibits penalizing persons, employers and health care providers from utilizing a direct payment system;
- allows the purchase or sale of health insurance in the private market, subject to certain conditions; and
- exempts laws enacted prior to January 1, 2010, from requirements of the amendment.

The joint resolution provides definitions for certain terms and includes a ballot summary.

This joint resolution appears to have a negative, non-recurring fiscal impact on state government. The Department of State, Division of Elections, estimates a cost of approximately \$65,045 for FY 10-11. The cost is a result of placing the joint resolution on the ballot and publishing two required notices.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters at the 2010 General Election, the resolution would take effect January 4, 2011.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Federal Health Care Reform

Currently, the U.S. Congress is considering an extensive overhaul of the national health care system with particular focus on access to affordable coverage in the private market and a reorganization of public programs. The U.S. House of Representatives passed H.R. 3962 on November 7, 2009, while the U.S. Senate passed H.R. 3590 on December 24, 2009. President Barack Obama released a proposal for federal health care reform on February 22, 2010, which includes many of the policy considerations in each of the House and Senate bills.

The bills differ with respect to policy decisions on health care reform, but both bills contain provisions relating to the following areas: mandated individual coverage; mandated employer offers of coverage; expansion of Medicaid; individual cost-sharing subsidies and tax penalties for non-compliance; employer tax penalties for non-compliance; health insurance exchanges; public option coverage; expanded regulation of the private insurance market; and revision of the Medicare and Medicaid programs.

Both bills require individuals to have health insurance coverage and provide penalties for non-compliance. Certain employers are required to offer health insurance to their employees or pay a penalty for non-compliance. The bills make substantive changes to Medicaid by increasing the eligibility threshold. The bills require tax increases as a means to finance health care reform provisions.

Key differences between the two bills include: ^{1 2}

Issue	Senate Bill: H.R. 3590 Patient Protections & Affordable Care Act	House Bill: H.R. 3962 Affordable Health Care for America Act
Mandated individual coverage	"minimum essential coverage" as defined in the bill	"acceptable coverage" as defined in the bill
Individual penalty	\$95-\$750 per person tax	2.5% of gross adj. income fine
Mandated employer offering	Required for companies with more than 50 employees	Required for companies with an annual payroll of greater than \$750,000
Employer penalty for failure to offer	\$750 per employee tax, if one full-time employee uses the federal subsidy	8% payroll tax fine
Other employer penalties	For employers who offer health insurance, if at least one full-time employee uses the federal subsidy, then \$750 per employee tax	Sliding scale payroll tax for companies with an annual payroll less than \$750,000
Health insurance exchanges	State-based American Health Benefits Exchanges	National Health Insurance Exchange
Individual subsidy: Exchange participation	Insurance premium credits	Insurance premium credits
Public option	N/A	Public insurance option offered through the National Exchange
Private insurance market regulation	Guarantee issue and renewability	Guarantee issue and renewability
Mandated state Medicaid expansion	Up to 133% of the Federal Poverty Level (\$29,326 for a family of four)	Up to 150% of the Federal Poverty Level (\$33,075 for a family of four)
CHIP	CHIP block grants funded through 2015	Repeal CHIP; enrollees required to participate in National Exchange
Financing	<ul style="list-style-type: none"> Excise tax on "Cadillac" plans Tax increase on HSAs 	<ul style="list-style-type: none"> Tax on high-income individuals and families Tax increase on HSAs

There is no existing requirement in federal law that individuals maintain health insurance coverage; nor does federal law require employers to provide health insurance to employees.

Florida Health Insurance

Florida law does not require state residents to have health insurance coverage. However, Florida law does require drivers to carry Personal Injury Protection (PIP), which includes certain health care coverage, as a condition of receiving a state driver's license.³ Florida law also requires most employers to carry workers' compensation insurance which includes certain health care provisions for injured workers.⁴

Massachusetts Health Insurance Mandate

In 2006, to address rising costs, the State of Massachusetts passed a health care reform initiative which requires every Massachusetts citizen to have minimum health insurance coverage, whether from the private market or public assistance.⁵ The law requires:

- Employers with ten or more employees to offer health insurance to their employees;
- Monetary penalties to be assessed on individuals and employers for non-compliance;
- An individual to report coverage compliance on his state income tax return; and
- Subsidies for individuals and families who do not meet a certain income threshold.

