

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Health and Human Services Appropriations Committee

BILL: CS/SJR 72

INTRODUCER: Health Regulation Committee, Senator Baker, and others

SUBJECT: Health Care Services

DATE: April 2, 2010 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stovall	Wilson	HR	Fav/CS
2.	Treadwell	Maclure	JU	Favorable
3.	Hansen	Hansen	HA	Favorable
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This is a joint resolution proposing the creation of Section 28 of Article I of the State Constitution to preserve the freedom of Florida residents to provide for their own health care by:

- Ensuring that any person, employer, or health care provider is not compelled to participate in any health care system;
- Authorizing a person or employer to pay directly, without using a third party such as an insurer or employer, for health care services without incurring penalties or fines; and
- Authorizing a health care provider to accept direct payment for health care services without incurring penalties or fines.

The joint resolution also prohibits a law or rule from prohibiting the purchase or sale of health insurance in private health care systems and specifies certain aspects of health care that are not affected by this constitutional amendment. The joint resolution also defines terms that are used within the proposed constitutional amendment. The joint resolution includes the statement that is to be placed on the ballot for the upcoming statewide election.

The Division of Elections (division) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is \$94.68. Therefore, the division estimates the cost for advertising this constitutional amendment is \$65,140.

This joint resolution does not amend, create, or repeal any sections of the Florida Statutes.

II. Present Situation:

Federal Health Care Reform¹

On March 21, 2010, Congress passed national health care reform. The new health care law (PL 111-148) and the reconciliation bill (HR 4872) passed shortly thereafter will bring sweeping changes to the U.S. health care system. Among other things, it:

- **Extends health insurance coverage** to about 32 million people who currently lack it, leading to coverage of about 94 percent of Americans. The cost of coverage expansions will total \$940 billion from fiscal 2010 to fiscal 2019. But taking into account the changes to mandatory spending and tax law, the overhaul will reduce the deficit by a net \$138 billion over the same period.
- **Creates state-based exchanges**, or marketplaces, where individuals without employer-provided insurance can buy health care coverage. Federal subsidies will be available to help cover the cost for individuals who earn between 133 percent and 400 percent of the federal poverty level (or \$24,352 to \$73,240 for a family of three in 2010).
- **Expands Medicaid eligibility** to all individuals with incomes of up to 133 percent of the federal poverty level. Specifies that in all states, the federal government will cover the entire cost of coverage to newly eligible people from 2014 through 2016. **In 2017, federal matching funds for all states will cover 95 percent** of the costs for the newly eligible people. The rate would be **94 percent in 2018, 93 percent in 2019 and 90 percent in 2020 and afterward.**
- **Provides a one-time, \$250 rebate for Medicare beneficiaries** who fall into a prescription drug coverage gap known as the “doughnut hole” in 2010 and seeks to eliminate the gap entirely within 10 years. Starting in 2011, the overhaul creates a discount of 50 percent on brand-name drugs for beneficiaries who fall into the gap. The discount will increase to 75 percent by 2020, with the government paying the rest of the cost of the drugs.
- **Imposes new regulations on health insurance companies.** Beginning six months after enactment, health insurers may rescind group or individual coverage only with clear and convincing evidence of fraud or intentional misrepresentation by an enrollee. Insurance plans also are required to allow parents to continue coverage for dependent children who would otherwise not have health insurance until a child reaches his or her 26th birthday. Insurers are barred from setting lifetime limits on the dollar value of health care. And they also may not set any annual limits on the dollar value of health care provided, effective six months after enactment.
- **Requires individuals to obtain health insurance** or pay either \$325 or 2 percent of income, whichever is higher, in 2015. Fines will increase in subsequent years.

¹ For a more detailed summary of the health insurance provisions in the federal health care reform initiatives, see the National Conference of State Legislatures website:

<http://www.ncsl.org/default.aspx?tabid=17639>

- **Penalizes employers with more than 50 workers** who have employees who obtain subsidies to purchase coverage through the exchanges. Companies that offer health care benefits face a penalty of either \$3,000 for each employee (full-time or part-time) who receives a subsidy or \$750 per full-time employee, whichever would be less.
- **Imposes an excise tax on high-cost health care plans** — the so-called Cadillac plans — beginning in 2018. The tax will apply to plans costing \$10,200 for individual coverage and \$27,500 for family coverage.
- **Increases the Medicare payroll tax** for individuals making more than \$200,000 and couples making more than \$250,000 and imposes an additional 3.8 percent surtax on investment income.
- **Creates a 2.9 percent tax on the sale of any taxable medical device**, excluding less invasive and risky products classified as Class I by the Food and Drug Administration. The tax also will not apply to eyeglasses, contact lenses and hearing aids.
- **Imposes new fees on health insurers.** Beginning in 2014, an annual flat fee of \$8 billion will be levied on the industry. It rises to \$11.3 billion in 2015 and 2016, \$13.9 billion in 2017, and \$14.3 billion in 2018. In 2019, these fees will be adjusted by the same rate as the growth in health insurance premiums.
- **Levies annual industrywide fees on brand-name drugs** totaling \$2.5 billion in 2011, \$3 billion from 2012 through 2016, \$3.5 billion in 2017, \$4.2 billion in 2018, and \$2.8 billion in 2019 and later years.

In 2008, approximately 60 percent of the U.S. population had employment-based health insurance.² Other individuals chose to obtain coverage on their own in the nongroup market. Others qualified for health coverage through Medicare, Medicaid, and other government programs. Still others had no defined health coverage.

