



Fighting Legal Challenges to Health Care Reform

States, individual lawmakers and others are developing constitutional and legislative challenges to national health care reform. These challenges appear to have little legal merit, but they represent a political strategy to derail reform that advocates must be prepared to address.

Efforts by legislators and state officials to pass constitutional amendments or similar legislation banning the individual mandate are the most common legal strategies. Other approaches currently being advanced by health reform opponents include: 1) challenges to Exchanges, 2) opting out of health reform, and 3) protests against the bigger Medicaid subsidy promised to Nebraska.

More than half of states are seeing some activity in one or more of these areas. This brief will discuss the challenges to health care reform and their political context. Additionally, it will provide both legal and advocacy responses.

State Challenges to an Individual Mandate

Both the House and Senate health care reform bills contain an individual mandate, or requirement that every individual obtain health insurance unless they meet criteria for an exemption. The bills also would impose fines for non-compliance. Legislators in at least 22 states have filed constitutional amendments or legislation challenging these provisions. Most of the constitutional amendments and legislative proposals prohibit compelling any person or employer to “participate in any health care system” and bar fines. Most assert a right to pay for health services directly, rather than through insurance.

Lawmakers in another six states are preparing similar initiatives, according to media accounts. So far, only Arizona’s legislature has passed a [constitutional amendment](#), which will go on the state ballot this November. In 2008, Arizona voters narrowly rejected a similar constitutional amendment. The Arizona legislation, like many of the bills, is modeled after the [American Legislative Exchange Council’s \(ALEC\) Freedom of Choice in Health Care Act](#), which states that individuals may choose *not* to purchase health insurance and *cannot* be penalized for opting not to have insurance. ALEC is a non-profit think tank that supports a libertarian agenda.

This avenue may lead to a showdown regarding the limits of congressional authority and states’ rights. If a constitutional amendment passes the state legislature, in most cases, it must also be approved by the voters before it becomes law. The earliest that a ballot measure could get to voters is November 2010. However, this process varies by state. For example, in 12 states constitutional amendments must be approved in two legislative sessions¹ before going to the voters.

¹ [National Conference of State Legislators](#).

When and if an amendment becomes law, the conflict between state law and federal law would have to be resolved in the courts. Because constitutional issues are raised, the case likely would go to federal court. Opponents of the amendment would most likely request that the court prevent the amendment from going into effect until the constitutional questions are resolved. This type of injunction, if granted by the court, would ensure that implementation of health care reform provisions could proceed without delay.

Legal Challenges to an Individual Mandate		
Announced Plans to File	Filed in 2009 or 2010	Approved by Legislature
Alaska, Kansas, Louisiana, Montana, Texas, and Wisconsin	Alabama, Colorado, Florida, Georgia, Indiana, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia, Washington, West Virginia, and Wyoming	Arizona

Source: [National Conference of State Legislators](#), last updated January 20, 2010, and Community Catalyst research.

Political Context

In each of the states listed above, the sponsors of constitutional amendments and legislative proposals are Republicans. Many of them are running for office against Democratic incumbents, and are using challenges to health care reform as a major plank in their campaigns. A number of the campaigns involve high-profile races for governor or other state-wide office, bringing more attention to the legal challenges.

Health industry funding may also be playing a role in some of the initiatives. Many politicians showing interest in pursuing constitutional amendments or legislation preserving state authority receive substantial funds from the health industry. [The Money in State Politics Institute](#) recently reported that over the last six years, the health industry donated over \$394 million to officeholders, ballot measures and political parties. In Florida, for [example](#), all 42 Republican co-sponsors of a constitutional amendment to ban the implementation of federal health care reform were recipients of large campaign contributions from the health industry, totaling over \$750,000 in 2008.

Relevant Constitutional Law

1. Commerce Clause. Congress has the power to regulate interstate economic activity.
2. Taxing and Spending Power. Congress has the power to collect taxes and spend for the “general welfare of the United States.”
3. 10th Amendment or States’ Rights. The Constitution prohibits Congress from requiring states to implement federal laws that interfere with states, rights.

