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Moving Forward with Health Reform

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EFFORTS TO NULLIFY HEALTH REFORM LIKELY TO FAIL, BUT COULD INTERFERE WITH LAW'S IMPLEMENTATION

By Judith Solomon

The new health care reform law, known as the Patient Protection and Affordable Care Act (PPACA),[1] requires most people to have health coverage or face a penalty. This requirement, most often referred to as an individual mandate, is an essential component of the new law. Without it, reforming insurance markets to require coverage of treatment for pre-existing conditions and to prohibit higher charges based on health status or gender is simply not possible — many healthier people would forgo coverage until they needed it, and insurance pools consequently would consist overall of sicker-than-average people, which would cause insurance premiums to rise substantially.[2]

Despite the central role that the individual mandate plays in health care reform, proposals have been introduced in over 35 state legislatures to prevent the individual mandate from taking effect.[3] In addition, two lawsuits have been filed to challenge the individual mandate, one by the attorney general of Virginia and another by the attorneys general of 13 states.

As explained below, Congress has the authority to enact the individual mandate, and the state nullification efforts almost certainly will be unsuccessful in invalidating the new federal law. But efforts to nullify the individual mandate could weaken political support for health reform and make successful implementation at both the state and federal levels more difficult to achieve. States could delay changing state laws or laying the groundwork necessary to implement various reforms until lawsuits resolving the legality of the nullifications measures are decided. As a *New York Times* article on nullification efforts noted, "the measures could create legal collisions that would be both

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[1] Public Law 111-148.

[2] Linda J. Blumberg and John Holahan, "The Individual Mandate — An Affordable and Fair Approach to Achieving Universal Coverage," *New England Journal of Medicine*, July 2, 2009. January Angeles, *et al., "*Major Insurance Market Reforms Will Not Work Unless They Are Part of Broader Health Reform," Center on Budget and Policy Priorities, January 27, 2010.

[3] The National Council of State Legislatures is tracking this legislative activity in the states at http://www.ncsl.org/default.aspx?tabid=18906.

expensive and cause delays to health care changes, and could be a rallying point for opponents in the increasingly tense debate."[4]

There is broad political support for eliminating insurance practices such as excluding coverage for pre-existing conditions and charging higher premiums to women and people in below-average health. Policymakers, the media, and the general public need to understand why these reforms cannot be successfully implemented unless they are accompanied by an individual requirement to carry health coverage.[5]

Congress Can Require Individuals to Have Insurance

Those who promote state efforts to prohibit the federal government from requiring individuals to have health coverage assert that such a requirement would be unconstitutional because it goes beyond the powers of Congress enumerated in the Constitution.[6]

Many legal experts have explained, however, that two provisions in the Constitution — the power to regulate interstate commerce and the authority to impose taxes for the "common defense and general welfare" — give Congress authority to require individuals to have health coverage.[7]

The Commerce Clause

Congress has broad authority under the commerce clause to regulate activity even if it is local in nature as long as the regulated activity has a substantial economic effect on interstate commerce. The new law explicitly invokes Congress's authority under the commerce clause in a series of findings that describe the direct connection between the requirement that individuals have coverage and economic activity.[8] For example:

- Without an individual mandate, some individuals would make an economic decision not to purchase coverage, thereby increasing financial risks to other households and to health care providers.

- The individual mandate and other provisions of health reform legislation will add millions of

[4] Monica Davey, "Health Care Overhaul and Mandatory Coverage Stir States' Rights Claims," *New York Times*, September 29, 2009.

[5] See also, "Key Health Insurance Market Reforms Not Achievable Without an Individual Mandate," Center on Budget and Policy Priorities, April 7, 2010.

[6] Randy Barnett, *et al.,* "Why the Personal Mandate to Buy Health Insurance is Unprecedented and Unconstitutional," The Heritage Foundation, December 9, 2009; David Rivkin, Jr. and Lee A. Casey, "Mandatory Insurance is Unconstitutional," *The Wall Street Journal,* September 18, 2009.

[7] Jack M. Balkin, "The Constitutionality of the Individual Mandate for Health Insurance," *The New England Journal of Medicine,* February 3, 2010; Akhil Reed Amar, "Constitutional objections to Obamacare don't hold up," *Los Angeles Times*, January 20, 2010; Simon Lazarus, "Mandatory Health Insurance: Is It Constitutional?" American Constitution Society for Law and Policy, December 2009; Mark A. Hall, "The Constitutionality of Mandates to Purchase Health Insurance," O'Neill Institute for National and Global Health Law at Georgetown University, 2009.

[8] Section 10106, amending section 1501 of Public Law 111-148.

new consumers to the health insurance market.

- The individual mandate will significantly reduce the billions of dollars in annual costs resulting from poorer health and shorter life spans of the uninsured.