State Legislation Opposing Certain Health Reforms

In response to the federal health care reform legislation, state legislators in at least 36 states have filed legislation to limit, alter, or oppose certain state or federal action, including single-payer provisions and mandates that would compel the purchase of health care insurance.³ In 26 of the states, the legislation includes a proposed constitutional amendment by ballot. The following figure represents those states introducing legislation opposing certain health care reforms:⁴

² U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2008*, 20 (Sept. 2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf> (last visited Mar. 16, 2010).

³ National Conference of State Legislators, *State Legislation Opposing Certain Health Reforms* (Mar. 15, 2010), available at <http://www.ncsl.org/?tabid=18906> (last visited Mar. 16, 2010).

⁴ *Id.*



Virginia became the first state in the nation to enact legislation opposing certain health reforms. Virginia enacted a state statute entitled “Health insurance coverage not required,” which will become law on March 10, 2010.⁵

Constitutional Amendments

Section 1, Article X of the State Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by a three-fifths vote of the membership of each house. 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. Section 5(e), Article XI of the State Constitution requires 60-percent voter approval for a constitutional amendment to take effect. An approved amendment will be effective on the first Tuesday after the first Monday in January following the election at which it is approved, or on such other date as may be specified in the amendment or revision.⁶

III. Effect of Proposed Changes:

The joint resolution creates Section 28 in Article I of the Florida Constitution to refer to health care services. Several terms are defined in the resolution, including the following:

- “Compel” includes the imposition of penalties or fines;
- “Direct payment” or “pay directly” means payment for lawful health care services without a public or private third party, not including any employer, paying for any portion of the service;

⁵ See Virginia SB 283 (2010).

⁶ FLA. CONST. art. XI, s. 5(e).

- “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-related service or treatment, to the extent that the service or treatment is permitted or not prohibited by law or regulation, that may be provided by persons or businesses otherwise permitted to offer such services; and
- “Penalties or fines” means 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.

The proposed constitutional amendment is intended to preserve the freedom of Florida residents to provide for their own health care by:

- Prohibiting a law or rule from compelling, directly or indirectly, any person, employer, or health care provider to participate in any health care system;
- Authorizing a person or employer to pay directly for lawful health care services without incurring penalties or fines; and
- Authorizing a health care provider to accept direct payment for lawful health care services from a person or employer without incurring penalties or fines.

The proposed constitutional amendment prohibits any law or rule from prohibiting the purchase or sale of health insurance in private health care systems, unless the law or rule is reasonable and necessary and does not substantially limit a person’s options.

The constitutional amendment states that it does not:

- Affect which health care services a health care provider is required to perform or provide;
- Affect which health care services are permitted by law;
- Prohibit care provided pursuant to workers’ compensation laws;
- Affect laws or rules in effect as of January 1, 2010; and
- Affect health care systems, provided the health care system does not have provisions that punish a person or employer for paying directly for lawful health care services or a health care provider for accepting direct payment from a person or employer for lawful health care services.

The specific statement to be placed on the ballot is provided. This language summarizes the provisions in the constitutional amendment, except it omits the definitions of terms used in the amendment.

An effective date for the amendment is not specified. Therefore, the amendment, if approved by the voters, will take effect on the first Tuesday after the first Monday in January following the election at which it is approved.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of the bill have no impact on public records or open meetings issues under the requirements of Article I, Section 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

If this constitutional amendment is adopted by the voters in Florida, it will directly affect any law or rule that is enacted or adopted after January 1, 2010, by the State of Florida or a local government concerning personal freedoms related to health care coverage.

Depending upon the nature and scope of any federal law subsequently adopted, the federal law could preempt the effect of this proposed constitutional amendment. The Supremacy Clause of the United States Constitution establishes federal law as the “supreme law of the land, and invalidates state laws that interfere with or are contrary to federal law.”⁷ However, the Tenth Amendment to the U.S. Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. Therefore, courts have consistently interpreted the Tenth Amendment to mean that “[t]he States unquestionably do retain a significant measure of sovereign authority. . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”⁸

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption.⁹ There are three types of preemption:

- Express preemption;
- Field preemption; and
- Conflict preemption.

⁷ *ABC Charters, Inc. v. Bronson*, 591 F.Supp.2d 1272 (S.D. Fla. 2008) (quoting *Lozano v. City of Hazleton*, 496 F.Supp.2d 477, 518 (M.D. Pa. 2007)); see also U.S. CONST., art. VI.

⁸ *New York v. United States*, 505 U.S. 144, 156 (1992) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* 752 (1833)).

⁹ 48A FLA. JUR 2D *State of Florida* s. 13.

“Conflict preemption” occurs when “it is impossible to comply with both federal and state law, or when state law stands as an obstacle to the objectives of federal law.”¹⁰ “Field preemption” occurs when federal regulation in a legislative field is so pervasive that Congress left no room for the states to supplement it. “Express preemption” occurs when federal law explicitly expresses Congress’ intent to preempt a state law.¹¹

The Florida constitutional amendment could be subject to a preemption challenge if the amendment is perceived to conflict with a federal law or rule adopted after January 1, 2010, governing health care. If a court concludes that that the amendment does directly conflict with a federal law or rule adopted after January 1, 2010, the Florida constitutional provision could be deemed unconstitutional.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Division of Elections (division) is required to publish the proposed constitutional amendment twice in a newspaper of general circulation in each county. The average cost per word to advertise an amendment is \$94.68. Therefore, the division estimates the cost for advertising this constitutional amendment is \$65,140.¹²

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

¹⁰ *Id.*

¹¹ *Id.*

¹² Department of State, *Bill Analysis: SB 72* (Nov. 18, 2009).

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Regulation on March 4, 2010:

The constitutional amendment, if adopted, will be placed in Article I rather than Article X and references to hospitals within the resolution have been deleted.

- B. **Amendments:**

None.