Legal Arguments Against an Individual Mandate

The basic legal argument being used against the individual mandate is that the requirement infringes upon states' rights, and specifically that Congress is overextending its powers to regulate, tax and spend. In summary:

- Congress is over-reaching its regulatory powers under the Commerce Clause. Congress is trying to regulate an individual's doing nothing (not purchasing health insurance), therefore regulating *inactivity*, not economic activity.
- By imposing a penalty for not having insurance, Congress is abusing the Taxing and Spending Clause. This "tax" on individuals violates a constitutional rule that requires this type of personal tax to be the same for every person in the country.
- Congress, by mandating insurance, is violating states' rights and preventing states from governing in the best interest of their residents. The federal government may only exercise powers granted to it by the Constitution; all else is left to the states. Mandating health insurance is not listed in the Constitution.

Further legal analysis may be found [here](#).

Legal Arguments in Support of an Individual Mandate

While the scale of current health care reform is unprecedented, the congressional powers to regulate, tax and spend are well founded and have been broadly interpreted by the courts. Congress has exercised these powers to provide health insurance through Medicare and to fund it through a mandated payroll tax. In summary:

- Congressional authority to mandate the purchase of health insurance is within the broad regulatory powers provided by the Commerce Clause. The individual mandate affects interstate commerce because with more people insured, premiums could go down. Also, many insurance companies operate in a regional marketplace across states.
- Congress has the power to tax and spend in order to improve general welfare. Taxing power may only be limited if it infringes on the rights of the individual; there is no fundamental right to be uninsured. Expanding coverage to millions of Americans will improve the health of the nation, including helping to stop the spread of communicable diseases.
- States' rights are not violated by the individual mandate. Congress has the power to make laws necessary to protect people. An individual mandate is necessary to reduce the cost of treating people by spreading the risk and costs across both healthy and unhealthy individuals. The mandate prevents people from only buying health insurance when they need it. Finally, the federal government is not forcing states to implement a federal program – it is proposing to use other means to encourage state participation, including offering Medicaid matching funds.

Further legal analysis may be found [here](#).

Other Challenges on the Horizon

1. Legal Questions on Exchanges

Exchanges are marketplaces for purchasing health insurance. They are designed differently in the House and Senate health reform bills. In the House version, the Exchange is nationally run, while the Senate language supports state-run Exchanges with a national fall-back option. House and Senate leaders have yet to resolve their differences. Meanwhile, critics of health reform, including some leading Republicans, are discussing legal challenges to Exchanges.

One approach, spearheaded by Sen. Orrin Hatch, a Utah Republican, is to challenge the constitutionality of requiring states to run Exchanges. He argues that Congress is overstepping its authority in violation of states' rights, because it is requiring states to participate in a federal regulatory scheme. Congress has attempted to avoid this problem by telling states that if they do not run a state-level exchange, the secretary of Health and Human Services (HHS) may set one up for them. Yet Hatch says this "conditional" approach strips states of any power. He writes in the [Wall Street Journal](#), "It [the Senate bill] renders states little more than subdivisions of the federal government." If a state passed a law preventing creation of an Exchange, the final interpretation would be left to the courts, based on their interpretation of the 10th Amendment.

A second tactic is to question whether these marketplaces can comply with privacy laws (HIPPA), employer-based insurance protections (ERISA), and tax-code issues (Section 125). These are highly complex questions, but similar issues have been successfully worked out by Massachusetts, which has run a state Exchange for three years.

Find more about the intricacies of these legal arguments [here](#).

2. Opting Out of Health Reform

A provision in the Senate bill would allow states to opt out of major components of reform, if they provide other, equivalent comprehensive coverage. Section 1332, "Waiver for state innovation," allows states to seek a five-year waiver beginning in 2017 of the provisions "relating to qualified health plans, Exchanges, cost-sharing reductions, tax credits, the individual responsibility requirement, and shared responsibility for employers." In turn, states must pass laws to comply with regulations, insure transparency, and provide coverage at least as comprehensive and affordable – to at least a comparable number of residents – as national health reform. The HHS secretary would review and approve waiver applications. Although states would get federal dollars for Medicaid and insurance subsidies, this would be an expensive option. The cost along with the fact that few states have undertaken their own comprehensive reforms suggests that this will not be a popular alternative.

Yet, it remains one way that states can distance themselves from federal reform. [Media reports](#) suggest that some Republican-led states will choose to opt out in any manner

possible. For example, State Sen. Carey Baker, a Florida Republican, said, “If there was an opt-in, we are essentially stating now that we are not going to opt in.”

