



A POLICYMAKER'S GUIDE TO FOLLOWING THE HEALTH CARE FREEDOM AMENDMENT

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This document is intended to summarily clarify for Ohio policymakers and the general public that, in November of 2011, when 67 percent of the voting public approved the Health Care Freedom Amendment as the 21st section of Article I of the Ohio Constitution, Ohioans prohibited state and local government from unilaterally imposing new health insurance and health care mandates.¹ Such mandates include the forced purchase of newly-mandated health insurance benefits.

In the wake of the Kasich Administration's executive action indicating that Ohioans will be forced to purchase insurance against "habilitative" autism care, many are seeking clarification on the application of the Ohio Health Care Freedom Amendment to state health insurance mandates.¹

And such clarification appears to be necessary: no less than six bills proposing state-imposed health insurance mandates were introduced during the Ohio legislative session that concluded in December of 2012. However, the legislature began its current session by taking an oath to abide by the Ohio Constitution - - a state constitution which now included the Health Care Freedom Amendment.

State "mandates" are statutes that require health insurance companies to cover certain types of health care providers or particular benefits. Examples include coverage for visits to chiropractors or dieticians, or coverage for maternity care or hormone replacement therapy. Some states even mandate that residents purchase coverage for breast implant removal and circumcision.² These mandates have proliferated amongst the states in recent decades: while there were virtually no such mandates in 1970, today there are 2,262 such mandates across the 50 states.³ This is largely the result of lobbying and political funding efforts by the health care providers or benefit manufacturers, who stand to benefit from mandated purchase of their products.⁴ And the cost of health insurance premiums including such mandates has risen in response. Once legislators begin down the road of mandates, it becomes difficult to draw principled lines and find a stopping point.

¹ The Governor's action appears to request the federal government to impose the mandate on Ohioans. The actual binding effect of the Administration's letter to the federal government is unknown at this time.

² See Council for Affordable Health Insurance, *Health Insurance Mandates in the States 2011*

³ Id.

⁴ Id.

State mandates violate the text of the Ohio Health Care Freedom Amendment. The HCFA is entitled in part "Preservation of freedom to choose . . . health care coverage," and applies to any legislative enactments subsequent to March of 2010. It provides, *inter alia*, that (1) no state law or rule may directly or indirectly force any Ohioan - - person, employer, or health care provider - - to participate in any health care treatment or health insurance coverage; (2) no state law or rule can prohibit the purchase or sale of a "non-complaint" health insurance policy; and (3) no state law or rule can penalize an Ohioan for purchasing or selling private health care or health insurance without new mandates.⁵

Each of these substantive provisions prohibits *new* state-based health insurance mandates. First, state mandates, by the very nature, compel Ohioans and Ohio employers purchasing health care insurance to participate in certain health care and health insurance systems by funding them. Secondly, state mandates prohibit Ohioans from purchasing a health insurance policy of their choice because they cannot purchase a health insurance policy without the newly-mandated coverage (and the attendant cost of paying for it). Thirdly, mandate legislation necessarily punishes, through civil or even criminal sanction, those who sell or purchase a health insurance policy that does not include the mandated item. In each of these ways, any new legislatively-enacted state health insurance mandate will violate the Ohio Constitution.

State mandates violate the purpose of the Ohio Health Care Freedom Amendment. Just as importantly, state insurance mandates violate the *spirit, intent, and purpose* of the Ohio Constitution. When voting to place the Health Care Freedom Amendment in Ohio's Bill of Rights, Ohio voters reviewed, on their ballots, the various reasons to "vote YES on Issue 3":

"preserve your right to choose your . . . health insurance"

"*Without* health care freedom, government can do the following to you: Force you to purchase costly government-defined health insurance [and] [m]ake you pay more to upgrade your existing health insurance to meet government requirements."

"Your YES vote for Issue 3 will: . . . [p]rohibit government from forcing you into government insurance or medical treatment *you don't want*."

