HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HJR 1 Health Care Services
SPONSOR(S): Health & Human Services Quality Subcommittee; Plakon and others
TIED BILLS: **IDEN./SIM. BILLS:** SJR 2

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee	10 Y, 4 N, As CS	Poche	Calamas
2) State Affairs Committee			
3) Health & Human Services Committee			

SUMMARY ANALYSIS

House Joint Resolution 1 proposes a ballot initiative to provide for the creation of Section 28 of Article I of the Florida Constitution relating to health care. Specifically, the constitutional amendment:

- Prohibits a law or rule from compelling, directly or indirectly, any person or employer to purchase, obtain, or otherwise provide health care coverage.
- Allows a person or employer to pay directly for lawful health care services and allows a health care provider to accept direct payment for lawful health care services.
- Prohibits the imposition of taxes or penalties on individuals and medical care providers who choose to participate in a direct payment system.
- Allows for the purchase or sale of health insurance in private health care systems to be free from prohibition by rule or law.
- Exempts laws or rules in effect as of March 1, 2010.

The joint resolution provides definitions for certain terms and includes a ballot summary.

This joint resolution has a negative, non-recurring fiscal impact on state government. The Department of State, Division of Elections, estimates a cost of approximately $90,537.42 for FY 11-12. The cost is a result of placing the joint resolution on the ballot and publishing two constitutionally required notices.

The joint resolution does not contain a specific effective date. Therefore, pursuant to the Florida Constitution, if adopted by the voters at the 2012 General Election, the resolution would take effect on January 8, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current Situation

Patient Protection and Affordable Care Act

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act ("PPACA")[1], as amended by the Health Care and Education Reconciliation Act of 2010[2]. PPACA, as amended, consists of 2,562 pages of text and several hundred sections of law.[3] The law contains comprehensive reform of the entire health care system in the United States. Most of the PPACA provisions take effect in 2014; however, many changes are phased in starting from the day the bill with signed on March 23, 2010 and continuing through 2019.

Effective for plan years that begin after September 23, 2010:

- All new private health insurance plans are required to cover immunizations, preventive care for infants, children and adolescents, and additional preventive care and screenings for women.
- Health insurers are prohibited from rescinding insurance coverage from members of a health insurance plan, except in case of fraud or material misrepresentation.
- Denial of coverage by health insurers for children with pre-existing conditions is prohibited.
- No lifetime limits on the amount paid out by the health insurance plan.
- No copayments or deductibles for certain preventative services.
- Coverage is required for dependents up to 26 years of age.

In 2011, health insurance companies are required to spend at least 85 percent of premium dollars on medical services in large group policy markets and 80 percent of premium dollars on medical services in small group and individual policy markets. Failure to reach the new medical loss ratio targets will result in the issuing of rebates to policyholders by insurers.

Effective in 2014:

- Health insurance coverage will be mandatory for almost all U.S. citizens. Those who do not purchase health insurance will be fined by the U.S. government through enforcement by the Internal Revenue Service. The fine increases from $95 in 2014 to $750 in 2016, and is indexed for subsequent years.[4] Exemptions for mandatory health insurance coverage will be granted for American Indians, in cases of extreme financial hardship, for those objecting to the mandatory provision for religious reasons, individuals without health insurance for less than three months, and individuals in prison.[5]
- Health insurance exchanges will be established, from which citizens can purchase health insurance coverage that meets the minimum essential coverage provisions of PPACA.
- Companies with 50 or more full time employees that do not provide health insurance coverage to its workers, resulting in at least one worker qualifying for a subsidy to purchase health

[1] P.L. 111-148, 124 Stat. 119 (2010)
[2] P.L. 111-152, 124 Stat. 1029 (2010)
[3] Michael D. Tanner, *Bad Medicine: A Guide to the Real Costs and Consequences of the New Health Care Law: Updated and Revised for 2011*, at page 49 (FN #3), February 14, 2011; available at http://www.cato.org/pubs/wtpapers/BadMedicineWP.pdf.
[4] The federal government expects to raise $17 billion from penalties by 2019. *See* Letter from Douglas Elmendorf, director, Congressional Budget Office, to U.S. House of Representatives Speaker Nancy Pelosi, March 18, 2010, table 2. Roughly 4 million Americans will be hit by penalties in 2016, with the average penalty costing slightly more than $1,000. *See* Congressional Budget Office and the staff of the Joint Committee on Taxation, *"Payments of Penalties for Being Uninsured under PPACA"*, April 22, 2010.
[5] Hinda Chaikind, et al., *Private Health Insurance Provisions in Senate-Passed H.R. 3590, the Patient Protection and Affordable Care Act*, CRS Report R40942