There are a couple of legislative proposals that take a different approach to opting out of health reform. In Utah, for example, State Rep. Carl Wimmer filed legislation ([HB 67](#)) that would require state agencies to obtain legislative approval prior to any participation in health reform.

In New Hampshire, legislation was filed to prohibit the state from expanding Medicaid (as a provision of national health reform) without legislative approval or without full federal funding ([SB 417](#)).

Finally, other states are considering a full opt out of the Medicaid program. This is an [option](#) advocated by the conservative think tank, The Heritage Foundation.

3. Questioning Nebraska’s Medicaid Deal

Attorneys general in 13 states are challenging a boost in federal Medicaid support for Nebraska included in the Senate bill, arguing it violates equal protection and due process provisions of the Constitution. This appears to be a political move to pressure Congress to eliminate Nebraska’s Medicaid deal or extend it to all states, rather than completely derail the law.

In current form, the Senate bill grants Nebraska additional support for the expansion of its Medicaid program. The Nebraska provision, nicknamed the “corn-husker kickback,” has heightened tension among states regarding the Medicaid expansion mandated by both bills (House to 150 percent of the federal poverty level (FPL) and Senate to 133 percent FPL). A deal between Sen. Ben Nelson and Senate Majority Leader Harry Reid to secure Nelson’s vote on the bill indefinitely shielded Nebraska from the costs of the Medicaid expansion. Instead, the full cost would be paid by the federal government.

Attorneys General in Alabama, Colorado, Florida, Idaho, Michigan, North and South Dakota, Pennsylvania, South Carolina, Texas, Utah, Virginia and Washington sent a [letter](#) to House Speaker Nancy Pelosi and Reid asserting that the Nebraska language is unconstitutional. In the Dec. 30, 2009, letter they write, “This provision of H.R. 3590 is inconsistent with protections afforded by the United States Constitution against arbitrary legislation.... The fundamental unfairness of H.R. 3590 may also give rise to claims under the due process, equal protection, privileges and immunities clauses and other provisions of the Constitution.... We ask that Congress delete the Nebraska provision from the pending legislation, as we prefer to avoid litigation.”

In recent days, however, Nelson said he is negotiating to obtain the same provision for all states in the bill’s final form. While this is appealing to most states given current budget woes, it is uncertain if the votes exist for this change, which the Congressional Budget Office estimates would cost \$35 billion through 2019.

What Can Advocates Do?

Talking Points:

- While every individual has a right to question federal policies, the motivation for these legal challenges appears to be derailing reform and maintaining the status quo. We need to address the problems in our health care system, including growing numbers of uninsured and underinsured people, denials of care and exclusions from coverage because of pre-existing conditions.
- The challenges appear to rest on weak legal ground. The federal courts have consistently upheld the power of Congress to regulate, tax and spend. These powers underlie the major provisions of health care reform. Health reform is in the best interests of the nation, and will provide health security for millions of people.
- Many states have not adopted widespread reforms and are not likely to pursue them in the near future. Standing in the way of reform would deny millions of people access to quality affordable health care.
- Health reform will bring jobs and money to the state and local economy. It will also bring coverage, through the Medicaid program and federal subsidies, to hard-working people who are without health insurance.

Organizing:

- Activate coalitions of supporters, including a range of stakeholders, to rally in support of reform.
- Recruit constitutional specialists to testify to the legislature about the constitutionality of the individual mandate and Exchanges.
- Hold local forums to discuss health reform with communities, spotlighting community members who would benefit from reform.
- Recruit health care insiders – such as physician, hospital and insurer allies – to help speak out in support of reform and against constitutional and legislative challenges.

Resources

- State calculator to estimate job growth due to increased Medicaid spending:
<http://www.familiesusa.org/issues/medicaid/other/medicaid-calculator/medicaid-calculator-states-map.html>
- Report on projected job growth as a result of health reform:
http://www.americanprogress.org/issues/2010/01/pdf/health_care_jobs.pdf
- The state-by-state cost of doing nothing about the health care crisis:
http://www.newamerica.net/publications/policy/cost_doing_nothing
- *Community Catalyst's* Medicaid defense toolkit:
http://www.communitycatalyst.org/resources/defending_medicaid/
- Estimate of state economic gains from Medicaid expansions in reform bills:
<http://www.rchnfoundation.org/images/FE/chain207/siteType8/site176/client/Medicaid.pdf>

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