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Health Care Reform and ERISA

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HEALTH CARE REFORM AND ERISA

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Recently, President Clinton and Hillary Rodham-Clinton delivered the text of their health care proposal to Capitol Hill.[1] It is the most comprehensive legislation submitted by an American President to a Congress in the history of the United States.[2] It is well over a thousand pages and, while members of Congress had been given parts of it via leaks and certain testimony by Mrs. Clinton, Secretary Wright, and others in the administration before the House Education Labor Committee,[3] it was the first comprehensive package. Although Congress has not fully digested the proposal, I will touch on some changes that have been made for a number of reasons since the initial proposal.

Unlike the State Assembly, where I served for twelve years, there is no health committee in Congress. In Congress, overlapping jurisdictions handle health care issues. Thus, the Clinton health care legislation will be dealt with by three committees in Congress: the one on which I serve,[4] the Ways and Means Committee, and the Energy and Commerce Committee. There is, of course, currently much disagreement concerning who gets what and who gets the most.

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* Representative Engel is a member of the House Committee on Education and Labor.

1 *See* Robert Pear, *Clinton's Health Plan: The Overview*, N.Y. TIMES, Oct. 28, 1993, at A1. On October 27, 1993, President Clinton delivered his health care proposal to Congress. The plan, as revealed, is extremely complex. Onlookers anticipate that controversy and debate will arise among both Republicans and Democrats. *Id.*

2 *Id.*

3 *See, e.g., Administration's Health Care Reform Proposal: Hearings Before the House Comm. on Education and Labor*, 103d Cong., 1st Sess. (Sept. 29, 1993) (statement of Hillary Rodham-Clinton), *available in* LEXIS, Legis Library, Health File [hereinafter *Hearings*].

4 *Id.*

> The Committee on Education and Labor has as one of its top charges providing for safe and healthy work places, and by extension, safe and healthy workers and families. . . .
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> . . . [T]he Committee has both legislative and oversight jurisdiction with respect to wages (including employee benefits), labor standards, welfare of miners [sic], worker retraining, and workers compensation.

Id.

When the President and Mrs. Clinton presented their plans at Statuary Hall, Bob Michel, the minority leader of the House, told the President: "You checked out the patient, made your diagnosis, and now you are coming to Congress for a second opinion."[5] Some people might find that thought comforting and others might find it downright scary. In either case, the President deserves an enormous amount of credit for tackling the issue. Members of Congress have long been aware that the issue needed to be addressed, but just continued plodding along their merry way. Whether you agree with the thrust of the President's program, it is now on the front burner.[6] Health care reform is going to happen—only the shape and form have yet to be determined.

The public perception has grown so strong[7] that the question is no longer whether our health care system will undergo substantial change, but rather, what kind of change will occur and when will it occur. The President and Mrs. Clinton made that abundantly clear when they said that they had no "pride of authorship," and that the only thing that concerns them is that we create a universal health coverage program.[8] The Clintons indicated that if Congress wants to change the proposal and pick it apart, they will be proud of the fact that Congress will have ultimately

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[5] Minority leader, Bob Michel, is co-author of one of six competing health care reform bills already introduced in Congress. H.R. 3080, 103d Cong., 1st Sess. (1993). The bill has passed through four committees, but lacks bipartisan support. 139 CONG. REC. H6777 (1993).

Clinton's proposal imposes the most governmental involvement in health care. Another bill, introduced by Senators Phil Gramm of Texas and John McCain of Arizona, is more conservative. It emphasizes a competitive market approach rather than government involvement. S. 1796, 103d Cong., 1st Sess. (1993). Michel's bill falls somewhere between the two as far as the degree of government involvement proposed. *See* Anne Reifenberg, *Health Care Bills Abound; But System's Woes Defying Diagnosis*, DALLAS MORNING NEWS, Jan 23, 1994, at A1; Kevin Willey, *GOP 'Dinosaurs' Out of Step on Health Reform*, ARIZ. REPUBLIC, Dec. 16, 1993, at B2.