¹ Information for this table is based on versions of H.R. 3590 and H.R. 3962, dated February 24, 2010, and does not reflect reconciliation efforts or subsequent amendments to conform the two bills.

² For detailed side-by-side bill comparisons, see Kaiser Family Foundation, Focus on Health Reform, at <http://www.kff.org/healthreform/sidebyside.cfm> and *House-Senate Comparison of Key Provisions*, at www.politico.com/static/PPM136_100104_health_reform_conference.html (last visited March 17, 2010).

³ s. 627.736, F.S.

⁴ Workers' compensation insurance provisions are found in Chapter 440, F.S.

⁵ Chapter 58 of the Acts of 2006, An Act Relating to Affordable, Quality, Accountable Health Care (April 12, 2006).

The legislation directed the state to set up a health insurance exchange, the “Commonwealth Connector” from which individuals may purchase insurance. The Commonwealth Connector also regulates the private health insurance market in the state.

Studies suggest that the Massachusetts health insurance mandate has not achieved projected state cost savings. State funding for the Commonwealth Connector and public assistance has increased government spending on health insurance programs by 42 percent.⁶ Cost to the individual has also risen as insurance premiums increased 40 percent from 2003 to 2008.⁷ In 2008, two years after passage of reform, Massachusetts health insurance premiums for family coverage exceeded the national average by \$1,500.⁸ When surveyed two years after implementation, Massachusetts residents still supported the mandate, but 51 percent believed their health care costs had risen as result.⁹ The uninsured rate in Massachusetts is 4.1 percent.¹⁰ The state’s safety-net hospitals indicate that a large percentage of patients seeking care are uninsured; however reform measures reduced the level of payments to hospitals for charity care.^{11 12}

Congressional Authority and Constitutionality

Constitutional scholars and health care policy experts are debating the constitutionality of many of the federal health care reform provisions. The debate centers on four constitutional issues.

Commerce Clause (U.S. Const. Art. I, Sec. 8, Clause 3)

Congress has the power to regulate interstate commerce, including local matters and things that “substantially affect” interstate commerce. Proponents of reform assert that although health care delivery is local, the sale and purchase of medical supplies and health insurance occurs across state lines, thus regulation of health care is within Commerce Clause authority. Arguing in support of an individual mandate, proponents point to insurance market de-stabilization caused by the large uninsured population as reason enough to authorize Congressional action under the Commerce Clause.¹³ Opponents suggest that the decision not to purchase health care coverage is not a commercial activity and cite to *United States v. Lopez* which held that Congress is prohibited from “...unfettered use of the Commerce Clause authority to police individual behavior that does not constitute interstate commerce.”¹⁴

Tax and Spend for the General Welfare (U.S. Const. Art. I, Sec. 8, Clause 1)

The Tax and Spend Clause of the U.S. Constitution provides Congress with taxation authority and also authorizes Congress to spend funds with the limitation that spending must be in pursuit of the general welfare of the population. To be held constitutional, Congressional action pursuant to this Clause must

⁶ Kevin Sack, “Massachusetts Faces Costs of Big Health Plan,” New York Times, see <http://www.nytimes.com/2009/03/16/health/policy/16mass.html> March 15, 2009.

⁷ Cathy Schoen, *Paying the Price: How Health Insurance Premiums are Eating Up Middle-class Incomes*, The Commonwealth Fund, see <http://www.commonwealthfund.org/Content/Publications/Data-Briefs/2009/Aug/Paying-the-Price-How-Health-Insurance-Premiums-Are-Eating-Up-Middle-Class-Incomes.aspx> (August 2009).

⁸ *Id.*

⁹ Robert J. Blendon, et al., *Massachusetts Health Reform: A Public Perspective from Debate Through Implementation*, Health Affairs, 27:6, at 559, 562 (2008).

¹⁰ Joanna Turner, et al., *A Preliminary Evaluation of Health Insurance Coverage in the 2008 American Community Survey*, U.S. Bureau of the Census, see www.census.gov/hhes/www/hlthins/2008ACS_healthins.pdf (September 22, 2009).

