HEALTH CARE Employer mandates in policy reform

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Editor's note: Views expressed are solely the author's.

Until the astonishing election results in Massachusetts on January 19 shifted the balance of power in the Senate, the passage of some form of federal health care legislation seemed imminent. Although it now appears unlikely that a bill will reach the President's desk in the near future, the pressure to pass reforms of some kind will keep the issues in the forefront of political debate, and the implications for business leaders have changed only in urgency.

Among the most contentious elements of the various proposals are mandates for insurance coverage. Two forms of mandates are being discussed. Individual mandates would require that individuals give proof of having health insurance or pay a fine to the government. Employer mandates require that employers either provide insurance coverage or pay a fee to the government for each employee not insured.

Of particular concern to business leaders are the employer mandates. Although these appear in various forms, the form currently popular is referred to as "play or pay." The employer either provides insurance coverage ("plays") or pays a fee to the government for each employee not insured.

Historical background

Employer health insurance mandates are not a new idea. They have been suggested in various federal and state initiatives for at least 40 years. On the federal level, employer mandates arose in the context of universal health insurance debates during the early 1970s and again during the Clinton administration in the early 1990s. On the state level, employer mandates have been attempted in several states and have been implemented in two, Hawaii and Massachusetts, and a recent mandate specific to the city of San Francisco has generated much discussion. It is likely that more states would have experimented with some version of employer mandates but for the restrictions imposed by ERISA, the Employee Retirement Income Security Act of 1974.

ERISA, one of the most complex and complicated areas of federal law, governs employee benefit plans, including health benefits, to a significant degree. Stated in very general terms, the ERISA issue in state health care reform has been that a state may not enforce state laws mandating health benefit plans governed by ERISA.

Using ERISA, the federal courts struck down a narrowly-tailored employer mandate in Maryland. Commonly referred to now as the WalMart Law, the statute required WalMart to restructure its employee benefits. In contrast, the courts upheld an employer mandate in the city of San Francisco, finding that it had broader general applicability. State employer mandate proposals could substantially evaporate if an employer mandate is enacted as part of federal health reform legislation.

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Economic and policy considerations

A primary policy goal of the various mandate proposals has been to increase the number of insured individuals. As health insurance became more and more associated with employment, employer mandates emerged as the most promising mechanism to achieve this policy goal. Indeed, according to the Rand Corporation, of the approximately 38 million individuals between the ages of 18 and 64 who did not have health insurance in 2006, approximately 75 percent worked at some point during that year, and most of those individuals were employed in full-time positions. Although increasing the number of people with health insurance presumably would increase access to health care, it remains politically contentious because access is only one dimension of health care reform. Two other prominent dimensions, the cost of health care and the cost of health care insurance, are more difficult to reconcile with employer mandates. Indeed, there is some evidence that employer mandates will increase the cost of health care nationally.

> *"Some employer mandates require an employer to sponsor and fund a health insurance plan; others use a payroll tax approach to funding care in either a pool or through health insurance exchanges; the third form is referred to as a "play or pay" plan.*

According to data compiled by the Kaiser Foundation and the Health Research and Educational Trust, 60 percent of employers offered health benefits in 2009. However, the data also show that only 46 percent of firms with fewer than 10 employees offered coverage, compared with 72 percent of firms with between 10 and 24 workers. More than 95 percent of firms with 50 or more workers offered health benefits in 2009. In part because of those data, many argue that the Senate proposal for employer mandates to cover only those firms with more than 50 employees would have limited effect on increasing the overall percentage of the population with health insurance. If the law applies to only those employers who already provide benefits, it may not substantially increase the number of insured. Smaller employers have less bargaining power, however, and pay more for insurance, making the burden of a mandate greater on them.

One of the reasons for the disparity between the number of people working for employers who offer insurance and the number of people who are uninsured is the extent to which individuals who are eligible for coverage will decline to purchase that coverage. Commonly referred to as the "take-up" rate, this disparity has been another focus of the policy debates in Congress. One of the most popular proposals for increasing the take-up rate is the individual mandate. It is argued that if employers are mandated to provide coverage, and employees are required to purchase that coverage, the take-up rate will dramatically increase and a much larger percentage of the population will be insured.

While that argument seems rational, there is evidence that the theory may not accurately predict behavior. For example, if an individual is required to pay a fine of $1,000 per year for refusing to purchase health insurance, but the cost of that health insurance would be $5,000 per year, people who do not perceive themselves at significant risk for needing health care services will likely pay the fine rather than pay five times that amount for health care coverage. They could save the difference, or spend it on goods and services they value more highly. The dilemma is that making fines large enough to modify behavior creates a political impediment to passage of the legislation.

Insurance plans tied to employment are popular in part because payments made by employers to purchase insurance for employees are excluded from taxable compensation. Economies of scale also create an advantage for larger purchasers; there are lower administrative costs included in premiums for large purchasers. Where health insurance is offered by an employer, it is also generally true that the employer advances the majority of the cost of that insurance. The Kaiser Foundation conducted a study of data from 2008 indicating that employers paid 73 percent of the cost of a family policy and 84 percent of the cost of coverage for a single employee. On average, employees who value health insurance coverage may place a similar dollar value on that insurance as part of their overall compensation for employment, though the value will certainly vary with the individual's perception of their risk of incurring health care costs.

At the same time, many economists believe that employers who provide generous health insurance benefits will pay less in wages and other forms of compensation than they otherwise would, and there is evidence that workers ultimately bear the costs of these health insurance benefits. The Congressional Budget Office notes that while firms offering health insurance will typically pay higher wages that firms that do not, that difference is accounted for by differences in the skill and productivity at those firms, and does not contradict the theory that employers pass on to employees the overall cost of providing that insurance. The argument that mandating insurance coverage for employees will lead to increased wages remains in question.