[6] *See* George J. Church, *Please Help Us*, TIME, Oct. 8, 1993, at 36 (noting health care issue as growing public and legislative issue).

[7] *But see* Carolyn Lochhead, *Public Cooling on Health Plan*, S.F. CHRON., Jan. 27, 1994, at A1. Critics of health care reform placed doubt in the minds of members of Congress and the public during the months between President Clinton's unveiling at Statuary Hall and his January 1994 State of the Union speech. Many Americans are intimidated by the enormity and complexity of the Clinton plan. They worry about the potentially high cost of the plan—in both dollars and quality of care. *Id.*; *see* Howard Finemen et al., *Health Care's War of Words*, NEWSWEEK, Feb. 14, 1994, at 26. Although most Americans agree that there is a health care problem in our country, they perceive other issues, such as crime and welfare, as more urgent needs. *Id.*

[8] Pear, *supra* note 1, at A1 (quoting President Bill Clinton, Address at Capitol Hill (Oct. 27, 1993)).

passed a consensus proposal.[9] The plan that Congress ultimately passes will probably be less ambitious than the one the President submitted to Congress because, in attempting to secure the 218 votes in the House and the 51 votes in the Senate, compromises must be made and will result in a more moderate plan.

On the political side, the administration is going about the health care package very differently from the way it went about the budget. Not one Republican in either House voted for the budget bill, but it passed anyway by a standard margin of two votes in the House and one vote in the Senate, with Vice President Gore breaking the tie.[10] It would be a disaster if that were to happen again. Health care reform must be bipartisan. It needs the Republicans and Democrats to put their heads together to come up with a consensus plan. Hopefully that will happen.

It is expected that Congress will vote on health care reform in the near future. A failure to act would be a tragedy. Nevertheless, there are definite problems with the system that must be corrected; for example, health care costs are not controlled.[11] It is necessary to deal with these issues now.[12]

One area that will likely experience some evil is the Employee Retirement Income Security Act of 1974 ("ERISA"),[13] the topic of this Symposium. As a member of the House Committee on Education and Labor, which has complete jurisdiction over ERISA, I am happy to participate in the symposium on the 20th Anniversary of ERISA.[14] There are important and sometimes controversial

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[9] Pear, *supra* note 1, at A1; *see* President's Message to the House of Representatives accompanying his proposed Health Security Act of 1993, 139 CONG. REC. H8587 (1993).

[10] *See* 139 CONG. REC. D922, D922 (daily ed. Aug. 5, 1993) (House vote on Omnibus Budget Reconciliation Act of 1993); 139 CONG. REC. D928, D929 (daily ed. Aug. 6, 1993) (Senate vote); *see also* 139 CONG. REC. S10625 (1993) (conference report).

[11] *See generally* Thomas L. Greaney, *No Painless Way to Cut High Costs*, NAT'L L.J., Dec. 21, 1992, at 26 (discussing rising cost in health care).

[12] *Cf.* David J. Rothman, *A Century of Failure: Health Care Reform in America*, 18 J. HEALTH POL., POL'Y & L. 271 (1993).

[13] *See* Cynthia K. Hosay, *National Health Care Reform Needed—But What Kind?*, 6 BENEFITS L.J. 63 (1993) (describing health care issues affecting benefit plans); *see also* Robert Macaulay Jr., *Clinton's Proposed Amendments to ERISA Threaten to Undo the Cost-Containment Gains Achieved Under Managed Care*, NAT'L L.J., Jan. 31, 1994, at 29.