"A YES vote means: Government should not have the power to force you and your family to buy a specific type of health insurance or health care from another."

"You and your family should *never* be imprisoned, fined or prosecuted for choosing health insurance or treatment different from government requirements."⁶

Thus, Ohio voters were very much aware that voting to enact the Health Care Freedom Amendment meant voting to prohibit the State of Ohio from forcing Ohioans to purchase a specific type of health coverage that they do not want.

While the Kasich Administration's recent promise to mandate autism coverage violates the spirit of Health Care Freedom, for technical reasons, it may not violate the text of the Amendment: the Administration's action comes in the form of a comment to a federal rule recommending that Obamacare regulations force Ohioans to purchase certain autism coverage - - whether this results in a "law" or "rule" is yet to be determined.

⁵ See Section 21, Article I of the Ohio Constitution.

⁶ Some of these statements have been consolidated and reformatted for reader ease. The official "arguments in favor of Issue 3" approved by the Ohio Secretary of State are available on the Secretary of State's website: <http://www.sos.state.oh.us/sos/upload/ballotboard/2011/3-argument-for.pdf>

Nevertheless, the Ohio legislators seemed poised to pass an identical mandate prior to the Administration's action.

State mandates are poor policy solutions. If the purpose behind the mandate is to provide access for those who cannot afford certain types of health treatments or products, then the mandate is a poorly-adapted policy solution. There are several reasons for this:

(1) Mandates conceal state spending. Policymakers' arguments in favor of mandates are typically stories that are targeted to tug out at the heartstrings - - stories targeted to make the case for subsidization and redistribution rather than a mandate for all. However, because Ohio has a balanced budget requirement, legislators would be required to cut state spending elsewhere or raise taxes to subsidize certain health care treatments or products. This would reveal, and force a debate regarding, the true cost of the mandate to Ohioans. Mandates, rather than taxing Ohioans as *taxpayers*, simply "tax" them as consumers, employers, and employees, and do so in a non-transparent and distortionary manner.

(2) Mandates are not "free." There is no such thing as a free lunch. State mandates increase the cost of health insurance premiums by as much as ten percent.⁷ This leaves those subject to the mandates with several options: pay more for health insurance and spend or save less elsewhere; cut non-mandated insurance coverage, such as vision and dental benefits, to pay for the mandated coverage; stop insuring one's employees; cut other employee salary and benefits to afford the added costs of coverage; or pass the added costs of coverage on to consumers through increasing prices.

(3) Health care needs are not uniform. Health insurance should not be uniform because health care needs are not uniform. For instance, those not anticipating having children may have no need for child-autism coverage, but may greatly benefit from instead purchasing vision or dental coverage. However, mandates impose a one-size-fits all solution on all Ohioans.

(4) Mandates do not apply "across-the-board." Mandates typically only effect insurance policies purchased by individuals and small businesses (businesses with greater than 100 employees are typically "self-insured," and exempt from state regulation). They typically have a sharply negative effect on small business and individuals, without impacting larger business and government employers.

(5) Mandates are not means-tested. The very wealthiest Ohioans may enjoy the reduced costs of certain health care treatments and products, even though they can already readily afford to pay. And they may do so at the expense of ordinary income earners who are forced to purchase, but may not use, the mandated treatment or product.

The Patient Protection and Affordable Care Act has added burden and complexity to Ohio's private health care market. Ohio's elected representatives should not compound those burdens by imitating the PPACA, through state insurance mandates, at the state level.

Because state insurance mandates violate the letter and spirit of Ohio's new Health Care Freedom Amendment, and because they are poor policy solutions to concerns for making health care affordable, Ohio's state senators and representatives should steer clear of them going forward.

For more information, see www.OhioConstitution.org, or contact Maurice A. Thompson, Director of the 1851 Center for Constitutional Law at (614) 340-9817, or MThompson@OhioConstitution.org.

⁷ See Council for Affordable Health Insurance, *Health Insurance Mandates in the States 2011*