insurance coverage through an exchange, must pay a tax penalty of $2,000 for every full time employee, less 30 workers.[6]
- An excise tax will be imposed on health care plans costing more than $10,200 for individual coverage and $27,500 for family coverage.
- No denials of coverage to anyone with a pre-existing condition.
- All plans must cover federally defined "essential benefits".
- Plan rating factors will be set by federal law, which limits the degree of pricing differential among differently situated people.

Other provisions of PPACA include:
- Medicaid eligibility is expanded to include those individuals with incomes up to 138 percent of the federal poverty level, resulting in coverage to 32 million previously uninsured Americans by 2019.
- Medicare payment rates for certain services will be permanently reduced.
- Various additional changes will be made to the federal tax code, Medicare, Medicaid, and other social programs necessary to fully implement the new law.

Today, nearly 1 in 4 Americans is receiving Medicaid benefits.[7] Over the next ten years, the federal government will spend $4.4 trillion on the Medicaid program.[8] The CBO originally estimated new state spending on Medicaid, as a result of the provisions of PPACA, at $20 billion between 2017 and 2019. More recently, the CBO has estimated a cost to the states of $60 billion through 2021.[9] However, a report issued by the Senate Finance Committee conservatively estimates that PPACA will cost state taxpayers at least $118.04 billion through 2023.[10]

The Florida Agency for Health Care Administration has estimated the financial impact of added Medicaid costs to the state, under the provisions of PPACA, to be $12.944 billion from FY 2013 through FY 2023.[11]

State Reaction to Federal Health Care Reform

After PPACA was enacted, some members of 40 state legislatures proposed legislation to limit, alter, or oppose selected state or federal actions, including single-payer provisions and mandates that would require purchase of insurance.[12] Three states placed proposed constitutional ballot questions on their November 2010- Arizona, Colorado, and Oklahoma.[13] The ballot question was approved in Arizona and Oklahoma, but was rejected in Colorado.[14] Idaho called for the creation of the 28th Amendment to the U.S. Constitution to prohibit Congress from making law requiring citizens to enroll in, participate in, or secure health care insurance or to penalize any citizen who declines to purchase or participate in

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[6] S. 4908H(a), PPACA, as amended by the Reconciliation Act, s. 1003 (2010). The Congressional Budget Office estimates that company penalties will cost businesses $52 billion from 2014 through 2019. *See* Letter from Douglas Elmendorf, director, Congressional Budget Office, to U.S. House of Representatives Speaker Nancy Pelosi, March 18, 2010. At least 728 waivers have been issued to employers by the Obama administration as of February 2011, exempting the employers from the provisions of PPACA. The list is available at http://www.hhs.gov/ociio/regulations/approved_applications_for_waiver.html (last viewed March 25, 2011).
[7] Congressional Budget Office, *Spending and Enrollment Detail for CBO's August 2010 Baseline: Medicaid*, August 2010; available at http://www.cbo.gov/budget/factsheets/2010d/MedicaidAugust2010FactSheet.pdf.
[8] Office of Management and Budget, *FY 2012 Budget of the U.S. Government*, February 2011; available at http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/budget.pdf.
[9] *Medicaid Expansion in the New Health Law: Costs to the States*, Joint Congressional Report by Senate Finance Committee, U.S. Congress, March 1, 2011, at page 1; available at http://energycommerce.house.gov/media/file/PDFs/030111MedicaidReport.pdf.
[10] *Id.* at pg. 2.
[11] *Overview of Federal Affordable Care Act*, Florida Agency for Health Care Administration, January 4, 2011; available at http://ahca.myflorida.com/Medicaid/Estimated_Projections/medicaid_projections.shtml.
[12] State Legislation and Actions Challenging Certain Health Reforms, 2010-11, National Conference of State Legislatures, http://www.ncsl.org/IssuesResearch/Health/StateLegislationampActionsChallengingCertai/tabid/18906/Default.aspx?tabid=18906, last accessed January 20, 2011.
[13] *See id.*
[14] *See id.*

any health care insurance.[15] Florida also adopted a non-binding resolution referencing a federal constitutional amendment process.[16]

Sixteen states proposed legislation to amend state law rather than amend the state constitution. Virginia became the first state to enact such a law on March 10, 2010. The states of Georgia, Idaho, Louisiana, Missouri, Utah and Arizona have also enacted similar laws.