[14] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)) ERISA regulates the employee benefit component of wages, including pensions and health benefits, by imposing duties and responsibilities on the employers providing these benefits and on the plans they sponsor. *See Health Care Reform: Hearings Before the House Comm. on*

health care issues involving ERISA. The most spirited debate will involve so-called ERISA preemption, under which states can regulate insurance policies sold to employers by commercial carriers but are effectively prohibited from regulating health benefit plans provided by employers which self-insure their workers.[15] Since its inception twenty years ago, ERISA has traditionally given self-funded plans—plans in which the employers pay the bills as they come in—an exemption from state insurance regulations.[16]

Through the years, this preemption from state law has had a major impact on health benefit plans. While section 514 of ERISA[17] confirms the continued authority of the state to regulate insurance companies, the so-called "deemer clause" states that no employee benefit plan, or any trust established under such a plan, shall be deemed to be an insurance company.[18]

The courts have interpreted this language to mean that states cannot regulate employee benefit plans.[19] States may, however, regulate insurance sold to employers.[20] In effect, the ERISA preemption allows states to regulate plans only indirectly by regulating insurance companies and contracts but not the health plans themselves.[21] To date, Congress has left the content and design of

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Education and Labor, 103d Cong., 1st Sess. (Sept. 29, 1993) (statement of Comm. Chairman William D. Ford).

15 *See Health Care Reform: Hearings Before the House Comm. on Education and Labor*, 103d Cong., 1st Sess. (Sept. 29, 1993). Section 514(a) of ERISA preempts state law regarding employee benefit plans. Plans which are "multiple employer welfare arrangement[s] and [are] fully insured" are subject to state laws which regulate insurance. 29 U.S.C. § 1144 (1988).

16 *See* JAMES M. NELSON, HEALTH AND WELFARE BENEFIT PLANS § 4.09, at 4-16 to 4-18 (1993).

17 29 U.S.C. § 1144.

18 *See* 29 U.S.C. § 1144(b)(2)(A).

19 *See, e.g.*, District of Columbia v. Greater Wash. Bd. of Trade, 113 S. Ct. 580 (1992) (holding state statute "related to" employee benefit plan within meaning of ERISA and thus was preempted); Stone & Webster Eng'g Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom.* Arcudi v. Stone & Webster Eng'g Corp., 463 U.S. 1220 (1983) (same).

20 *See, e.g.*, Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977) (holding program offered was not employee benefit plans subject to ERISA, but rather was insurance subject to regulation by state).

21 *See Managed Care, More Disputes Over ERISA Preemption Anticipated By Health Care Attorney*, Pens. & Ben. Daily (BNA) (Dec. 20, 1990); *see also* FMC Corp. v. Holliday, 498 U.S. 52, 60-61 (1990). The issue of whether state law applies to employee benefit plans is often litigated. If a plan does not fully comply with ERISA, state law may not be preempted. *But see* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (state statute requiring minimum mental health care benefit not preempted); Michigan United Food and Comm. Workers Unions v. Baerwaldt, 767

health care plans to negotiations between employers and their workers. The ERISA regulations for health benefit plans deal mainly with disclosure requirements, fiduciary standards, and claims-review enforcement standards. ERISA also extends certain nondiscrimination protection to participants in employer-provided plans, such as the COBRA law[22] that offers workers continuing coverage once they leave their job.[23]

Although this apparently narrow mandate by the federal government has laid down some basic ground rules for health insurance plans, it has in practice also caused some controversy and confusion. One such example can be found here in New York State. Last year, a federal court found that the New York State hospital payment system, under which the state sets reimbursement rates for all patients, was in violation of ERISA.[24] Under the New York system, insurance companies that do not refuse coverage to high risk groups are allowed to pay the Medicaid rate to hospitals. All other insurers pay a rate thirteen percent above the Medicaid level.[25] In practice, this allows Blue Cross/Blue Shield, which is required to accept all people, to pay lower rates. The reason behind this discrepancy is simple—New York has large pockets of poor indigent patients[26] whose care must most often be paid for by the State. New York State wants to provide coverage for as many people as possible, and although this system is no doubt a backdoor way of accomplishing that goal, it is more or less an effective one.

The courts, however, did not agree that this was a legal scheme. Ultimately, the New York hospital system required a waiver from ERISA.[27] The recently negotiated budget bill contains a provision in the respective Senate and House versions, in-

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F.2d 308 (6th Cir. 1985) (state requirement that policies provide certain level of substance abuse coverage not preempted).

