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# National Health Care Reform and the Public's Health

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On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (ACA or the Act) into law.<sup>1</sup> ACA aims to improve access to care and health outcomes through a number of mechanisms, including requiring most individuals to carry health insurance, prohibiting insurers from denying health insurance coverage based on pre-existing conditions, and creating exchanges through which individuals and families not eligible for employer- or government-sponsored health insurance may purchase coverage. While the Act is aimed primarily at improving individual health by increasing access to health insurance, it also contains a number of provisions targeted directly at improving health at the population level. Most of these provisions, which encompass a variety of disease prevention and access-to-care initiatives, are found in ACA Title IV.

## **Brief Overview of the Act**

Perhaps the Act's most notable feature is a large-scale expansion of the number of people covered by qualified health insurance. This expansion, which is expected to reduce the number of non-elderly uninsured Americans by 32 million persons by 2019, will be accomplished in multiple ways.<sup>2</sup> First, Medicaid will be expanded to include nearly all individuals under the age of 65 whose income falls at or below 133% of the federal poverty line (FPL).<sup>3</sup> This is a marked change from the current regime, which generally limits Medicaid eligibility to pregnant women, children, parents with young children, and some people who receive Supplemental Security Income who meet both

income and asset tests. Although states will continue to administer the Medicaid program, most of the costs related to the newly eligible will be covered by the federal government under the new, national threshold for Medicaid eligibility.

Second, health insurance coverage will be expanded by provisions that require individuals who do not meet a specified exemption to purchase qualifying coverage. Those who choose not to purchase such coverage will be required to pay a penalty of the greater of \$695 per year per person (up to a maximum of \$2,085 per family) or 2.5% of household income per year.<sup>4</sup> Employers with 50 or more employees will be assessed a fee of \$2,000 per employee (in excess of 30 employees) if they do not offer qualified coverage and have at least one employee who receives a premium subsidy.

Third, to facilitate insurance coverage for those not covered by a group or public plan, exchanges through which individuals and small businesses can purchase qualified coverage will be created. Subsidies will be provided to individuals and families with incomes between 100-400% of FPL to pay premiums for insurance purchased through the exchanges.<sup>5</sup> The Act also aims to increase the number of insured by prohibiting insurers from denying coverage or charging higher rates based solely on a person's gender and health status. Insurer practices such as imposing lifetime limits, or caps, on the dollar value of coverage will also be prohibited.<sup>6</sup>

## **ACA's Title IV Public Health Provisions**

While many ACA provisions can be expected to positively affect public health through the aggregation of improvements in individual access to care, provisions within Title IV are aimed directly at improving population health by preventing chronic disease, increasing

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access to preventive services, and creating healthier communities.

Title IV creates several federal entities designed to improve the evidence base for public health as well as the delivery of preventive and other care at the population level. First among these is the National Prevention, Health Promotion and Public Health Council, which is charged with coordinating and providing leadership in prevention, wellness, and health promotion.<sup>7</sup> The Council, which will be chaired by the U.S. Surgeon General, is also tasked with developing an evidence-based, achievable national strategy for improving the health status of Americans and preventing avoidable illness and disability. It will provide recommendations for achieving these goals to Congress and the President.

A national Prevention and Public Health Fund will be created “to provide for expanded and sustained national investment in prevention and public health programs to improve health and help restrain the rate of growth in private and public sector health care costs.”<sup>8</sup> The fund is authorized to disburse \$15 billion over ten years, beginning with \$500 million in 2010 and increasing to \$2 billion in 2015. Of the fund’s 2010 allocation, \$250 million will be used to increase access to primary care health professionals by funding residency programs for physicians, supporting the development of physician assistants and nurse practitioners, and providing operating support for nurse-managed health clinics. The remaining \$250 million has been allocated to community and clinical prevention initiatives including anti-obesity and tobacco cessation activities, public health infrastructure to detect and respond to infectious diseases, and various public health research and training initiatives.<sup>9</sup>

In addition, the Act also reorganizes and funds the U.S. Preventive Services Task Force (USPSTF), which will review the evidence base for preventive services, develop recommendations for the health care community, coordinate among federal entities to identify gaps in research, and recommend areas for further study. USPSTF’s recommendations, which are already influential in the health care community, may gain additional prominence because the Act restricts funding for a number of services and initiatives to those that USPSTF determines are supported by available evidence.<sup>10</sup>

Title IV also provides funding and resources for a number of discrete, evidence-based preventive services, including school-based health centers and oral health campaigns.<sup>11</sup> It aims to increase uptake of prevention services by requiring Medicare to cover a number of prevention services and requiring Medicaid plans to cover immunizations for adults, preven-

tive services recommended by USPSTF, and tobacco cessation services for pregnant women.<sup>12</sup> It also makes regulatory changes aimed at improving access to services such as requiring that medical diagnostic equipment be made accessible to people with disabilities, and attempts to improve access to vaccines for adults by authorizing the Department of Health and Human Services (HHS) Secretary to negotiate vaccine prices and enter into contracts for their purchase.<sup>13</sup>

