

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HR 1561 Federal Health Care Legislation

**SPONSOR(S):** Eisnaugle and others

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

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	<u>Health &amp; Family Services Policy Council</u>	<u></u>	<u>Quinn</u>	<u>Gormley</u>
2)	<u>Rules &amp; Calendar Council</u>	<u></u>	<u></u>	<u></u>
3)	<u></u>	<u></u>	<u></u>	<u></u>
4)	<u></u>	<u></u>	<u></u>	<u></u>
5)	<u></u>	<u></u>	<u></u>	<u></u>

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**SUMMARY ANALYSIS**

House Resolution 1561 urges the Florida Attorney General to file suit challenging the constitutionality of any individual health care mandate passed into law by the federal government. The Resolution provides that a copy be presented to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and each member of the Florida Congressional delegation.

## 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:

##### Background

##### **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:<sup>1</sup>

Issue	Senate Bill: H.R. 3590 Patient Protections & Affordable Care Act	House Bill: H.R. 3962 Affordable Health Care for America Act
<b>Mandated individual coverage</b>	"minimum essential coverage" as defined in the bill	"acceptable coverage" as defined in the bill
<b>Individual penalty</b>	\$95-\$750 per person tax	2.5% of gross adj. income fine
<b>Mandated employer offering</b>	Required for companies with more than 50 employees	Required for companies with an annual payroll of greater than \$750,000
<b>Employer penalty for failure to offer</b>	\$750 per employee tax, if one full-time employee uses the federal subsidy	8% payroll tax fine
<b>Other employer penalties</b>	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
<b>Health insurance exchanges</b>	State-based American Health Benefits Exchanges	National Health Insurance Exchange
<b>Individual subsidy: Exchange participation</b>	Insurance premium credits	Insurance premium credits
<b>Public option</b>	N/A	Public insurance option offered through the National Exchange
<b>Private insurance market regulation</b>	Guarantee issue and renewability	Guarantee issue and renewability
<b>Mandated state Medicaid expansion</b>	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)
<b>CHIP</b>	CHIP block grants funded through 2015	Repeal CHIP; enrollees required to participate in National Exchange

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

### 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.<sup>2</sup> 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."<sup>3</sup>

#### *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

<sup>1</sup> 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](http://www.politico.com/static/PPM136_100104_health_reform_conference.html) (last visited March 17, 2010).

<sup>2</sup> Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> Opponents cite U.S. Supreme Court case law that prohibits "a tax to regulate conduct that is otherwise indisputably beyond [Congress'] regulatory power."<sup>6</sup>

### *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."<sup>7</sup> 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.<sup>8</sup> Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.<sup>9</sup>

### *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."<sup>10</sup> 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."<sup>11</sup>

### **Attorney General Actions**

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.

On March 17, 2010, Idaho's Governor signed into law HB 391, the Idaho Health Freedom Act.<sup>12</sup> Among other things, the Act requires the Idaho Attorney General to, "seek injunctive relief and other appropriate relief as expeditiously as possible" in the event an individual health care mandate is passed

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<sup>4</sup> *Helvering v. Davis*, 301 U.S. 619 (1937).

<sup>5</sup> Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O'Neill Institute, at 7.

<sup>6</sup> 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.

<sup>7</sup> Rivkin at 3.

<sup>8</sup> 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).

<sup>9</sup> Hall at 8-9.

<sup>10</sup> *New York v. United States*, 505 U.S. 144, 160 (1992).

<sup>11</sup> Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).

<sup>12</sup> Like Idaho, the Legislatures in Virginia and Utah have passed statutes related to reform. The Arizona Legislature has passed a proposed constitutional amendment.

by any government, subdivision or agency thereof. Legislative proposals have been filed in more than 30 other states related to federal health care reform.<sup>13</sup>

### **House Resolution 1561**

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In Support of the resolution, HR 1561 provides the following "whereas clauses"

- Whereas, the United States Constitution establishes a limited federal government, as expressed in the Bill of Rights, that protects the freedom of individuals and the rights of states
- Whereas, the United States Congress is currently debating the issue of health care reform and legislation such as the Patient Protection and Affordable Care Act (Senate H.R. 3590) and the Affordable Health Care for America Act (House H.R. 3962)
- Whereas, the United States Congress is urged to enact legislation that respects and recognizes the rights of individuals, families, groups, and communities to make decisions about their health care insurance and treatment options
- Whereas, the "individual mandate" provision included in Senate H.R. 3590, House H.R. 3962, and President Barack Obama's health care plan requires all individuals to purchase health insurance products and services
- Whereas, such individual mandates are contrary to the rights of a free and prosperous people and deny individuals the right to make one of the most basic health care decisions for themselves and their loved ones
- Whereas, the United States Supreme Court has recognized each individual's freedom to refuse health care treatment
- Whereas, on January 19, 2010, Attorney General Bill McCollum sent to Congressional leaders an analysis in which he outlined the unconstitutionality of the individual healthcare mandates
- Whereas, according to his analysis, the United States Congress does not possess the constitutional authority to compel individuals under threat of government fines or taxes to purchase an unwanted product or service simply as a condition of living in this country
- Whereas, if the individual mandate provision becomes law, the Attorney General has stated that he will be compelled to challenge the constitutionality of that provision, and other states may also join in the challenge

#### **B. SECTION DIRECTORY:**

Not applicable.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

#### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

##### **1. Revenues:**

None.

##### **2. Expenditures:**

None.

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<sup>13</sup> *State Legislation Opposing Certain Health Reforms*, National Conference of State Legislatures; located at <http://www.ncsl.org/IssuesResearch/Health/StateLegislationOpposingCertainHealthReforms/tabid/18906/Default.aspx?tabid=18906> (last viewed on March 18, 2010).

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

Not applicable because this resolution does not appear to: require the counties or cities to spend funds or take action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**