22 Comprehensive Omnibus Budget Reconciliation Act of 1986 (COBRA), Pub. L. No. 99-272, 100 Stat. 227 (codified as amended in scattered sections of 29 U.S.C.).

23 29 U.S.C. § 1161 (1988) (one of several COBRA provisions which actually amended ERISA).

24 Traveler's Ins. Co. v. Cuomo, 1992 U.S. Dist. LEXIS 19397 (S.D.N.Y. Dec. 17, 1992), *aff'd*, 1993 U.S. App. LEXIS 27746 (2d Cir. 1993).

25 *See id.*

26 *See* Alfred Lubrano, *Hunger Quietly Gnaws at Nation*, NEWSDAY, Feb. 7, 1993, at 7 (reporting statistic that 1,385,914 people live below poverty level in New York City—20% of its population).

27 *See* Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 568 (1993) (amending § 162 of ERISA).

serted by Senator Moynihan and myself, granting New York an ERISA exemption for two years.[28] The Governor personally told me that this was a priority and "a must" since it will save New York one billion dollars. There are other states that applied for the exemption,[29] but New York was the only one that ultimately received it. Four other states were knocked down. Just prior to the vote, there were some rumblings that the Senate was going to knock out the exemption. At that point, a couple of my colleagues in New York and I, as instigator, said that if that provision were knocked out, we were not going to vote on the budget bill—even the loss of one member would have made the budget bill fail. We are very pleased that we were able to accomplish a great deal by granting New York the ERISA exemption for two years.

It was senseless to dismantle the State's hospital payment system at a time when major reform was in progress. Congress is voting on major health care reform legislation within the year that takes this entire problem into account. The two-year waiver gives New York State time to restructure its health care system and respond to changes in the federal law. Prior to the two-year waiver, we introduced H.R. 1036, a bill dealing with ERISA and prevailing wage laws, in response to recent court decisions that found prevailing state wage laws violative of ERISA.[30] Also violative of ERISA were apprenticeship training programs that gave the state exclusive power to review and register problems. Public contractors were typically affected.[31] In addition, the mechanic's lien, which grants persons who perform work or services on prop-

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[28] *See* H.R. 2264, 103d Cong., 1st. Sess. (1993).

[29] *See* H.R. REP. No. 103-111, 103d Cong., 1st Sess. 110-12 (1993), *reprinted in* 1993 U.S.C.C.A.N. 473.

[30] H.R. 1036, 103d Cong., 1st Sess. (1993). Introduced on February 23, 1993, H.R. 1036 seeks to amend § 514(b) of ERISA by granting an exemption to any state law that requires payment of prevailing wages, including employee benefits, on public projects. It also grants exemptions for state laws that authorize standards for apprenticeship programs and mechanic's liens. *Id.* § (9)(A)-(C); *see* 29 U.S.C. § 1144(b). Similar legislation has passed in New York. *See* N.Y. LABOR LAW § 220 (McKinney 1986 & Supp. 1994). Subdivision 5 was amended in 1989 to include remuneration of apprenticeship training within the meaning of supplements. *Id.* § 220(5)(6). Subsection 3 of the Labor Law now mandates that wages paid on a public work project shall not be less than the prevailing wage and will provide for supplements, including health and retirement benefits, in accordance with the prevailing practices of the locality. *Id.* § 220(3)(a); *see* 1989 MCKINNEY'S SESSION LAWS OF NEW YORK c. 752.

[31] *See* National Elevator Indus. v. Calhoon, 957 F.2d 1555, 1562 (10th Cir. 1992) (holding that ERISA preempted Oklahoma's prevailing wage law as it related to apprenticeship training programs on public works projects); Electrical Joint Apprenticeship Comm. v. MacDonald, 949 F.2d 270, 275 (9th Cir. 1991) (noting that only state

erty a lien on the property to ensure payment for their work or services, was found violative of ERISA provisions.[32]

H.R. 1036 simply states that ERISA does not preempt the following types of state laws: (1) any law providing for payment of prevailing wages on public projects, (2) any state law establishing minimum standards for certification or regulation of apprenticeships, and (3) any law providing for a lien or other security for the collection of delinquent contributions to a multiemployer plan.[33] That returns us to federal health care reform.