Title IV also funds research to increase the evidence base for public health interventions, as well as support for those programs. Among these funding initiatives are a grant program for community interventions that promote healthy lifestyles for individuals between the ages of 55-64, funding for childhood anti-obesity projects, and grants to states to provide incentives for Medicaid recipients to participate in healthy lifestyle programs.<sup>14</sup> To determine whether the funded interventions are having the desired effect now and into the future, HHS will conduct research related to effectiveness and cost of public health services to determine whether the health status of the American public is improving.<sup>15</sup>

Finally, Title IV requires and funds a number of other provisions designed to improve public health. These include provisions to:

- require that most chain restaurants post certain information about the nutrition and caloric content of foods they sell;
- mandate that some employers provide reasonable times and places for nursing mothers to nurse or express breast milk;
- fund the development of drugs and devices that are deemed important but unlikely to be funded by the private sector;
- provide resources for centers for excellence to study and treat depressive disorders;
- establish a national public-private partnership to provide public education and communication about health promotion and disease prevention; and
- raise awareness about breast cancer through a national education campaign.<sup>16</sup>

### Legal Challenges

While the Act holds great promise — the nonpartisan Congressional Budget Office estimates that it will decrease both the number of uninsured Americans and the federal deficit — elected officials from over 20 states and a number of private individuals and groups have filed legal challenges in an attempt to slow or stop its implementation.<sup>17</sup> In an action that gained national attention, Florida’s Attorney General, joined by offi-

cialists from 12 other states, filed suit immediately after the Act was signed.<sup>18</sup> Virginia, which has passed a law that prohibits the federal government from requiring residents to obtain health insurance coverage, filed a separate challenge later the same day.<sup>19</sup> At least 20 cases challenging ACA have now been filed in various federal courts.

The flagship claim in most anti-ACA cases is that the Act oversteps Congress's power to regulate under the Commerce Clause.<sup>20</sup> The arc of the Supreme Court's Commerce Clause jurisprudence appears to be in the direction of broad congressional authority, and the Court has long recognized that the business of insurance falls within Congress' authority under the Commerce Clause.<sup>21</sup> The plaintiffs argue, however, that the application of the Commerce Clause in ACA is different than that previously upheld since ACA regulates not only action but inaction — the failure to purchase health insurance. Many other claims have also been raised, including that the Act's insurance mandate provision is a "direct" tax of the type prohibited by the Constitution and that the Medicaid expansion impermissibly commandeers state governments.<sup>22</sup>

These claims have met with a mixed response so far in the courts. On October 7, Judge Steeh of the Eastern District of Michigan became the first to rule on the merits of a case challenging the Act. Although conceding that the Commerce Clause question "arguably presents an issue of first impression," Judge Steeh found ACA to be a constitutional exercise of Congress' Commerce Clause power. He also found the argument that the penalty imposed on those who do not purchase coverage exceeds Congress' authority to be "without merit."<sup>23</sup> All other claims in the case were dismissed without prejudice, and an appeal has been filed with the Court of Appeals for the Sixth Circuit.

On November 30, Judge Moon of the Western District of Virginia dismissed the case that had been filed in that district as well. Judge Moon also found that ACA falls within Congress' Commerce Clause authority, noting that "it is rational to believe the failure to regulate the uninsured would undercut the Act's larger regulatory scheme for the interstate health care market." He also held that the Act does not violate the Establishment Clause or the Equal Protection Clause, as plaintiffs had argued. Finally, Judge Moon found a variety of other claims based on religious objections to the Act to be unfounded.<sup>24</sup> The case has been appealed to the Court of Appeals for the Fourth Circuit.

Less than a month later, Judge Hudson of the Eastern District of Virginia became the first judge to find a portion of the Act unconstitutional when he held that the Act's individual mandate would compel an individual to involuntarily enter the stream of commerce

by purchasing a commodity in the private market, and that this exceeds Congress' authority under the Commerce Clause. Judge Hudson also rejected the argument that the individual mandate comes within Congress's authority to tax and spend for the general welfare.<sup>25</sup> This decision has also been appealed. Several similar challenges, including the Florida case, are likely to be resolved in the coming months and years. Regardless of how the various cases are decided in the lower federal courts, it is likely that the constitutionality of ACA will be decided by the Supreme Court before its main provisions go into effect in 2014.

