HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 7235 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[1]

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

[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

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.

• **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.

Much of the federal health care reform debate has centered on the cost of reform measures. 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.[2] Together with the education provisions, CBO estimates that federal reform will "produce a net reduction in federal deficits of $143 billion over the 2010-2019 period."[3] Of that total, CBO attributes $19 billion in savings to education

[2] 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 19, 2010).
[3] *Id*., at 2.

provisions.[4] CBO estimates the cost of coverage requirements in the two bills to be $938 billion over the 2010-1019 period.[5] Discretionary spending provisions include:[6]

Agency	Action	Cost
Internal Revenue Service	Implement eligibility determination, documentation and verification processes	$5 - $10 billion over 10 years
Dept of Health & Human Services and Ofc of Personnel Management	Implement changes in Medicare, Medicaid and CHIP	$5 - $10 billion over 10 years

Approximately 32 million nonelderly people would become insured under the bills and CBO estimates that 6 percent of the total population of nonelderly legal residents would remain uninsured.[7]
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.

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),[8] which includes certain health care coverage, as a condition of registering a motor vehicle.[9] Florida law also requires most employers to carry workers' compensation insurance which includes certain health care provisions for injured workers.[10]

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.[11] Opponents suggest that the decision not to purchase health care coverage is not a commercial activity and cite to *United States v. Lopez*[12] which held that Congress is prohibited from

[4] *Id*.
[5] *Id*., at 22.
[6] *Id*., at 11.
[7] *Id*., at 9.
[8] Section 627.736, F.S.
[9] Section 320.02(5)(a), F.S.
[10] Workers' compensation insurance provisions are found in Chapter 440, F.S.
[11] Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).
[12] 514 U.S. 549 (1995).

"…unfettered use of the Commerce Clause authority to police individual behavior that does not constitute interstate commerce."[13]

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."[14] 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.[15] Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.[16]

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."[17] 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."[18]

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.[19] 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.[20]

Nine states are currently considering statutory amendments to prohibit mandated health insurance coverage.[21] 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

[13] 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).
[14] *Id*.
[15] 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).
[16] Hall, *supra* note 25, at 8-9.
[17] *New York v. United States*, 505 U.S. 144, 160 (1992).
[18] Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).
[19] 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).
[20] *Id*.
[21] *Id*.

it enacts laws that compel the purchase health insurance.[22] Changes to state law failed in New Hampshire.[23]

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."[24]

On March 23, 2010, Attorney General McCollum, along with twelve other state Attorneys General (six 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;
- Constitutes an unlawful capitation or direct tax under Article I[25]; and
- Violates state sovereignty under the Tenth Amendment. [26]

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."

[22] Chapter Law 46, Idaho Health Freedom Act, effective date June 1, 2010.
[23] National Conference of State Legislatures, *supra* note 19.
[24] Florida Attorney General Bill McCollum, Letter to Congressional Leaders, dated January 19, 2010.
[25] 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.")
[26] Complaint, McCollum v. Sebelius, No. 3:10-cv-91 (N.D. Fla., filed March 23, 2010).

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.

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."[27]

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

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