As New York case law demonstrates, there is an inherent conflict between following the requirements of ERISA and giving states the flexibility to fashion their own health care plans. ERISA preemption and President Clinton's health care reform proposal appear to be on a collision course. Under the President's plan, ERISA preemption as it now exists will have to be changed substantially in order to give states the flexibility to reach universal coverage by forming health alliances.[34] As the President envisions it, health alliances will serve as purchasing agents for health insurance.[35] States will have flexibility, such as the option

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regulation of apprenticeship that ERISA permits is regulation meeting standards of Fitzgerald Act, as federally authorized apprenticeship program).

32 *See, e.g.*, Trustees of the Elec. Workers Health and Welfare Trust v. Marjo Corp., 988 F.2d 865, 868 (9th Cir. 1993) (finding Nevada's statute which holds contractors liable for benefit contributions by subcontractors preempted by ERISA).

33 H.R. 1036, *supra* note 30, § 9; *see* 139 CONG. REC. H8958 (1993). Representative Berman, author of H.R. 1036, states that its purpose is to simply restore the rights of states to protect their workers in three areas: prevailing wages, apprenticeships, and remedies for collecting delinquent plan contributions. *Id.* at H8962.

34 H.R. 3600, 103d Cong., 1st Sess. (1993). Subtitle D, sections 1300 and 1301 of President Clinton's Health Security Act deal with the establishment of regional and corporate health alliances. *Id.* Under the President's plan, very large corporations could create their own private alliances, but corporations with fewer than 5000 employees would be required to join a regional alliance. *Id.*; *see* David Osborne, *Hillary Doctors Image to Win Nation's Respect*, N.Y. TIMES, Sept. 12, 1993, at 11 (reporting on regional health care alliances that would be mandated for each state under Clinton plan).

35 *See Clinton Health Security Plan—Preliminary Plan Summary*, U.S. NEWSWIRE, Sept. 22, 1993, *available in* LEXIS, Nexis Library, USNWR File. An official White House summary of the plan indicates that the regional and corporate alliances' responsibility will be to serve as a purchasing agent for employees and consumers, to solicit competitive bids from health plans, to distribute consumer information, and to collect premiums and pay health plans. *Id.*; *see* H.R. 3600, *supra* note 34, §§ 1300-1301.

to allow many health insurance plans in the alliances or else to establish a single-pay option.[36]

The President's plan seems to walk a fine line when it comes to the treatment of large corporations. It proposes that ERISA preemptions remain in place for corporate alliances that include more than 5000 employees.[37] The alliances must abide by federal guidelines and provide basic benefits packages, but they will be exempt from different nuances of state laws. The reason is that it would be an administrative nightmare for large companies like General Motors to adhere to fifty different state laws. As the health care reform debate unfolds, this will obviously be one of the relevant points. It is clearly unwise to set up a different health care system in each of the fifty states; it is especially unwise with regard to large companies. Nevertheless, if there is too much federal control of the system, there will be yelling in Congress that this proposal ties the hands of insurance companies and small businesses. Conversely, if too much flexibility is given to the states, others will declare a lack of progress in addressing a nationwide problem. Given these conditions, several members of Congress, including myself, feel there should be no attempt to walk this fine line—the United States is heading for a national health care system, so these incremental steps are unnecessary diversions. This is why I endorse a plan that would replace the current insurance system with a basic benefit plan made available to all Americans by the state.[38]

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[36] H.R. 3600, *supra* note 34, at subtitle B. Part 2 lists the requirements for single-payer systems under the President's plan. *Id.*

Mrs. Clinton, testifying before the House Education and Labor Committee, noted that the single-payer option would have to be adopted by each state and must guarantee the benefit package would equal the package available to all under the President's plan. *Hearings*, *supra* note 3.

