

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB RCC 10-05 Compulsory Health Coverage

SPONSOR(S): Rules & Calendar Council

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

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Rules & Calendar Council	9 Y, 5 N	Thomas	Birtman
1)				
2)				
3)				
4)				
5)				

SUMMARY ANALYSIS

The bill declares that it is the policy of the state that a person may not be “compelled by federal, state, or local government to purchase health insurance or health services, except as a condition of:

1. public employment,
2. voluntary participation in a state or local benefit,
3. operating a dangerous instrumentality, or
4. undertaking an occupation having a risk of occupational injury or illness,

or in case of an actual emergency declared by the Governor when the public health is immediately endangered.”

The bill authorizes the Attorney General to “initiate and otherwise advocate” the policy of the state declared above in any court or administrative forum on behalf of a person in the state “whose constitutional rights may be subject to infringement by an act of Congress respecting health insurance coverage, or subject to the implementation of a federal legislative program relating to or impacting the rights or interests of persons respecting health insurance coverage.”

The bill does not appear to have a significant fiscal impact on state or local government.

The bill takes effect upon becoming a law.

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:

Federal Health Care Reform

The U.S. Congress spent the last year debating an extensive overhaul of the national health care system. On March 21, 2010, the House passed the Senate version of federal health care reform (H.R. 3590) and President Barak Obama signed the bill into law on March 23, 2010. Key policy areas of reform include: 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; expanded regulation of the private insurance market; and revision of the Medicare and Medicaid programs.

The House also passed a "reconciliation" bill on March 21, 2010, and the Senate is currently considering amendments to this bill. Reconciliation legislation is composed entirely of revenue-related amendments to an authorizing bill. In this case, the reconciliation bill, H.R. 4872, is a series of revenue-related amendments to H.R. 3590.

The following table outlines the two bills:¹

Issue	Reconciliation Bill: H.R. 4872 Health Care & Education Affordability Act of 2010	Senate Bill: H.R. 3590 Patient Protections & Affordable Care Act
Mandated individual coverage	Not defined	"minimum essential coverage" as defined in the bill
Individual penalty	The greater of \$695; up to 3X\$695=\$2,085; or 2.5% of household income Phase-in penalty through 2016	\$95-\$750 per person tax

¹ Information for this table is based on versions of H.R. 4872 and H.R. 3590, dated March 19, 2010. 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 April 13, 2010).

Mandated employer offering	Same as H.R. 3590	Required for companies with more than 50 employees
Employer penalty for failure to offer	If at least one full-time employee uses the federal subsidy, then \$2,000 per full-time employee, excluding the first 30 employees tax	If one full-time employee uses the federal subsidy, then \$750 per employee tax
Other employer penalties	For employers who offer health insurance, if at least one full-time employee uses the federal subsidy, then the lesser of \$3,000 for each employee using the subsidy or \$750 per full-time employee tax	For employers who offer health insurance, if at least one full-time employee uses the federal subsidy, then \$750 per employee tax
Health insurance exchanges	Same as H.R. 3590	State-based American Health Benefits Exchanges
Individual subsidy: Exchange participation	Insurance premium credits for incomes at 133% - 400% of the Federal Poverty Level (\$29,326 – \$88,200 for a family of four) to purchase insurance through the Exchanges	Insurance premium credits for incomes at 100% – 400% of the Federal Poverty Level (\$22,050 – \$88,200 for a family of four) to purchase insurance through the Exchanges
Employer subsidy: Exchange participation	Same as H.R. 3590	The “free choice voucher” is available for employees at less than 400% of Federal Poverty Level (\$88,200 for a family of four) whose share of the insurance premium exceeds 8% but is less than 9.8%, and who choose to enroll in an Exchange The voucher is equal to what the employer would have paid for coverage. Employers who offer the free choice voucher will not be subject to penalties for employees who participate in the Exchange
Public option	N/A	N/A
Private insurance market regulation	<ul style="list-style-type: none"> • Guarantee issue and renewability • Grandfather existing individual and group plans but requires grandfathered plans to extend coverage to dependents until age 27; and prohibits rescissions of coverage. Grandfathered plans must meet some new benefit standards by 2014 • Creates Health Insurance Reform Implementation Fund and allocates \$1 billion in funding 	<ul style="list-style-type: none"> • Guarantee issue and renewability • New benefits standards effective in 2014
Mandated state Medicaid expansion	Same as H.R. 3590	Up to 133% of the Federal Poverty Level (\$29,326 for a family of four)
CHIP	Same as H.R. 3590	CHIP block grants funded through 2015
Financing	<ul style="list-style-type: none"> • Excise tax on “Cadillac” plans valued at more than \$10,200 for individuals and \$27,500 for families • Tax increase on HSAs • Impose taxes on certain health care sector segments \$2.5 - \$14.3 billion 	<ul style="list-style-type: none"> • Excise tax on “Cadillac” plans valued at more than \$8,500 for individuals and \$23,000 for families • Tax increase on HSAs • Impose taxes on certain health care sector segments \$2.3 - \$10 billion