¹¹ See “Some Massachusetts Safety Net Hospitals face Budget Problems because of Health Insurance Law,” Kaiser Daily Health Report (March 19, 2008).

¹² For detailed discussion of the Massachusetts Health Insurance Mandate, see Michael Tanner, *Massachusetts Miracle or Massachusetts Miserable: What the Failure of the ‘Massachusetts Model’ Tells Us about Health Care Reform*, Briefing Paper No. 112, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=10268 (June 9, 2009). See Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain*, Policy Analysis No. 657, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=11115 (January 20, 2010).

¹³ Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).

¹⁴ Peter Urbanowicz and Dennis G. Smith, *Constitutional Implications of an ‘Individual Mandate’ in Health Care Reform*, The Federalist Society for Law and Public Policy, at 4 (July 10, 2009).

be reasonable.¹⁵ With respect to the penalty or fine on individuals who do not have health insurance, proponents suggest that Congress' power to tax and spend for the general welfare authorizes the crafting of tax policy which in effect encourages and discourages behavior.¹⁶ Opponents cite U.S. Supreme Court case law that prohibits "a tax to regulate conduct that is otherwise indisputably beyond [Congress'] regulatory power."¹⁷

The Tenth Amendment and the Anti-Commandeering Doctrine (U.S. Const. Amend. 10)

The Tenth Amendment reserves to the states all power that is not expressly reserved for the federal government in the U.S. Constitution. Opponents of federal reform assert that the individual mandate violates federalism principles because the U.S. Constitution does not authorize the federal government to regulate health care. They argue, "...state governments – unlike the federal government – have greater, plenary authority and police powers under their state constitutions to mandate the purchase of health insurance."¹⁸ Further, opponents argue that the state health insurance exchange mandate may violate the anti-commandeering doctrine which prohibits the federal government from requiring state officials to carry out onerous federal regulations.¹⁹ Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.²⁰

Supremacy Clause (U.S. Const. Art. 6, Clause 2)

Supremacy Clause jurisprudence firmly establishes that the U.S. Constitution and federal law possess ultimate authority when in conflict with state law. The Supreme Court held "...the Supremacy Clause gives the Federal Government 'a decided advantage in the delicate balance' the Constitution strikes between state and federal power."²¹ Proponents cite to the Supremacy Clause as a self-evident justification for passage of federal health reform. Opponents assert that the Supremacy Clause only protects congressional actions that are based on express authority in the Constitution and "where [the action] does not impermissibly tread upon state sovereignty."²²

State Reaction to Federal Health Care Reform

State constitutional amendments addressing the state-federal relationship and federal health care reform are currently under consideration before 24 state legislatures.²³ Arizona passed the Freedom of Choice in Health Care Act last year and it will appear on the ballot for voter approval November 2010.

Thirteen states are considering statutory amendments to prohibit mandated health insurance coverage.²⁴ In March 2010, Virginia and Idaho enacted such a statutory change. Utah passed state law changes; enactment is pending gubernatorial approval.²⁵ In addition to asserting the right of citizens to choose health care services without the threat of penalty from the federal government, the Idaho law directs the state's Attorney General to sue the federal government if it enacts laws that compel the purchase health insurance.²⁶

¹⁵ *Helvering v. Davis*, 301 U.S. 619 (1937).

¹⁶ Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O'Neill Institute, at 7.

¹⁷ David B. Rivkin and Lee A. Casey, "Illegal Health Reform" *Washington Post*, August 22, 2009, at A15. Rivkin and Lee cite to *Bailey v. Drexel Furniture*, 259 U.S. 20 (1922), a Commerce Clause case which held that Congress has the authority to tax as a means of controlling conduct.

¹⁸ *Id.*

¹⁹ Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, *The Annals of the American Academy of Policy and Social Science*, 574, at 158 (March 2001).

²⁰ Hall, *supra* note 16, at 8-9.

²¹ *New York v. United States*, 505 U.S. 144, 160 (1992).

²² Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).

