

Senate Passes Health Reform; Measure Now Ready for House-Senate Conference

On December 24, the U.S. Senate approved H.R.3590, its health reform bill. The 60 to 39 vote on the Patient Protection and Affordable Care Act was strictly partisan—all Democrats and the two Independents who caucus with the Democrats voted in favor of the measure. All Republicans (except one, Sen. Jim Bunning (R-KY), who did not vote) voted against it. Senate approval means the bill now goes to a House-Senate conference to reconcile the differences between the Senate bill and the House-approved H.R.3962. The House passed its bill November 7, 2009.

The great bulk of the complex, systemic health reform legislation is either identical or very similar in the two bills. However, there are key and controversial differences. Lawmakers say they want to complete the conference process by the end of January. However, it is unclear how long it will take to resolve deep controversies over abortion, employer responsibilities, new taxes and whether to create a government-underwritten health plan to compete with private insurance.

Health reform, the centerpiece of the Obama Administration's domestic agenda, will affect one sixth of the U.S. economy, and virtually every American individual and business. Its impact on NPDA members will vary based on any given company's current practices with respect to insuring (or not insuring) its workers; and on the extent to which a company participates in Medicare or Medicaid funded benefit programs.

Most of the bill's new rules will not become effective for several years—as late as 2014 in the Senate bill or 2013 in the House bill. Lawmakers decided to include a delayed effective date because of their belief that it will take years to implement these sweeping new rules (e.g., to set up the exchanges through which small businesses and individuals can purchase reformed health insurance). But the delay in effective dates also means there will be ongoing efforts to enact additional legislation over the next three to four years. These efforts will focus on a virtually certain perceived need to change provisions in this legislation due to opposition to them, or to fix unintended errors, or to expand provisions found to be inadequate as implementation efforts begin. Thus, even if a compromise version of the House and Senate bills becomes law later in 2010, ongoing efforts to change the new law are likely to begin almost immediately.

Below is a general summary of the provisions that appear to have the most potential for impacting most NPDA members companies.

Employer Responsibility: H.R.3590 does not contain a “hard employer mandate.” In other words, it 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. An effort to modify that definition to include workers who work 390 hours/quarter or more has not yet succeeded, although there is still hope for winning that modification while the bill is in conference.

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 that waiting period to 90 days will continue during the conference process.

This provision is very different from the way the House bill addresses employer responsibility issues. The House bill does contain a "hard employer mandate." It 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.

The process of reconciling these two very different approaches will also have to address such implementation issues as at what point a company counts its employees or measures its payroll. Typically (for example, for purposes of making pension plan contributions), measurements are mandated for a specific date—e.g., the last day of a tax year with a "look back" rule to pick up employees who worked most of the year but terminated just prior to the measurement date. Another possible approach would be to use average numbers over the course of a tax year—this approach would seem to work better if the final rule is based on size of payroll than it would if it is based on number of employees, especially if the further rule that there must be an employee who qualifies for a federal subsidy is in play. It is also possible that conferees will choose to give regulatory authority to the federal government—potentially Health and Human Services (HHS) or Department of Labor (DOL) to determine the rules for calculating employer responsibility issues.

There are other rules—and they differ in the House and Senate versions of the bill—that will affect some NPDA member companies. For example, there are new taxes on companies that provide retiree health insurance companies, tax credits for small employers who offer health insurance for the first time, etc.

NPDA has been active in encouraging Congress to minimize (or eliminate) new financial burdens on employers with respect to health insurance. These efforts have borne some fruit in the Senate bill. The assessment-free waiting period allowed prior to enrolling new workers in a health insurance plan was lengthened from 30 days to 60 days. 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 what could be crippling to some companies new financial responsibilities on some NPDA (and other) companies. NPDA will continue to fight, both in Washington and via grassroots, to eliminate or mitigate this potential adverse impact.

It is impossible at this writing to predict whether and how Congress will respond to a big surge in employer concerns. Along with NPDA and other industry-specific trade groups, small and large business groups (e.g., the National Federation of Independent Businesses (NFIB, the principal trade group for small businesses), the Chamber of Commerce, the American Benefits Council (ABC, the group that represents the human resources concerns of large employers), and others are either opposing both versions of health reform, or withholding support until/unless Congress solves these employer concerns. These efforts will intensify as conference gets underway in January.

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 provisions, which NPDA supported in Washington and via grassroots, are likely to remain in the final bill, although the specifics of how the enhanced Medicaid payments will work will not emerge until near the end of the conference process.

CLASS Act: The Senate bill contains the CLASS Act (Community Living Assistance Services and Supports Act). A floor amendment, offered by Sen. John Thune (R-SD), to strip it from the Senate bill failed. 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 the final bill is still subject to some uncertainty, despite its inclusion in both the House and Senate versions of the legislation.

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, although the legislation’s supporters argue that the benefits are designed to allow beneficiaries to pay for in-home long-term care services and/or supports.

There has been concern expressed by some NPDA members about the CLASS Act program's implementing rules. If the CLASS Act program is enacted into law, these rules are highly likely to be developed via regulation during the five years between creation of the program and the potential for the first claims. The concerns range from whether HHS (or another government agency) will condition benefits payments on use of certified service providers, to failure to impose any conditions at all on how to use the program's cash benefits. Those concerns will be addressed, by NPDA and by the government, if and when the CLASS Act program becomes law and the relevant government agencies begin the process of writing the implementing regulations.

What's Next. As noted above, the fate of health reform is still uncertain. There are very tough issues that appear difficult to resolve—among them, for example, is how to address whether or not insurance available through an exchange can provide abortion coverage. This is a deeply-divisive issue on which compromise has so far proven elusive. There are enough votes on both sides of this issue to prevent enactment of the bill, although there is also a deep commitment to finding a way to resolve those concerns so that a health reform bill can be enacted.

During the conference process, NPDA and many, many other interest groups will continue to fight hard to improve the 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 the legislation would impose on employers. There will also be intense lobbying on whether there should be a government-run (underwritten) insurance program, whether to create the CLASS Act disability/long-term care program, and many other issues.

The conference process could move quickly—both Congress and President Obama would like to pass a health reform bill by the time the President delivers his State of the Union address (the date of this year's State of the Union address has not yet been set, but historically the speech is delivered towards the end of January). However, to succeed with this kind of time frame will require lawmakers to find a balance between fiscally and socially conservative Democrats, and progressive Democrats—both of which have blocks of votes big enough to block enactment. Typically, that kind of balancing of competing (and strongly-held positions) takes more time.

In short, the health reform measures now in their final stage of the legislative process remain flawed and potentially seriously harmful to employers and the jobs they provide, including many NPDA businesses. However, it also contains new rules that many view as not only beneficial, but also critically necessary, for the U.S. economy and American workers. How Congress will resolve these difficulties, and how long it will take lawmakers to do so—and even whether it is possible to resolve them—are questions that will come clearer in the weeks ahead.