## Conclusion

Since many of ACA's provisions do not go into effect until 2014, it is possible that the Act will not be implemented as passed by Congress and signed by the President, either because it may be amended by future Congresses or because some of the legal challenges described above may succeed. Since most of these legal challenges, even if successful, would only affect the parts of ACA that require individuals to carry health insurance, many of its beneficial public health impacts would remain even if that portion of the Act is struck down. Lack of access to health insurance (and therefore health care) is, however, a public health problem in its own right. Success by plaintiffs challenging ACA can therefore be expected to negatively impact both the health status of individual Americans as well as the health of the public as a whole.

## References

1. The Act was modified by the *Health Care and Education Affordability Reconciliation Act of 2010*, Pub. L. 111-152, 124 Stat. 1029, which was signed by President Obama on March 30, 2010. Throughout this paper we refer to this combined legislation, Pub. L. No. 111-148, 124 Stat. 119 (2010), as "the ACA" or "the Act."
2. Letter from Congressional Budget Office to the Honorable Nancy Pelosi (March 2010) (on file with authors) (providing an estimate of the budgetary effects of the reconciliation proposal, in combination with the effects of H.R. 3590, ACA, as passed by the Senate).
3. *Patient Protection and Affordable Care Act*, Pub. L. No. 111-148 § 2001(a)(1), 124 Stat. 271 (adding 42 USC § 1396a(a)(10)(A)(i)(VIII)).
4. Pub. L. No. 111-148 § 5000A, 124 Stat. 244; Pub. L. 111-152 § 1002, 124 Stat. 1032.
5. Pub. L. No. 111-148 § 1401, 124 Stat. 213; Pub. L. 111-152 § 1001, 124 Stat. 1030.
6. *Id.*, at 1001, 124 Stat. 131 (amending 42 U.S.C. 300gg et seq.).
7. 42 U.S.C.A. § 300u-10 (2010).
8. *Id.*, at § 300u-11.
9. U.S. Department of Health and Human Services, *Sebelius Announces New \$250 Million Investment to Strengthen Primary Health Care Workforce*, Press Release, available at <<http://www.hhs.gov/news/press/2010pres/06/20100616a.html>> (last visited December 10, 2010); U.S. Department of Health and Human Services, *HHS Awards Nearly \$100 Million in Grants for Public Health and Prevention Priorities*, available

- at <<http://www.hhs.gov/news/press/2010pres/09/20100924a.html>> (last visited December 10, 2010).
10. 42 U.S.C.A. § 280g-10 (2010); See, e.g., Pub. L. No. 111-148 § 4106, 124 Stat. 559.
  11. 42 U.S.C.A. §§ 280h-4 to -5; 280k-1 to -3.
  12. Pub. L. No. 111-148 §§ 4106, 4107, 124 Stat. 559.
  13. 29 U.S.C.A. § 794f; Pub. L. No. 111-148 § 4204, 124 Stat. 571.
  14. Pub. L. No. 111-148 §§ 4108, 4201, 4202, 4306, 124 Stat. 561, 564, 566, 587.
  15. 42 U.S.C.A. § 300u-15; Pub. L. No. 111-148 § 4402, 124 Stat. 588.
  16. Pub. L. No. 111-148 §§ 4205, 4207, 124 Stat. 573 577.; Pub. L. No. 111-148 § 4004, 124 Stat. 544; 42 U.S.C.A. §§ 292d, 290bb-33; 42 U.S.C.A. § 280m.
  17. See Letter from Congressional Budget Office, *supra* note 2, at 2.
  18. Officials from seven other states have since joined the suit. *Florida v. Sebelius*, No. 3:10-cv-00091 (N.D. Fla. 2010).
  19. Va. Code Ann. § 38.2-3430.1 (2010); *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10cv188 (E.D. Va. 2010).
  20. The “Commerce Clause” grants Congress the power to “regulate Commerce ... among the several States.” U.S. Const. art. I, § 8.
  21. See *United States v. South-Eastern Underwriters Ass’n*, 322 U.S. 533, 540 (1944) (“Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.”); *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding federal regulation of marijuana grown for home use as part of a national scheme for banning controlled substances).
  22. U.S. Const. art. I, § 9 prohibits the levying of a direct tax “unless in Proportion to the Census or Enumeration.” This Article is modified by the 16th Amendment, which clarifies that “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” U.S. Const. amend. XVI.
  23. Order Denying Plaintiffs’ Motion for injunction and Dismissing Plaintiffs’ First and Second Claims for Relief, *Thomas More Law Center v. Barack Hussein Obama*, No. 2:10-cv-11156 at 18 (E.D. Mich. 2010).
  24. Order Granting Defendant’s Motion to Dismiss, *Liberty Univ. v. Geithner*, No. 6:10-cv-00015 (W.D. Va. 2010).
  25. Memorandum Opinion, *Virginia ex rel. Cuccinelli v. Sebelius*, No. 3:10-cv-188 (E.D. Va. 2010).