²³ National Conference of State Legislatures, *State Legislation Opposing Certain Health Reforms, 2009-2010*, see <http://www.ncsl.org/IssuesResearch/Health/StateLegislationOpposingCertainHealthReforms/tabid/18906/Default.aspx?TabId=18906#AZ08> (last visited March 13, 2010). Florida and Arizona are not included in this count.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Chapter Law 46, Idaho Health Freedom Act, effective date June 1, 2010.

In Florida, Attorney General Bill McCollum has asserted the constitutionality argument to Congress. On January 19, 2010, Attorney General McCollum sent a letter to U.S. House and Senate leadership in which he said that he would pursue legal action if the individual mandate becomes law. Attorney General McCollum then sent a letter to the president of the National Association of Attorneys General on March 16, 2010, asking other attorney generals to participate in litigation challenging the individual mandate. The basis for Attorney General McCollum's proposed challenge is that Congress lacks Commerce Clause authority to compel individuals to purchase health insurance. According to the Attorney General, "A citizen's choice not to buy health insurance cannot rationally be construed as economic activity, or even 'activity,' to subject that inactivity to regulation under the Commerce Clause."²⁷

Effect of Proposed Changes

House Joint Resolution 37 proposes the creation of Section 28 of Article X of the Florida Constitution relating to health care. The resolution prohibits any person, employer or health care provider from being compelled to participate in any health care system. With respect to an individual or employer mandate, this provision would allow any person or employer to opt-out of mandated insurance coverage and would allow for flexibility in any health care provider's participation in a particular health care system.

The resolution authorizes any person or employer to pay directly for health care services and provides that persons or employers shall not incur a penalty or fine for direct payment. The resolution authorizes a health care provider to accept direct payment and provides that such health care provider will not incur a penalty or fine for accepting direct payment. This provision would allow a person or employer to purchase health care services without participation in a health care system or plan.

The resolution prohibits any law or rule which prohibits private health insurance sales or purchases. The bill subjects this prohibition to reasonable and necessary rules that do not substantially limit purchase or sale options. This provision would allow the purchase or sale of private insurance to individuals regardless of a mandate requiring individuals to have health insurance coverage.

The resolution directs that its provisions do not affect:

- Required performance of services by a health care provider or hospital;
- Health care services permitted by law;
- Worker's compensation care as provided by general law;
- Laws or rules in effect as of January 1, 2010; and
- Any health care system terms and conditions that do not provide punitive measures against persons, employers or health care providers for direct payment.

The resolution provides definitions or usage for the following terms:

- "Compel" includes the imposition of penalties or fines.
- "Direct payment" or "pay directly" means payment for health care services without the use of a public or third party, excluding any employers.
- "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals for, or payment, in full or in part, for health care services, health care data, or health care information for its participants.
- "Lawful health care services" means any health care service offered by legally authorized persons or businesses, provided that such services are permitted or not prohibited by law or regulation.
- "Penalties or fines" mean any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge, or any named fee with a similar effect established by law or rule by an agency established, created, or controlled by the government which is used to punish or discourage the exercise of rights protected under this section.

²⁷Florida Attorney General Bill McCollum, Letter to Congressional Leaders, dated January 19, 2010.

The resolution provides for a ballot summary which describes the provisions of the constitutional amendment in plain language.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters at the 2010 General Election, the resolution would take effect January 4, 2011.

B. SECTION DIRECTORY:

Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Non-recurring FY 2010-2011

The Department of State, Division of Elections estimates the bill will cost approximately \$65,045.16 in non-recurring General Revenue for publication costs. See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the general election.²⁸ Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is \$94.68 per word. The word count for HJR 37 is 687 words X \$94.68 = \$65,045.16.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

²⁸ Fla. Const., art. XI, s. 5(d).
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2. Other:

Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, the amendment must be placed before the electorate at the next general election held after the proposal has been filed with the Secretary of State's office or at a special election held for that purpose. The resolution would be submitted to the voters at the 2010 General Election and must be approved by at least 60 percent of the voters voting on the measure.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The joint resolution does not contain an express exemption for required Personal Injury Protection coverage. If statutory changes are made to PIP in the future they may conflict with the voter-approved joint resolution.

It is unclear how the courts will apply or construe provisions of the joint resolution if approved; it may affect other programs in a manner that is unforeseen at this time.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES