

## On the Verge of Enactment, Health Reform Stalls

What a difference one special election can make!

On January 19, Massachusetts elected Scott Brown, a Republican, to fill the three years remaining in the term of the late Senator Edward Kennedy (D-MA). As a result, Senate Democrats now control only 59 votes, one short of the 60 they need to break a filibuster. That, in the face of unified GOP opposition to H.R.3590, the Senate version of health reform approved by the Senate on December 24, has brought the health reform debate to a grinding halt.

This is by no means the “sure death” of health reform. House and Senate Democratic leadership, locked since late December in an effort to meld H.R.3962 (passed by the House on November 7) with the Senate bill, are now scrambling to find a way forward. There are a number of options, each with its own political difficulties. It will take some time—insiders are predicting months—before it’s clear what, if any, health reform measure will rise from the ashes of the current all-Democratic effort. But in the meantime, negotiations continue in an effort to craft a single bill that can pass both the House and the Senate.

The great bulk—some say 80 percent or more—of the two complex, systemic health reform bills is either identical or very similar. However, there are key and controversial differences. And, to break through a Republican filibuster in the Senate, even more issues must be addressed. Neither the House nor the Senate bill will die until the end of this Congress (probably in October of this year), and so efforts to agree to the changes needed to enact it will continue until either Congress succeeds, or the 111<sup>th</sup> Congress adjourns.

Possibilities for enactment of health reform later this year include changes in the make-up of the Senate that restore the Democrats’ 60-vote margin (either by changes in personnel or by the addition of one or more Republicans who will support a bill); enactment by the House of the Senate-passed measure, either before or after Congress enacts a separate bill that would amend H.R.3590 to address House members’ concerns; or the crafting of a new approach. Leadership is actively discussing all of these strategies.

In the meantime, some version of H.R.3590 and/or H.R.3962 may yet become law. Thus, it’s useful to understand how these measures would affect NPDA members. This will help NPDA members prepare for the possibility that some or all of the bill’s new rules will become law. It will also help NPDA members discuss with their Senators and Members of Congress the outcomes that will be most beneficial to NPDA member companies and their workers.

Accordingly, below is a general summary of the provisions in both bills that appear to have the most potential for impacting NPDA members companies.

***Employer Responsibility:*** The Senate bill does not require employers to offer or pay for health insurance for their workers. However, any company with more than 50 employees

that does not offer and pay at least 60 percent of the premium for health insurance for their employees would be subject to an assessment equal to \$750 for each of its full-time employees if any of its employees qualifies for a federal subsidy with which to purchase health insurance on his/her own. Small companies—those with 50 or fewer workers—would be exempt from this rule.

The bill defines a full-time employee as one who works 20 hours or more per week. There is an ongoing effort to modify that definition to include workers who work at least 390 hours/quarter. There is also an ongoing effort to include specific rules on how to count workers—e.g., on a particular day, or as an average over the year.

The Senate bill would also allow an employer to require a 60-day waiting period, without becoming liable for the assessment for failure to provide health insurance (if the company employs a worker who qualifies for a subsidy), before enrolling a new worker in the company's health insurance plan. Efforts to expand the waiting period to 90 days continue.

This provision is very different from the way the House bill addresses employer responsibility issues. The House bill would require companies to offer and pay at least 65 percent (family) or 72.5 percent (individual) of the premium for health insurance for their full-time *and* part-time workers. It would exempt small employers, defined as those with payrolls of \$500,000 or less. Employers with payrolls in excess of \$500,000 would have to pay a penalty tax if they fail to comply with this "employer mandate." The penalty tax would start at two percent of payroll on payrolls of more than \$500,000, and graduate up, in two percent increments, until the tax equals eight percent of payroll for payrolls in excess of \$750,000.

The Senate bill also contains a provision that will require employers, under certain circumstances, to issue vouchers with which certain low-income employees can buy exchange-based health insurance rather than accepting coverage through their employer's plan. The bill would allow a low-paid worker whose employer-provided health insurance costs between more than eight percent and 9.8 percent of his/her income to decline the employer coverage and instead take an employer-paid voucher to use to buy exchange-based individual health insurance. The cost of the voucher would be deductible by the employer, and tax-free to the employee. There is no similar provision in the House bill.

*Political prospects:* The employer responsibility section of the health reform bill is controversial, and thus could fall out of a scaled-back package designed to win broad bipartisan support. However, if efforts to gain only one or a handful of GOP Senators' support succeed, then the employer responsibility provisions could survive. If that happens, the Senate approach is more likely than the House's "hard" employer mandate.

NPDA has been quite successful in encouraging the Senate to minimize (or eliminate) new financial burdens on employers with respect to health insurance. For example, the assessment-free waiting period allowed prior to enrolling new workers in a health insurance plan was lengthened from 30 days to 60 days, and there is no "hard mandate"

that employers offer (and pay for) health insurance in the Senate bill. However, the Senate bill still has the potential for imposing new fees that could be crippling to some companies. NPDA will continue to fight to eliminate or mitigate this potential adverse impact.

***Community First Choice Option (CFC Option):*** Both the Senate-passed H.R.3590 and the House-approved H.R.3962 contain provisions that will increase Medicaid payments to the States when the States implement programs that encourage provision of in-community and/or in-home (rather than institutional) care. These NPDA-supported provisions are likely to remain in a final bill unless its scope is significantly reduced, a distinct possibility.

***CLASS Act:*** The Senate bill contains the CLASS Act (Community Living Assistance Services and Supports Act). Authority to create a CLASS Act program is also in the House-passed bill. However, there remains a great deal of concern among key lawmakers in both chambers about whether a CLASS Act program would constitute a new federal entitlement, and about whether the program's contemplated financing will turn out to be sound. Thus, its inclusion in a final bill is questionable, especially if GOP support is required to enact a revised bill into law.

Generally, the CLASS Act would create a new federal disability/long-term care insurance program. All but small employers would be required to automatically enroll their workers in the CLASS Act program, although individual employees would be allowed to opt out of participating in the program. Employees would pay an "actuarially sound" premium (currently estimated to be about \$65 per month). Benefits would also be "actuarially sound," and are currently projected to be about \$50 per day. Program participants would qualify for benefits after five years of working and participating in the program, if and when they become unable to perform at least two activities of daily living. There are no restrictions on how the daily cash benefits could be used.

There has been concern expressed by some NPDA members about the CLASS Act program's implementing rules. If a final health reform law does include the CLASS Act program, the implementing rules are likely to be developed via regulation. NPDA will work on member concerns ranging from whether HHS (or another government agency) will condition benefits payments on use of certified service providers, to the imposition of rules on how the program's cash benefits can be used.

***Revenue:*** The Senate bill contains a new tax on "high value" health insurance. While insurers, not employers, would pay the tax (except when employers are considered insurers, as would happen for self-insured plans), employers would be responsible for calculating whether the aggregate value of all the health insurance benefits they offer add up to enough to constitute "high value" insurance. The House bill imposes a surcharge on high incomes (\$1 million for married couples). The House intensely dislikes the Senate's high value health insurance tax; the Senate does not like the high income surcharge. This intensely controversial issue could crater a systemic health reform bill.

***Insurance Reforms:*** Both the House and Senate bills contain insurance reforms that would prohibit insurers from denying coverage based on preexisting conditions, and from using a person's health history in pricing coverage. Both bills also ban lifetime benefit caps and significantly restrict annual caps. Both also contain rules on how insurance companies can price coverage. These are among the most likely rules to be enacted into law, regardless of how Congress decides to proceed in enacting health reform.

***Exchanges:*** Both bills also create "exchanges"—new marketplaces through which individuals and small businesses can buy insurance. The Senate bill creates state-based exchanges, while the House bill would set up a national exchange. The House bill includes a government-underwritten health insurance plan in the options available to those who buy their insurance through the exchange. These are very controversial issues—enough so that they could doom inclusion of exchanges in any form in a final bill. But exchanges are among the key elements of reform, and lawmakers will try hard to find a way to include exchanges in a final bill.

As noted, the fate of health reform is still uncertain. During the next few weeks Congressional leadership and President Obama will struggle hard to salvage their year-long health reform effort. NPDA and many other interest groups will continue to fight hard for an improved bill and/or to prevent enactment of legislation that could cripple business. NPDA and others will continue to educate members of Congress about the potential for a jobs-killing, economy-weakening impact from the new taxes and expenses that H.R.3962 and H.R.3590 would impose on employers. The effort is likely to continue for at least the next several weeks, and perhaps all the way through to the end of the 111<sup>th</sup> Congress next autumn.