HJR 37

On April 22, 2010, during the 2010 Regular Session of the Florida Legislature, both the House of Representatives and the Senate passed HJR 37, which contained nearly identical language as what appears in current HJR 1, by a three-fifths vote in each chamber. HJR 37 proposed to create Section 28 of Article I of the Florida Constitution relating to health care services. Again, HJR 37 contained nearly the same language as that which appears in HJR 1, with a small exception, to be discussed further below.

Following passage of HJR 37, it was signed by the Speaker of the House of Representatives and President of the Senate and filed with the Department of State for inclusion on the statewide ballot for the 2010 General Election. The language contained in HJR 37 was designated as Amendment 9 by the Division of Elections. A group of Florida voters filed a complaint in the Second Judicial Circuit Court in Tallahassee asking the court to determine whether the ballot summary contained in Amendment 9 complied with the requirements of Florida statutes related to proposed constitutional amendments and the numerous appellate court decisions interpreting the applicable Florida statutes.[17]

The Second Circuit determined that the ballot summary for Amendment 9 was misleading and ordered it removed from the November 2010 ballot.[18] Specifically, the court found that the following three phrases found in the ballot summary were misleading:

- "…to ensure access to health care services without waiting lists…"
- "…protect the doctor-patient relationship…"
- "…guard against mandates that don't work…"[19]

Each of these three phrases were determined to be examples of the kind of comments that the Florida Supreme Court has held may not be included in ballot summaries. As a result, the Second Circuit concluded that the ballot summary contained in Amendment 9 did not comply with the applicable Florida statute.[20]

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[15] *See id.*
[16] *See id.*
[17] Fla. Dept. of State v. Mangat, 43 So.3d 642, 646 (Fla. 2010); s. 101.161(1), F.S., states, "Whenever a constitutional amendment or other public measure is submitted to the vote of the people, the substance of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word 'yes' and also by the word 'no', and shall be styled in such a manner that a 'yes' vote will indicate approval of the proposal and a 'no' vote will indicate rejection. The wording of the substance of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the joint resolution, constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. Except for amendments and ballot language proposed by joint resolution, the substance of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with s. 100.371(5). The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of."
[18] *See id.* at 647
[19] *See id.*
[20] *See id.*

The Secretary of State then asked the Second Circuit to substitute the text of Amendment 9 for the ballot summary, rather strike the entire amendment from the ballot. The court ruled that its sole function was to determine if the ballot summary, ballot title and the amendment complied with Florida statutes. The court further stated, "…it was not empowered to correct the acts of the Legislature, even if its failure to do so resulted in the amendment being struck from the ballot."[21]

The Department of State filed an appeal to the First District Court of Appeal in Tallahassee. In addition, the Department filed an unopposed suggestion of certification to the Florida Supreme Court. The First District certified that the judgment of the Second Circuit Court presented a matter of great public importance that required immediate resolution by the Florida Supreme Court, and the Court accepted the case on appeal. Following a detailed analysis of statutory law and the current case law on the constitutional requirement of amendments and ballot summaries, the Florida Supreme Court agreed that the ballot language contained in Amendment 9 was misleading and ambiguous.[22] The only option available to the Court to correct the misleading and ambiguous language was to strike Amendment 9 from the November 2010 ballot.[23]

HJR 1 has removed the offensive phrases from the ballot summary. The remainder of the Joint Resolution is identical to the text of HJR 37.

Massachusetts Health Insurance Mandate

In 2006, to address rising costs, the state of Massachusetts passed a health care reform initiative which requires every Massachusetts resident to have minimum health insurance coverage, whether from the private market or through public assistance.[24] The law requires:

- Employers with ten or more employees to offer health insurance to their employees;
- Monetary penalties to be assessed on individuals and employers for non-compliance;
- An individual to report coverage compliance on his state income tax return; and
- Subsidies for individuals and families who do not meet a certain income threshold.

The legislation directed the state to set up a health insurance exchange, the "Commonwealth Connector", from which individuals may purchase insurance. The Commonwealth Connector also regulates the private health insurance market in the state.

