

O'Neill Institute

for National and Global Health Law

Legal Solutions in Health Reform: The Constitutionality of Mandates To Purchase Health Insurance **EXECUTIVE SUMMARY**

INTRODUCTION:

Health insurance mandates have been a component of many recent health care reform proposals. Because a federal requirement that individuals transfer money to a private party is unprecedented, a number of legal issues must be examined. This paper analyzes whether Congress can legislate a health insurance mandate and the potential legal challenges that might arise, given such a mandate. The analysis of legal challenges to health insurance mandates applies to federal individual mandates, but can also apply to a federal mandate requiring employers to purchase health insurance for their employees. There are no Constitutional barriers for Congress to legislate a health insurance mandate as long as the mandate is properly designed and executed, as discussed below. This paper also considers the likelihood of any change in the current judicial approach to these legal questions.

POTENTIAL SOLUTIONS:

- **Congress's Authority to Regulate Commerce:** The federal government has the authority to legislate a health insurance mandate under the Commerce Clause of the United States Constitution. A federal mandate to purchase health insurance is well within the breadth of Congress' power to regulate interstate commerce. Congress can avoid legal challenges related to the 10th Amendment and states' rights by preempting state insurance laws and implementing the mandate on a federal level. If Congress wants states to implement a federal mandate, it has the following two options:
 - **Conditional Spending:** Congress may condition federal funding, such as that for Medicaid or public health, on state compliance with federal initiatives.
 - **Conditional Preemption:** Congress may allow states to opt out of complying with direct federal regulation as long as states implement a similar regulation that meets federal requirements.
- **Congress's Authority to Tax and Spend for the General Welfare:** Congress also has the authority to legislate a health insurance mandate under its Constitutional authority to tax and spend. There are no plausible Tenth Amendment and states' rights issues arising from Congress's taxing and spending power. However, Congress' taxation power cannot be used in a way that burdens a fundamental right recognized in the Constitution's Bill of Rights and judicial interpretations by the U.S. Supreme Court. Since there is no fundamental right to be uninsured, no fundamental rights challenge exists.
- **Other Relevant Constitutional Rights:** Challenges under the First and Fifth Amendments relating to individual rights may arise, but are unlikely to succeed. The federal government should include an exemption on religious grounds to a health insurance mandate as an added measure of protection from legal challenges based on religious freedom. In the alternative, the federal government can simply exempt a federal insurance mandate from existing federal legislation protecting religious freedom.
- **Considerations:** To avoid a heightened level of scrutiny in any judicial review, the federal government should articulate its substantive rationale for mandating health insurance during the legislative process.

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LEGAL ISSUES & APPLICABLE LAW:

- **Commerce Clause:** Congress has the power to regulate interstate commerce, including local matters that substantially affect interstate commerce. Health care and health insurance both affects and is distributed through interstate commerce, giving Congress the power to legislate an insurance mandate using its Commerce Clause powers.
- **Taxing and Spending Power:** Congress has the power to tax and spend for the general welfare. It can use its taxing power to implement a “pay or play” model to tax individuals that did not purchase insurance or provide tax benefits to those that do purchase insurance. Congress can also use its spending powers to influence state action. The taxing power of the federal government can be limited if a tax intentionally and directly burdens the exercise of a fundamental right.
- **Federalism:** The 10th Amendment and principle of state sovereignty in the Constitution prohibit the federal government from commanding the states to implement federal law or policies that would interfere with state sovereignty. This is referred to as the “anti-commandeering” principle. A federal employer mandate covering state and local government workers appears consistent with existing Constitutional decisions but still might be susceptible to challenge under the Tenth Amendment.
- **Individual Rights:** The First and Fifth Amendment contain provisions that may have some bearing on a health insurance mandate.
 - **Free Exercise of Religion:** The First Amendment’s Free Exercise Clause protects the free exercise of religion. In addition, the Religious Freedom Restoration Act (RFRA) prevents the federal government from enacting a law that substantially burdens an individual’s exercise of religion, unless the government has a compelling interest.
 - **Due Process and Takings Clauses:** The Fifth Amendment includes two relevant provisions. The Due Process Clause guarantees that no person shall be deprived of life, liberty, or property without due process of law. The Takings Clause states that the government may not take an individual’s property without just compensation.

CONCLUSION:

The Constitution permits Congress to legislate a health insurance mandate. Congress can use its Commerce Clause powers or its taxing and spending powers to create such a mandate. Congress can impose a tax on those that do not purchase insurance, or provide tax benefits to those that do purchase insurance. If Congress would like the states to implement an insurance mandate, it can avoid conflicts with the anti-commandeering principle by either preempting state insurance laws or by conditioning federal funds on state compliance. A federal employer mandate for state and local government workers may be subject to a challenge; however, such a challenge is unlikely to be successful. Individual rights challenges under the First Amendment’s Free Exercise Clause or RFRA are unlikely to succeed, although a federal insurance mandate should include a statement that RFRA does not apply or provide for a religious exemption. Fifth Amendment Takings Clause challenges are also unlikely to be successful. The legal analysis presented is likely to endure, as the Supreme Court’s current position and approach to interpreting relevant Constitutional issues appear to be stable.