Recently, the White House has agreed to revise its health plan to provide for easier state adoption of a single-payer health plan so long as the plan guarantees comparable benefits to those in the President's plan. *See* Dana Priest, *Health Plan May Let States Form Single-Payer Systems*, WASH. POST, Oct. 23, 1993, at A7.

[37] H.R. 3600, *supra* note 34, § 1393. Section 1393 deals with the applicability of ERISA enforcement on the alliances and notes that individuals enrolled under the corporate alliance health plans fall under all applicable provisions of ERISA. *Id.*

Recently, Secretary of the Treasury, Lloyd Bentsen, soothed business leaders' displeasure at the 5000 employee requirement by suggesting that the topic is open to discussion and that the number is flexible. *See* Robert Pear, *U.S. Official Hints at New Flexibility Over Health Plan*, N.Y. TIMES, Jan. 27, 1994, at A1. Bentsen also noted that most business leaders prefer a requirement closer to 500 employees. *Id.*

[38] *See* H.R. 1200, 103d Cong., 1st Sess. (1993). Sponsored by Representative McDermott and commonly known as the American Health Security Act, H.R. 1200 seeks

Mrs. Clinton says that they attempted to take what they felt was wrong and correct it and leave alone what they thought was right. They felt that a single-payer plan would be too radical a change for most Americans.[39] Some people are satisfied with the current health care system and, unlike myself, are not particularly disturbed that thirty-seven or thirty-eight million Americans are currently uninsured.[40] It *is* very important that we have universal coverage.

Most people incorrectly assume that the thirty-seven or thirty-eight million Americans who do not have health care coverage are unemployed people. It is important to know that the majority is working, but their employers do not provide them with health care coverage.[41]

What will happen to ERISA under health care reform remains unclear, but the committee is looking at the question very

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to establish a state-based health system that would provide universal coverage for all. Under this program, a payroll tax will be levied on employers and employees and a "sin tax" on tobacco in order to finance the plan. It would abolish the current Medicare/Medicaid system and provide for coverage under a universal government plan that would cover acute care, long-term nursing home and in-home care, prescription drugs, and dental and mental health care. *See* Ann O'Hanlon & Spencer Rich, *Key Provisions of the Major Health Care Bills*, WASH. POST, Oct. 28, 1993, at A18; H.R. 1200, *supra*; *see also* Paul Wellstone, *Single-Payer Plan; A Government-Financed System is Our Best Bet for Universal Coverage and Cost Control*, STAR TRIB., Oct. 25, 1993, at 16H. Senator Wellstone, sponsor of the senate version of the American Health Security Act, argues that his plan would be a comprehensive benefits package that would cover primary and preventive care, long-term care, mental health and substance abuse care, and prescription drugs. The federal government would collect the money and each state would receive an annual health care budget. *Id.*

39 A memo by President Clinton's advisor Ira Magaziner noted that a health plan based on managed competition should be the model for the President's plan. *See* Michael Duffy & Dick Thompson, *Behind Closed Doors: The Inside Story of How Bill and Hillary Clinton Fashioned the Health Care Plan*, TIME, Sept. 20, 1993, at 60, 62. The memo called for capped payments and ruled out more radical approaches, such as the single-payer system. *Id.*

Mrs. Clinton, while testifying before Congress, noted that the plan was designed to fix what was wrong but to still leave the basic employer/employee model of health care intact. *Hearings*, *supra* note 3.

40 *See Number of Persons Without Health Insurance Coverage Grew by 4 Million Since '89, EBRI Reports*, 1993 Daily Labor Report (BNA) 239, Dec. 15, 1993, at D7 [hereinafter *EBRI Reports*]. A recent study reported that the number of persons without health insurance reached 38.5 million in 1992. *Id.* According to the Employee Benefit Research Institute, it based its findings on the March 1993 Current Population Survey conducted by the Census Bureau. *Id.*

41 *See EBRI Report*, *supra* note 40, at D7. According to the Employee Benefit Research Institute, one of the main reasons for the increase in uninsured individuals was a decline in coverage for workers in small firms. *Id.* Of the 38.5 million uninsured, over 50% worked for firms employing fewer than 100 workers. *Id.*

carefully. Under ERISA, states cannot require employers to provide health insurance—it is in direct conflict with the President's "employee mandate."[42] The cornerstone of their plan, if it remains in place, will have to undergo drastic changes relating to aspects of ERISA.