Studies suggest that the Massachusetts health insurance mandate has not achieved projected cost savings to the state. In effect, the health system overhaul in the state was an expansion of Medicaid, increasing state enrollment 25 percent since 2006.[25] Of the 410,000 newly insured individuals in Massachusetts under the new program, three in four individuals are paying nothing or very little for health insurance coverage. State funding for the Commonwealth Connector and public assistance has increased government spending on health insurance programs by 42 percent.[26] In addition, the state spends $414 million on uncompensated care, which was to have been eliminated through the health care overhaul in 2006. Cost to the individual has also risen as insurance premiums increased 40 percent from 2003 to 2008.[27]

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[21] *See id.*
[22] *See id.* at 651.
[23] *See id.*
[24] Chapter 58 of the Acts of 2006, An Act Relating to Affordable, Quality, Accountable Health Care (April 12, 2006).
[25] Sally C. Pipes, *Has Massachusetts Experience Put ObamaCare on a Path to Repeal?*, Investor's Business Daily (January 12, 2011), accessed at http://www.investors.com/NewsAndAnalysis/Article.aspx?id=559597&p=1.
[26] Kevin Sack, "Massachusetts Faces Costs of Big Health Plan", New York Times, see http://www.nytimes.com/2009/03/16/health/policy/16mass.html March 15, 2009.
[27] Cathy Schoen, *Paying the Price; How Health Insurance Premiums are Eating Up Middle-class Incomes*, The Commonwealth Fund, see http://www.commonwealthfund.org/Content/Publications/Data-Briefs/2009/Aug/Paying-the-Price-How-Health-Insurance-Premiums-Are-Eating-Up-Middle-Class-Incomes.aspx (August 2009).

In 2008, two years after passage of reform, Massachusetts health insurance premiums for family coverage exceeded the national average by $1,500.[28] Indeed, health insurance premiums prior to the health care overhaul increased at a rate 3.7 percent slower that the national average.[29] After the health care overhaul in Massachusetts, health insurance premiums are increasing 5.8 percent faster than the national average. When surveyed two years after implementation, Massachusetts residents still supported the mandate, but 51 percent believed their health care costs had risen as a result.[30] The uninsured rate in Massachusetts is 4.1 percent.[31] Slightly more than 35 percent of the remaining uninsured residents of Massachusetts are between the ages of 18 and 25, and slightly more than 60 percent of the remaining uninsured residents are under the age of 35.[32] Before the health insurance mandate was enacted in Massachusetts, residents between the ages of 18 and 25 made up roughly 30 percent of the uninsured population.[33] The state's safety-net hospitals indicate that a large percentage of patients seeking care are uninsured. From 2006 to 2008, emergency room use increased by 9 percent. However, reform measures reduced the level of payments to hospitals for charity care.[34][35] One essential difference between the Massachusetts health reform plan and federal health care reform is that Massachusetts exercised is state police power as authority for creating its' health reform plan, which includes an individual mandate for purchasing health insurance. Police powers are reserved to the states by the U.S. Constitution.[36]

Florida Health Insurance Mandates

Florida law does not require state residents to have health insurance coverage. However, Florida law does require drivers to carry Personal Injury Protection ("PIP"), which includes certain health care coverage, as a condition of receiving a state driver's license.[37] Florida also requires most employers to carry workers' compensation insurance which includes certain health care provisions for injured workers.[38] While Florida does not require residents to have health insurance, the state does impose nearly 50 coverage mandates, including mandated offerings, on those who do have insurance.[39]

