

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 Judiciary Committee

BILL: CS/SJR 72

INTRODUCER: Health Regulation Committee, Senator Baker, and others

SUBJECT: Health Care Services

DATE: March 17, 2010 REVISED: _____

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

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

II. Present Situation:

Federal Health Care Reform¹

On November 7, 2009, the U.S. House of Representatives approved health care reform legislation, H.R. 3962, the Affordable Health Care for America Act (the House bill). On December 24, 2009, the U.S. Senate passed its version of health care reform, the Patient Protection and Affordable Care Act, in H.R. 3590 (the Senate bill). Health care reform is driven predominantly by long term and growing concerns about access, cost, and quality of health care.

Many of the issues in these two bills are substantially similar, while some issues are approached quite differently. Recent changes in the political party composition in the U.S. Senate appear to have slowed the likelihood of passage of either of these bills or a compromise version of the bills. However, interest remains in pursuing federal legislation that might affect health insurance coverage for people in this country, including Floridians. The provisions in the House bill and the Senate bill are indicative of trends that might be present in future laws concerning health care services. At this point, the exact nature and scope of health care reform at the state or federal level is uncertain.

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.

Currently, neither federal law nor Florida law requires individuals to have health insurance. Massachusetts, for example, requires certain individuals to have health insurance. The state imposes a penalty for each month individuals are without insurance.³

Both the House bill and the Senate bill mandate most individuals to have health insurance, with penalties for noncompliance. The penalty for non-compliance is different in the bills. Both bills offer some form of financial assistance to eligible individuals, but, in most instances, require the individual to obtain insurance that is offered through a government-run exchange to access that assistance.

There is currently no federal or Florida requirement for employers to offer health benefits. Hawaii, for example, requires nearly all employers to provide health insurance to their employees who work 20 hours or more a week for four consecutive weeks under the Prepaid Health Care Act, established in January 1, 1975.⁴ Both the House and Senate bills impose requirements on employers who offer health insurance and on those who do not. Some

¹ For a more detailed summary of the health insurance provisions in the federal health care reform initiatives, see: A *Comparative Analysis of Private Health Insurance Provisions of H.R. 3962 and Senate-Passed H.R. 3590*, prepared by the Congressional Research Service, dated January 8, 2010, available at http://www.ncsl.org/documents/health/CRS_Rpt_Comp_HR3962_HR3590.pdf (last visited on Mar. 15, 2010).

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).

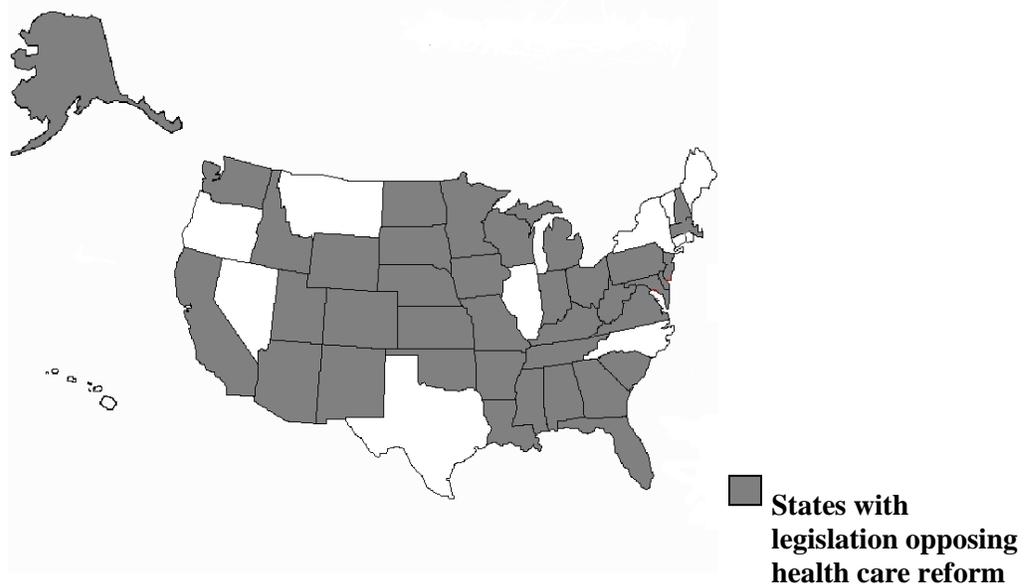
³ See MASS. GEN. LAWS. ANN. ch. 111M, s. 2.

⁴ See HAW. REV. STAT. ch. 393.

businesses would be exempt from the requirements, based on payroll or number of employees. The House bill mandates employers with wages above a certain threshold to provide health insurance, with penalties for non-compliance. While the Senate bill does not specifically impose a mandate, it creates an employer responsibility that results in penalties for non-compliance. Both the House and the Senate bills define benefit packages that must be provided by qualified insurance plans. Such benefit packages specify coverage for certain categories of essential benefits and impose rules regarding cost-sharing, benefit limits, and actuarial values based on essential benefits. Both bills require the Secretary of Health and Human Services to adopt or specify essential benefits, based on broad categories of benefits listed in the bills. Most of the categories listed are the same in both bills: hospitalizations, outpatient/ambulatory services, prescription drugs, rehabilitation, mental health care, substance use disorder services, preventive services, maternity care, and pediatric care.

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.⁵ 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:⁶



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, 2010.⁷

⁵ 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).

⁶ *Id.*

⁷ See Virginia SB 283 (2010).

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.⁸

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;
- “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.

⁸ FLA. CONST. art. XI, s. 5(e).

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.”⁹ 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.”¹⁰

In conducting a preemption analysis in areas traditionally regulated by the states, there is a presumption against preemption.¹¹ There are three types of preemption:

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

“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.”¹²

“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.¹³

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

⁹ *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.

¹⁰ *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)).

¹¹ 48A FLA. JUR 2D *State of Florida* s. 13.

¹² *Id.*

¹³ *Id.*

per word to advertise an amendment is \$94.68. Therefore, the division estimates the cost for advertising this constitutional amendment is \$65,140.¹⁴

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

¹⁴ Department of State, *Bill Analysis: SB 72* (Nov. 18, 2009).