The reconciliation bill also includes significant amendments to the Higher Education Act of 1965² by changing the structure of the student loan system.

The Congressional Budget Office (CBO) released an estimate of the direct spending and revenue effects of the combined reconciliation and Senate bills on March 20, 2010.³ CBO estimates the cost of coverage requirements in the two bills to be \$938 billion over the 2010-2019 period.⁴

Prior to enactment of these bills, there was no existing requirement in federal law that individuals maintain health insurance coverage; nor did federal law require employers to provide health insurance to employees.

² 20 U.S.C. 1001, et al.

³ Cost estimate for the amendment in the nature of a substitute for H.R. 4872, incorporating a proposed manager's amendment, Congressional Budget Office, see <http://www.cbo.gov/doc.cfm?index=11379&type=1> (last visited April 13, 2010).

⁴ *Id.*, at 22.

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),⁵ which includes certain health care coverage, as a condition of registering a motor vehicle.⁶ Florida law also requires most employers to carry workers' compensation insurance which includes certain health care provisions for injured workers.⁷

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 issues 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.⁸ Opponents suggest that the decision not to purchase health care coverage is not a commercial activity and cite to *United States v. Lopez*⁹ which held that Congress is prohibited from "...unfettered use of the Commerce Clause authority to police individual behavior that does not constitute interstate commerce."¹⁰

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."¹¹ 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.¹² Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.¹³

⁵ Section 627.736, F.S.

⁶ Section 320.02(5)(a), F.S.

⁷ Workers' compensation insurance provisions are found in Chapter 440, F.S.

⁸ Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).

⁹ 514 U.S. 549 (1995).

¹⁰ 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).

¹¹ *Id.*

¹² 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).

¹³ Hall, *supra* note 25, at 8-9.

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

Supremacy Clause jurisprudence establishes that the U.S. Constitution and federal law possess ultimate authority when in conflict with state law. The Supreme Court has held "...the Supremacy Clause gives the Federal Government 'a decided advantage in the delicate balance' the Constitution strikes between state and federal power."¹⁴ Proponents cite to the Supremacy Clause as 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."¹⁵

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 22 state legislatures, not including Florida.¹⁶ Arizona passed the Freedom of Choice in Health Care Act last year and it will appear on the ballot for voter approval November 2010. Similar measures have failed in Georgia, Indiana, Mississippi and New Hampshire.¹⁷

Nine states are currently considering statutory amendments to prohibit mandated health insurance coverage.¹⁸ In March 2010, Virginia, Utah, and Idaho enacted such a statutory change. 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.¹⁹ Changes to state law failed in New Hampshire.²⁰

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 attorneys general to participate in litigation challenging the individual mandate. Attorney General McCollum argued that Congress lacks Commerce Clause authority to compel individuals to purchase health insurance: "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."²¹

On March 23, 2010, Attorney General McCollum, along with twelve other state Attorneys General (five others have since joined), filed a lawsuit in the U.S. District Court, Northern District of Florida, challenging the constitutionality of H.R. 3590. The complaint contends that H.R. 3590:

- Exceeds Congress' legislative powers under Article I;

¹⁴ *New York v. United States*, 505 US. 144, 160 (1992).