Legal Challenges to PPACA

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[28] *Id*.
[29] John C. Cogan, et al., *The Effect of Massachusetts' Health Reform on Employer-Sponsored Insurance Premiums*, Forum for Health Economics & Policy: Vol. 13: Iss. 2, Article 5 (2010); abstract accessed at http://www.bepress.com/fhep/13/2/5.
[30] Robert J. Blendon, et al., *Massachusetts Health Reform: A Public Perspective from Debate Through Implementation*, Health Affairs, 27:6, at 559, 562 (2008).
[31] Joanna Turner, et al., *A Preliminary Evaluation of Health Insurance Coverage in the 2008 American Community Survey*, U.S. Bureau of the Census, see www.census.gov/hhes/www/hlthins/2008ACS_healthins.pdf (September 22, 2009).
[32] Sharon Long, *"On the Road to Universal Coverage: Impacts of Reform in Massachusetts"*, Health Affairs (July/August 2008): w270-w284, ex. 6.
[33] Allison Cook and John Holahan, *"Health Insurance Coverage and the Uninsured in Massachusetts: An Update Based on the 2005 Current Population Survey Data"*, Blue Cross Blue Shield of Massachusetts Foundation, 2006.
[34] See "Some Massachusetts Safety Net Hospitals Face Budget Problems Because of Health Insurance Law", Kaiser Daily Health Report (March 19, 2008).
[35] For detailed discussion of the Massachusetts Health Insurance Mandate, see Michael Tanner, *Massachusetts Miracle or Massachusetts Miserable: What the Failure of the 'Massachusetts Model' Tells Us about Health Care Reform*, Briefing Paper No. 112, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=10268 (June 9, 2009); see also Aaron Yelowitz and Michael F. Cannon, *The Massachusetts Health Plan: Much Pain, Little Gain*, Policy Analysis No. 657, Cato Institute, see http://www.cato.org/pub_display.php?pub_id=11115 (January 20, 2010).
[36] Amendment X, U.S. Constitution; the specific enumerated powers granted to the federal government can be found in Article I, Section 8, U.S. Constitution.
[37] S. 627.736, F.S.
[38] Workers' compensation insurance provisions are found in Chapter 440, F.S.
[39] Victoria Craig Bunce and JP Wieske, *Health Insurance Mandates in the States 2010*, Council for Affordable Health Care; available at http://www.cahi.org/cahi_contents/resources/pdf/MandatesintheStates2010.pdf. For example, Florida mandates coverage for alcoholism and substance abuse, diabetic supplies, orthotics and/or prosthetics, and well child care.

On the same day that PPACA was signed into law by President Obama, Florida's Attorney General Bill McCollum filed a federal lawsuit in Pensacola challenging the constitutionality of the new law.[40] At the time suit was filed, Florida was joined by twelve states, by and through their individual attorneys general. Currently, twenty six states, the National Federation of Independent Business, and two private individuals are plaintiffs in the federal action. In addition, Virginia filed its own federal lawsuit challenging the constitutionality of PPACA.[41]

In total, twenty four constitutional challenges to PPACA were filed in federal courts across the country.[42] The majority of lawsuits challenge the mandate that requires individuals to purchase health insurance.[43] Other constitutional issues raised in the federal lawsuits include the imposition of a fine for failing to purchase health insurance, whether or not the federal government has constitutional authority to institute health care reform, establishing financial disclosure rules for doctors, and changes made to Medicaid and Medicare.[44]

The Florida lawsuit argues that the federal government violates the Commerce Clause of the U.S. Constitution by forcing individuals to purchase health insurance or pay a penalty. In addition, the lawsuit targets the expansion of eligibility for Medicaid as an infringement on states' rights. The choice given the states by the new law, according to the lawsuit, is to fully shoulder the costs of health care or forfeit federal Medicaid funding by opting out of the system. Finally, the suit contends that the expansion of Medicaid eligibility to include individuals within 138 percent of the federal poverty level "commandeers" states and their resources to complete federal tasks and achieve federal goals, all in violation of the Tenth Amendment to the Constitution.[45]

On January 31, 2011, Judge Vinson of the District Court for the Northern District of Florida in Pensacola entered an Order granting the plaintiffs' Motion for Summary Judgment and declared the individual mandate provision of PPACA unconstitutional.[46] Judge Vinson also ruled that, because the provisions of PPACA were rendered ineffective without the individual mandate and because the law lacked a severability clause, the entire Act was void.

Currently, the federal government has complied with certain terms established by Judge Vinson to stay his order. The terms included a provision that the federal government seek an expedited review of the order on summary judgment by the 11th Circuit Court of Appeals in Atlanta. The federal government filed an appeal and petitioned for expedited review on March 8, 2011. The 11th Circuit has scheduled the deadlines for filing briefs, beginning with the federal government's brief due on April 4, 2011. Based on the briefing schedule, oral argument will likely be held in early June 2011. An opinion is likely to be issued in late summer or early fall 2011.