Those who claim that Congress lacks authority under the commerce clause to require individuals to have coverage assert that requiring individuals to have coverage is *not* regulation of economic activity. They claim that the individual mandate is not regulation of economic activity because people who do *not* buy health insurance are not engaged in economic activity.[9]

These claims do not withstand scrutiny. The individual mandate requires people to engage in an economic transaction — the purchase of health insurance. As one legal expert has written, "the whole argument for an individual mandate is to get health care consumers to internalize their costs and not spread them to the larger interstate economy."[10] The decision to go *without* coverage has an impact on the larger health care system by increasing uncompensated care and making insurance more expensive for those who purchase coverage.[11] Moreover, as Yale law professor Jack M. Balkin has pointed out, people who *do not* buy coverage *do* engage in economic activity. When uninsured people get sick they go to emergency rooms, borrow money from family members, buy over-the-counter drugs, or engage in other economic activities as a substitute for paying premiums.[12]

Power to Levy Taxes

The PPACA imposes a tax penalty on individuals who do not comply with the individual mandate. Congress's power to tax for the general welfare is broad, and challenges to this power are successful "only when taxes directly or intentionally burden the exercise of fundamental rights."[13] Opponents claim the tax is beyond Congress's power because it is a means to an end that Congress could not have accomplished directly. But it does not matter that the tax has a regulatory purpose. Supreme Court precedents are clear that Congress can use its taxing and spending powers to regulate or discourage an activity.[14]

In judging whether Congress has the power to levy a tax like that included in health reform legislation, the test is whether Congress could reasonably conclude that the tax promotes the general welfare. Again, quoting Professor Balkin, "the test is easily satisfied."

> Taxing uninsured people helps to pay for the costs of the new regulations. The tax gives uninsured people a choice. If they stay out of the risk pool, they effectively raise other people's insurance costs, and Congress taxes them to recoup some of the costs. If they join the risk pool, they do not have to pay the tax. A good

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[9] Barnett, *et al.,* Rivkin and Casey, note 4.

[10] Steven D. Schwinn, "Is an Individual Health Insurance Mandate Constitutional?" *Constitutional Law Prof Blog,* September 25, 2009.

[11] Lazarus, note 6.

[12] Balkin, note 6.

[13] Hall, note 6.

[14] Lazarus, note 6.

> analogy would be a tax on polluters who fail to install pollution-control equipment: they can pay the tax or install the equipment.[15]

The Supremacy Clause

In some states, legislative proposals to bar the individual mandate from taking effect initiate a process of amending the state constitution. In these states, if the legislative proposal passes, state residents would vote on the proposed constitutional amendment in the next election. Attempts also may be made to amend state constitutions by collecting signatures to qualify proposals for the November 2010 ballot in states that allow such a process. So far, three states, Virginia, Idaho, and Utah, have passed state laws that attempt to nullify the mandate.

Under the supremacy clause of the U.S. Constitution, federal law trumps conflicting provisions in state law. As a result, state laws and state constitutional amendments nullifying the individual mandate are themselves null and void. The individual mandate included in the PPACA applies in all states, regardless of state legislation or state constitutional provisions to the contrary. Health law expert Timothy Jost has observed that blocking the federal law from taking effect through state action is "constitutionally impossible" and "nullification laws are pure political theater."[16]

Why an Individual Mandate Is Essential

Even though attempts to nullify provisions of federal health reform legislation have no legal effect, they should not be ignored. With enactment of the PPACA, substantial efforts are needed to meet tight deadlines for implementation. Legal challenges and campaigns to block the legislation will consume time and resources needed for implementation and may slow implementation until legal challenges are resolved. State provisions that purport to prohibit the individual mandate could be used as a shield by those who refuse to comply with the law. They also may weaken political support for health reform. Thus, implementation is likely to proceed more smoothly if there is broader understanding of why an individual mandate is critical to the success of health insurance reform.

In most states, health insurers selling coverage in the individual insurance market today can set higher premiums for people with chronic illnesses and other health conditions or deny them coverage altogether. Women can be charged more than men, and older people can be charged substantially higher premiums than younger people. Insurers also can exclude coverage for pre-existing conditions. Health reform will change these rules, limiting the variation in premiums based on age and eliminating altogether variation that is based on gender and health status. These new rules, along with subsidies for those with low and moderate incomes, will make coverage available and affordable to millions of people who currently are uninsured or underinsured.

Once these market reforms take effect in 2014, insurers will no longer be able to deny coverage to people because they are sick. But if there were no individual mandate to accompany these reforms,

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[15] Balkin, note 6.

[16] Timothy S. Jost, "Can the States Nullify Health Care Reform?" *New England Journal of Medicine,* February 11, 2010.

people could wait until they are sick to buy coverage. As Uwe E. Reinhardt, one of the nation's leading health economists, has explained:

> If [insurance reforms are instituted but] insurance coverage is voluntary, individuals who believe themselves to be healthy will take a chance and go without health insurance, knowing that in case of serious illness they can buy insurance at premiums completely divorced from their own health status. Therefore the risk pool of insured would include mainly individuals who are sicker, which would drive up the community-rated premium, which would then drive even more relatively healthier people out of the risk pool, and so on.[17]

The individual mandate prevents the rise in premiums that would occur if people could wait until they became sick to buy coverage. With an individual mandate, the risk pool will include both healthy and sick individuals, and many fewer people will be uninsured. Insurers will have far less incentive to compete on the basis of which insurer is best at cherry-picking healthier people and discouraging enrollment by those in poorer health. Instead, insurers will be much more likely to compete based on price and quality.

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[17] Uwe E. Reinhardt, "The Case for Mandating Health Insurance," *New York Times,* October 23, 2009.