¹⁵ Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).

¹⁶ 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 April 13, 2010).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Chapter Law 46, Idaho Health Freedom Act, effective date June 1, 2010.

²⁰ National Conference of State Legislatures, *supra* note 19.

²¹ Florida Attorney General Bill McCollum, Letter to Congressional Leaders, dated January 19, 2010.

- Constitutes an unlawful capitation or direct tax under Article I²²; and
- Violates state sovereignty under the Tenth Amendment.²³

The Attorneys General request the court to declare H.R. 3590 unconstitutional and enjoin the Secretary of the U.S. Department of Health and Human Services, the Secretary of the U.S. Treasury and the Secretary of the U.S. Department of Labor from enforcing it. No action has yet occurred on the case.

Effect of Proposed Changes

Section 1 of the bill declares that it is the policy of the state that a person may not be “compelled by federal, state, or local government to purchase health insurance or health services, except as a condition of:

1. public employment,
2. voluntary participation in a state or local benefit,
3. operating a dangerous instrumentality, or
4. undertaking an occupation having a risk of occupational injury or illness,

or in case of an actual emergency declared by the Governor when the public health is immediately endangered.”

The bill provides that this declared policy is not to “be construed to prohibit collection of debts lawfully and consensually incurred for health insurance or health services.”

The bill further provides that the Attorney General shall have standing and may “initiate and otherwise advocate” the policy declared in Section 1 of the bill in any court or administrative forum on behalf of a person in the state “whose constitutional rights may be subject to infringement by an act of Congress respecting health insurance coverage, or subject to the implementation of a federal legislative program relating to or impacting the rights or interests of persons respecting health insurance coverage.”

The bill takes effect upon becoming a law.

B. SECTION DIRECTORY:

Section 1 provides the policy of the state regarding the purchase of health insurance or health services.

Section 2 authorizes the Attorney General to pursue litigation in defense of the policy declared in Section 1 of the bill.

Section 3 provides an effective date.

²² U.S. CONST., art. 1, s. 9 provides that “No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” (The Sixteenth Amendment to the United States Constitution provides an exception to this clause of the Constitution. The Amendment states that “Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”)

²³ Complaint, *McCullum v. Sebelius*, No. 3:10-cv-91 (N.D. Fla., filed March 23, 2010).

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill does not appear to have a fiscal impact on state revenues.

2. Expenditures:

This bill does not appear to have any significant fiscal impact on state expenditures. See "D. FISCAL COMMENTS" below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

This bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

This bill does not appear to have any significant fiscal impact on local government expenditures. See "D. FISCAL COMMENTS" below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill itself should not have a direct economic impact on the private sector.

D. FISCAL COMMENTS:

Any direct immediate impact on state expenditures is related to the initiation of a law suit by the Attorney General, which has already been filed.

The long term fiscal impact of the bill is dependent on the outcome of any resulting litigation.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure to funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

The bill creates a policy of the state that conflicts with federal health care legislation and would implicate a "Supremacy Clause" analysis. The Supremacy Clause is a clause in the United States Constitution, Article VI, Clause 2, that establishes the Constitution, Federal Statutes, and U.S. treaties as the highest form of law in the American legal system. However, the congressional action must be based on express authority in the Constitution and "where [the action] does not impermissibly tread upon state sovereignty."²⁴

²⁴ Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).

- B. RULE-MAKING AUTHORITY:
The bill does not appear to require rulemaking.

- C. DRAFTING ISSUES OR OTHER COMMENTS:
None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

N/A