ERISA also prohibits states from legislating employee benefit plans. The President's plan outlines a basic benefits package that will be required in all health insurance packages while at the same time allowing the individual states to tailor the health care plan to fit the needs of their particular residents.[43] Therefore, if universal coverage is to be obtained, this provision of ERISA must also be altered.

Additionally, there is the whole issue of ERISA preemption and relation to employer-provided health care plans. There is much to like about the President's health care proposal. An idea of change is in the air, driving the debate, and the public is clamoring for action because they are paying higher out-of-pocket insurance premiums and undergoing a tightening of coverage.[44]

The issue of preexisting conditions also needs to be addressed.[45] In many instances, e.g., children born with heart murmurs, preexisting conditions do not debilitate people, but when they try to apply for health insurance coverage, they are de-

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[42] *See* H.R. 3600, *supra* note 34, § 1006(a)(2)(C)(ii). Under the President's plan, employers would be required to pay at least 80% of the average workers premium. *Id.* Under ERISA preemption, states are not currently permitted to regulate employee benefit plans. 29 U.S.C. § 1144(a).

[43] *See* H.R. 3600, *supra* note 34, § 2(2)(H). The health plan is described as a partnership between the federal government and the states, allowing the state and its local communities to "design an effective, high-quality system of care that will serve the residents of that state. *Id.*; *see Hearings*, *supra* note 3. Individual state plans must guarantee that their plans are comparable to the President's plan. *Id.*

[44] *See* H.R. 3600, *supra* note 34, § 2322(D). The President's plan seeks to keep insurance premiums in line with the general inflation rate over five years. *Id.* Before completing the plan, President Clinton met with 21 Americans who related their problems with the current health care system and concerns for the future. *See* Ron Fournier, *Clintons Get Personal, Listen to Individual Health-Care Problems*, CHI. TRIB., Sept. 16, 1993, at 2. The President discussed the issue with people from across the country who had written to the White House about their health care problems. *Id.* Many of the complaints were related to the high cost of insurance premiums, as well as the lack of available coverage for people with pre-existing health problems. *Id.* Difficulties with red tape and paperwork were also highlighted. *Id.*

[45] *See* Pear, *supra* note 1, at A1, A24 (noting that President's plan is designed to cover all Americans regardless of medical status); *see also* H.R. 3600, *supra* note 34, § 2322(B). Section 2322 is devoted to the problem of pre-existing conditions and adequately assuring that medical coverage will be available. *Id.*; *see Hearings*, *supra* note 3 (concerns of New Jersey Representative Marge Rouhema).

nied because they are deemed to have a prior "problem" even though it has not debilitated them in any manner. These types of issues must be addressed. Additionally, people are fearful of losing their jobs and being left without insurance, and rightfully so. Employers have already begun taking health benefits away from workers.

The Clinton plan therefore includes a number of things that the American public demands. People, by and large, will be allowed to choose their own doctors[46]—the American public is not ready to have doctors assigned to them. This is the cornerstone of all proposed plans including the President's. The plan also provides that there will be no gap in coverage between jobs. Long-term health care and mental health care will also be enhanced.[47] There are also a few issues involving New York. New York, as a city and, to some degree, as a state, has been very generous in terms of providing mental health coverage for Medicaid patients and other types of coverage. We are very concerned that some of this coverage may erode under the new plan. Also, since New York has been very generous and other states have not, there is some fear that as the nation moves toward uniform coverage, New York will be subsidizing other states, like Mississippi, which