While those in favor of mandates focus on the belief that mandates will increase insurance coverage, one of the most common criticisms is the argument that there will be a disproportionate impact on lower-wage workers. The concern is that those workers may see offsetting reductions in their wages and that in some cases, likely affecting the lowest-income workers, minimum wage laws coupled with minimum benefit requirements may result in some loss of jobs. Although the economic evidence does not suggest that a high percentage of workers will lose employment if employer mandates are enacted, there is a concern expressed in some studies that the impact will primarily be felt by those who are currently uninsured and who are otherwise economically marginalized.

The current proposals

The House of Representatives passed the Affordable Health Care for Americans Act on November 7, 2009. The Senate bill, the Patient Protection and Affordable Care Act, passed on December 24, 2009. Although it is now unlikely that either of the two bills will be signed into law as written, they provide useful indicators of the thinking of the Congress. As passed, the House bill would require that employers offer coverage and contribute minimum percentages of the premium cost for a plan that meets some defined package of essential benefits, or pay 8 percent of their payroll into a Health Insurance Exchange Trust Fund. The House bill would eliminate or reduce the assessment for small employers with annual payrolls of less than $750,000. Those with less than $500,000 in annual payroll costs are fully exempt.

The Senate bill assesses employers having more than 50 employees who do not have coverage a fee of $750 per full time employee, while employers with 50 or fewer employees are exempt from the penalty provision. The Senate bill requires employers with more than 200 employees to automatically enroll employees into health insurance plans, allowing employees an opportunity to opt out of that coverage. The House bill has a similar automatic enrollment provision, but makes it applicable to all employers. The House bill also requires a federal government study of the impact of these requirements on employers, and requires that that study make a recommendation to the Congress regarding the appropriateness of an employer hardship exemption.

Legal questions

Some critics argue that mandates are an impermissible extension of federal regulation into matters which should be left to the states. Until recent decisions by the United States Supreme Court imposed some constraints, the federal government has relied, without much limitation, on the commerce clause as constitutional justification for a wide range of federal regulation. Simply stated, the rule has been that if matters substantially impact interstate commerce, they are subject to regulation by the federal government. In 1945, the Supreme Court ruled that insurance is interstate commerce, and thus subject to federal regulation. The constitutionality of a mandate that every citizen purchase health insurance, or pay a fine, is a more interesting and more open question.

Legal challenges might also arise on the basis of individual rights. For example, individuals might assert a religious objection under the First Amendment, though some laws which violate individual religious faiths or practices have been upheld where they have general applicability and the courts found some rational basis for their impact on religious and nonreligious practices. Another argument might arise under the Fifth Amendment, an argument that forcing an expenditure of money is a deprivation of either property or liberty without due process, but the Supreme Court has taken a limited view of this procedural argument in prior decisions.

An uncertain future

Some informed observers have suggested that employer mandates will not be part of any final legislation. While it is not likely that current proposals will become law, if employer mandates are eventually enacted, businesses will face complex and challenging requirements. Whether employer mandates significantly increase the percentage of insured individuals, or have any positive effect on the increasing cost of health care, will remain open questions for some time to come. ■

HEALTH CARE Mercer survey results for employer health plans

by Mercer

According to the Mercer 2009 National Survey of Employer-Sponsored Health Plans, employers are making gains when it comes to managing healthcare costs. "Small and large employers used different strategies to keep health insurance cost growth down in 2009," says Ann Thomas, business leader of Mercer's Utah office. "Small employers moved employees into low-cost consumer-directed health plans and raised PPO deductibles. We saw relatively little cost-shifting among large employers — what jumped out was a real increase in their use of programs and policies designed to improve workforce health and wellness."

The Mercer survey also revealed that:

- On average, employers held cost growth to 5.5 percent
- The average annual cost of health benefits per employee rose to $8,945
- High deductible health plan offerings among small employers jumped from 9 percent to 15 percent
- High deductible health plans are offered by 20 percent of larger employers

Mercer conducts its annual National Survey of Employer-Sponsored Health Plans in late summer, when most employers have a good fix on their costs for the current year. More than 2,900 employers completed the survey in 2009. Results represent about 600,000 employers and more than 90 million full- and part-time employees. ■

FINANCE Credit union credit cards can offer lower fees, penalties

by Utah CEO staff

For the first time since introducing its Safe Credit Cards Project in 2007, the Pew Charitable Trusts included credit unions in its annual review — and found that credit unions offer generally lower credit card prices and fees than banks.

According to the October 2009 report, "Credit unions offered significantly lower advertised rates compared to bank credit cards, with penalty fees that were half the cost of comparable bank fees and fewer dangers associated with 'unfair or deceptive' practices." The report found that median advertised annual interest rates at the 12 largest credit unions — between 9.90 and 13.75 percent — were approximately 20 percent lower than comparable bank rates. Further, late fee and other penalty charges "were generally less severe than those of banks," with nearly half of the credit union credit cards including no penalty rates.

The Pew Charitable Trusts published the report, *Still Waiting: "Unfair or Deceptive" Credit Card Practices Continue as Americans Wait for New Reforms to Take Effect*, in response to sweeping legislation introduced by the Credit CARD Act of 2009. The Act, most of which will not take effect until February 2010 and later, was a result of the Federal Reserve Board deeming that the credit card industry engaged in certain practices that were considered "unfair or deceptive" to consumers. The Pew Charitable Trusts set out to determine how widespread such practices were, and to identify trends since it last reviewed the industry in December 2008.

To download a copy of the report, visit www.pewtrusts.org/creditcards. ■