Congressional Authority and Constitutionality

The federal lawsuits filed by several states challenging the constitutionality of PPACA focus on one or more of the following 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

[40] State of Florida v. U.S. Dept. of Health and Human Services, Case No.: 3:10-cv-91-RV/EMT (N.D. Fla.)
[41] State of Virginia v. Kathleen Sebelius, Case No.: 3:10-cv-188-HEH (E.D. Va.)
[42] A list of all cases that have been filed to challenge the constitutionality of PPACA can be found at http://healthcarereform.procon.org/view.resource.php?resourceID=004134, last accessed on March 27, 2011; see also ACA Litigation Snapshot Overview, http://acalitigationblog.blogspot.com, last accessed March 25, 2011.
[43] *Id.*
[44] *Id.*
[45] Kathleen S. Swendiman, *Health Care: Constitutional Rights and Legislative Powers*, CRS Report R40846, page 10, FN 66.
[46] Florida v. U.S. Dept. of HHS, ---F.Supp.2d---, 2011 WL 285683 (N.D. Fla.)

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.[47] 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".[48]

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 be reasonable.[49] 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.[50] Opponents cite U.S. Supreme Court case law that prohibits "a tax to regulate conduct that is otherwise indisputably beyond [Congress'] regulatory power".[51]

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."[52] 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.[53] Proponents for reform suggest that Tenth Amendment jurisprudence only places wide and weak boundaries around Congressional regulatory authority to act under the Commerce Clause.[54]

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."[55] 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."[56]

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[47] Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, N. Eng. J. Med. 362:6, at 482 (February 11, 2010).
[48] 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).
[49] *Helvering v. Davis*, 301 U.S. 619 (1937).
[50] Mark A. Hall, *The Constitutionality of Mandates to Purchase Health Insurance*, Legal Solutions in Health Reform project, O'Neill Institute, at 7.
[51] David 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.
[52] *Id.*
[53] 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).
[54] Hall, *supra* note 16, at 8-9.
[55] *New York v. United States*, 505 U.S. 144, 160 (1992).
[56] Clint Bolick, *The Health Care Freedom Act: Questions and Answers*, Goldwater Institute, at 3 (February 2, 2010).

Federal Preemption Doctrine

The federal preemption doctrine may be invoked in determining the impact of the joint resolution on the Legislature's potential obligations to ensure that the provisions of PPACA are made effective in Florida.

The federal preemption doctrine is derived from the Supremacy Clause of the U.S. Constitution[57], which reads, in part, "…Constitution and the laws of the U.S. … shall be the supreme law of the land…anything in the constitutions or laws of any State to the contrary notwithstanding." In other words, federal law, whether found in the Constitution or statute, will trump state law.

Preemption may be express or implied, and is compelled whether Congress' command is explicitly stated within the language of the statute or is implicitly contained in its structure and purpose.[58] Preemption is implied when there is a conflict between a federal law and a state law.[59] There is a conflict between federal law and state law when the dictates of both laws cannot be complied with or where dual compliance with the laws may be technically possible but the state law creates an obstacle to fulfilling the federal policy and goals.[60]

Effect of Proposed Changes

House Joint Resolution 1 proposes the creation of Section 28 of Article I of the Florida Constitution relating to health care. The resolution prohibits any rule or law that directly or indirectly compels any person or employer to purchase, obtain, or otherwise provide for health care coverage.

The resolution authorizes any person or employer to pay directly for health care services and provides that persons or employers shall not incur a penalty or fine for direct payment. The resolution authorizes a health care provider to accept direct payment and provides that such health care provider will not incur a penalty or tax for accepting direct payment. This provision allows a person or employer to purchase health care services without participation in a health care system or plan.

The resolution prohibits any law or rule which abolishes the private market for health care coverage of any lawful health care service. This provision would allow the purchase or sale of private insurance to individuals regardless of a mandate requiring individuals to have health insurance coverage.

The resolution directs that its provisions do not affect:

- Required performance of services by a health care provider;
- Health care services permitted by law;
- Workers' compensation care as provided by general law;
- Laws or rules in effect as of March 1, 2010; and
- Any health care system terms and conditions that do not provide punitive measures against persons, employers, or health care providers for direct payment; except that the section does not prohibit any negotiated provision in an agreement that contractually limits copayments, coinsurance, deductibles, or other patient charges.
- Any general law passed by two-thirds vote of the membership of the House of Representatives and the Senate after the effective date of the resolution, if the law specifically states the public necessity that justifies the exception to the section.

