SB 733

Department of Legislative Services

Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

Senate Bill 733 (Senator Pipkin, *et al.*)
Finance

Health Care Freedom Act of 2011

This proposed constitutional amendment prohibits any law requiring an individual, employer, or health care provider to participate in any health care system or to pay penalties or fines for nonparticipation. It also prohibits any restrictions on an individual's ability to pay for health care directly or a provider's ability to accept direct payment for health care services. Subject to reasonable and necessary laws, the purchase or sale of health insurance in private health care systems may not be prohibited.

Fiscal Summary

State Effect: Adoption of the constitutional amendment does not directly affect governmental finances.

Local Effect: If approved by the General Assembly, this constitutional amendment will be submitted to the voters at the 2012 general election. It is not expected to result in additional costs for local election boards.

Small Business Effect: None.

Analysis

Bill Summary: The proposed constitutional amendment specifies that it does not (1) affect which health care services a health care provider must perform or provide; (2) affect which health care services are authorized or not prohibited by law; (3) prohibit health care provided under any law related to workers' compensation; or (4) affect the terms or conditions of any health care system to the extent that those terms and conditions do not penalize an individual or employer for paying directly for lawful health

care services or a hospital for accepting direct payment from an individual or employer for lawful health care services.

Current Law: Maryland law does not require State residents to obtain health care coverage.

In January 2006, the Maryland General Assembly adopted the *Fair Share Health Care Fund Act*, which imposed an assessment on certain employers based on the provision of health insurance coverage. In effect, it would have required large employers to spend a certain amount of their payroll on employee health care or pay a fine. However, in *Retail Industry Leaders Association v. James D. Fielder, Jr.*, the U.S. Court of Appeals for the Fourth Circuit ultimately ruled that the bill was preempted by the federal Employee Retirement Income Security Act.

Background: In March 2010, major federal health care reform legislation (the Patient Protection and Affordable Care Act or ACA) was enacted to expand health care coverage, control health care costs, and improve the health care delivery system. Two key provisions of the Act are individual and employer health insurance mandates.

Under the individual mandate, beginning in 2014 most U.S. citizens and legal residents will be required to have qualifying health coverage or face a tax penalty of the greater of $695 per year up to a maximum of three times that amount ($2,085) per family or 2.5% of household income. Exemptions will be granted for financial hardship, religious objections, American Indians, those without coverage for less than three months, undocumented immigrants, incarcerated individuals, those for whom the lowest cost plan option exceeds 8% of an individual's income, and those with incomes below the tax filing threshold.

Under the employer mandate, employers with more than 50 employees that do not offer insurance or do not offer insurance that is affordable to their lower-income employees will pay a penalty (the lesser of $3,000 for each employee receiving a premium credit or $2,000 for each full-time employee) or provide vouchers (equal to what the employer would have paid to provide coverage to the employee under the employer's plan) to lower-income employees to purchase coverage through a state health insurance exchange. In response to passage of ACA, legislation has been introduced in at least 40 state legislatures to limit, alter, or oppose selected state or federal actions, including single-payor provisions and the individual mandate. As of November 2010, seven states have signed or enacted such legislation (Arizona, Georgia, Idaho, Louisiana, Missouri, Utah, and Virginia).

In addition, at least 24 legal challenges have been filed in response to ACA. The cases involve at least 26 states, as well as public interest groups, educational institutions, and

numerous individuals. The most challenged provisions of the law are the individual mandate and the related penalty. Those provisions have been most often challenged on the grounds that they violate the Commerce Clause of the U.S. Constitution. Three major cases are summarized below.

In *Thomas More Center v. Obama*, which challenged the constitutionality of the individual mandate and the related penalty, Judge George Steeh of the U.S. District Court for the Eastern District of Michigan dismissed the case, ruling that the individual mandate is constitutional because choosing not to obtain health insurance qualifies as an example of "activities that substantially affect interstate commerce," and Congress may regulate interstate commerce under the Commerce Clause. Judge Steeh also found that the individual mandate penalty was not an improperly apportioned direct tax, but a sanction that is allowed under the Commerce Clause. The plaintiffs have filed an appeal to the U.S. Court of Appeals for the Sixth Circuit.

In *State of Florida v. U.S. Department of Health and Human Services*, Judge Roger Vinson of the U.S. District Court for the Northern District of Florida ruled on January 31, 2011, that the individual mandate is unconstitutional and unseverable from the rest of the law. On March 3, 2011, Judge Vinson clarified that he would not require the federal government to cease implementation of ACA but rather he required the Administration to move forward on their appeal of his decision within seven days and request expedited consideration in either the federal appeals court or the U.S. Supreme Court.

In *Commonwealth of Virginia v. Sebelius*, Judge Henry E. Hudson of the U.S. District Court for the Eastern District of Virginia ruled that the individual mandate and penalty are unconstitutional and exceed the regulatory authority granted to Congress under the Commerce Clause. The ruling does not enjoin any part of the federal law, pending rulings by higher courts. An appeal has not yet been filed in this case.

Local Effect: The Maryland Constitution requires that proposed amendments to the constitution be publicized either: (1) in at least two newspapers in each county, if available, and in at least three newspapers in Baltimore City once a week for four weeks immediately preceding the general election; or (2) by order of the Governor in a manner provided by law. State law requires local boards of elections to publicize proposed amendments to the constitution either in newspapers or on specimen ballots; local boards of elections are responsible for the costs associated with these requirements. It is anticipated that the budgets of local election boards will contain funding for notifying qualified voters about proposed constitutional amendments for the 2012 general election in newspapers or on specimen ballots.

Additional Information

Prior Introductions: SB 397 of 2010 was heard by the Senate Finance Committee, but no further action was taken on the bill. Its cross file, HB 603, received an unfavorable report from the House Health and Government Operations Committee.

Cross File: None designated; however, HB 880 (The Minority Leader, *et al.* – House Health and Government Operations), is nearly identical.

Information Source(s): Department of Budget and Management, Maryland Health Insurance Plan, Department of Health and Mental Hygiene, Maryland Insurance Administration, Department of Legislative Services

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