The resolution provides definitions or usage for the following terms:

[57] Article VI, U.S. Constitution
[58] *See* FMC Corp. v. Holliday, 498 U.S. 52, 56-57, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990).
[59] *See* Talbott v. Am. Isuzu Motors, Inc., 934 So.2d 643, 645 (Fla. 2nd DCA 2006).
[60] *See id.*

- "Compel" includes the imposition of penalties or taxes.
- "Direct payment" or "pay directly" means payment for health care services without the use of a public or third party, excluding any employers.
- "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 it participants.
- "Lawful health care services" means any health care service offered by legally authorized persons or businesses, provided that such services are permitted or not prohibited by law or regulation.
- "Penalties or taxes" mean 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 resolution provides for a ballot summary which describes the provisions of the constitutional amendment in plain language.

The joint resolution does not contain a specific effective date. Therefore, if adopted by the voters at the 2012 General Election, the resolution would take effect on January 8, 2013.[61]

B. SECTION DIRECTORY:

Not applicable.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

Non-recurring FY 2011-2012

According to information received from the Department of State, Division of Elections, the bill will cost approximately $90,537.42 in non-recurring General Revenue costs for the cost of publication. See Fiscal Comments for further explanation.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

[61] Article XI, s. 5(e), Fla. Const.

None.

D. FISCAL COMMENTS:

Each constitutional amendment is required to be published in a newspaper of general circulation in each county, once in the sixth week and once in the tenth week preceding the General Election.[62] Costs for advertising vary depending upon the length of the amendment. According to the Department of State, Division of Elections, the average cost of publishing a constitutional amendment is $106.14 per word. The word count for HJR 1 is 853 words, including both the text of the amendment and the ballot title and summary. 853 words X $106.14 = $90,537.42.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Article XI, Section 1 of the Florida Constitution authorizes the Legislature to propose amendments to the State Constitution by joint resolution approved by three-fifths of the elected membership of each house. If agreed to by the Legislature, 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. The joint resolution would be submitted to the voters at the 2012 general election and must be approved by at least 60 percent of the voters voting on the measure. Assuming that PPACA is found to be constitutional and is implemented as the law of the land, this joint resolution will conflict with the individual mandate provision of the Act. Under the current doctrine of federal preemption, this joint resolution may be found to be implicitly preempted by PPACA.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The language of the Resolution may impact the legal arguments of the State in ongoing federal litigation. For example, the term "compel" is defined to include payment of penalties and taxes. There is tax case law that establishes a significant legal difference between a tax and a penalty, and the federal government's constitutional ability to impose both in certain cases.[63]

[62] Art. XI, s. 5(d), Fla. Const.

[63] Article I, s. 8 of the U.S. Constitution, known as the General Welfare Clause, provides Congress with independent taxation power. The power of Congress to lay and collect taxes, duties and excises requires only that it be a revenue raising measure and that the associated regulatory provisions bear a "reasonable relation" to the statute's taxing power. *See* United States v. Aiken, 974 F.2d 446, 448 (4th Cir. 1992); *see also* Sozinsky v. United States, 300 U.S. 506, 513 (1937). The U.S. Supreme Court has recognized the

The resolution includes a "date certain" exclusion to exempt all laws and rules in effect as of March 1, 2010 from compliance with the provisions of this rule. However, the effect of this provision is unclear. While there are many rules and laws that fall under this provision and are currently in effect, it is unclear if even minor changes to the laws or rules could be made without a two-thirds vote of the Legislature, or risk violating the amendment.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 29, 2011, the Health and Human Services Quality Subcommittee adopted a strike-all amendment. The strike-all amendment conforms the language of HJR 1 to CS/SJR 2. Specifically, the strike-all amendment:

- Prohibits a law or rule compelling any person or employer to purchase, obtain, or otherwise provide for health care coverage
- Removes reference to "health care system" and "private health care systems" in certain sections
- Replaces "penalties or fines" with "penalties or taxes"
- Removes and replaces language in the ballot summary consistent with the changes made in the text of the proposed constitutional amendment.

In addition, the strike-all amendment changes the title of the proposed section of the Florida Constitution from "health care services" to "health care freedom."

The bill was reported favorably as a Committee Substitute. The analysis reflects the Committee Substitute.

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importance of the difference between the two terms, holding "the two words [tax versus penalty] are not interchangeable…and if an exaction [is] clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *See* United States v. La Franca, 282 U.S. 568, 572 (1931); *see also* Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996).