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46 The President recently noted that his plan "strengthens and restores what is best about our medicine and places the doctor-patient relationship back at the heart of the American health care system." *Transcript of Remarks by President Clinton at Health Care Event*, U.S. NEWSWIRE, Dec. 16, 1993 *available in* LEXIS, News Library, USNWR File. President Clinton also noted that his plan protects the American people's cherished right to choose their doctors. *Id.*

There have, however, been critics of Clinton's health care reform legislation. Dr. Roy W. Vandiver, President of the Medical Association of Georgia, argues that Clinton's plan would restrict a patient's choice of doctors. *See* Robin Toner, *Health Plan's Foes Top Wall of Public Fear*, N.Y. TIMES, Jan. 25, 1994, at A1, D21. Recently, the Health Insurance Association of America's "Libby and Louise" television advertising has attacked this portion of the legislation. *Id.* Polls indicate that nearly half of all Americans believe doctor choice will be curtailed. *See* Richard Benedetto, *Most Desire Change in Clinton Proposal/Agree U.S. System Needs an Overhaul*, USA TODAY, Sept. 27, 1993, at 8A.

47 The President's plan will provide for coverage for people in need of outpatient mental health care. *See* Tracy Thompson, *What if You Need Mental Health Care?: The President's Plan Includes a Broad Range of Treatment—With Some Limits*, WASH. POST, Nov. 2, 1993, at Z17; *see also* Shari Roan, *Advocates Hail New Respect for Mental Health Care*, L.A. TIMES, Sept. 30, 1993, at E1. Advocates say that by including mental health care prominently in the health plan, the President has taken great steps to remove the stigma of mental illness and advance the public's understanding of mental disorders. *Id.* However, some critics are disappointed that mental health coverage was not given full parity with other physical illnesses and will not reach such parity until the year 2001. *Id.*; *see* H.R. 3600, *supra* note 34, title III, subtitle F.

have not provided the coverage comparable to New York. It is unfair to penalize New York.

There is also an issue of undocumented or illegal aliens. There are a million illegal aliens in New York City and the metropolitan area.[48] The proposal, as sent to Congress, simply states that the various regions will have to handle the problem on their own. This means New York, which has no control over the flow of undocumented people that enter the state, is left holding the bag—hardly an equitable result. Both Republicans and Democrats met recently and agreed that this has to change before anyone could feel comfortable with or support the plan.

The details of the funding mechanisms involved in the President's plan are now emerging. A platform will be financed through taxes on cigarettes which are expected to raise eighty-nine billion dollars over five years.[49] The changes in Medicare and Medicaid which will save money and higher wages as a result of health care savings are expected to bring in seventy-one billion dollars in new revenues.[50] We also estimate that we can save billions of dollars a year just in administrative costs if we achieved a universal form—one or two forms for the entire country.[51] Cur-

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[48] *But see* Deborah Sontag, *Study Sees Illegal Aliens in New Light*, N.Y. TIMES, Sept. 2, 1993, at B1, B8. A recent study by the New York City Department of Planning estimates that there are 490,000 undocumented immigrants in New York State, with approximately 80% living in New York City. *Id.* at B1. The City Planning Department based its analysis on a complex formula of data from border crossings, airports, and the census. *Id.* The President's plan mandates that undocumented aliens are not eligible for enrollment in the medical plan. *See* H.R. 3600, *supra* note 34, § 1005(a).

[49] *See* O'Hanlon & Rich, *supra* note 38, at A18. The financing for the President's plan mandates the employer to cover up to 80% of the employee's policy cost and employees to make up the remaining 20%. *Id.* Non-working people will be financed by a 75¢ per pack cigarette tax, a 1% payroll tax on large employers, Medicare and Medicaid, and limits on deductions for medical insurance premiums. *Id.*; *see* H.R. 3600, *supra* note 34, Title IV; O'Hanlon & Rich, *supra* note 38, at A18.

[50] *See Health Plan Sees Medicare, Medicaid Cuts*, CHI. TRIB., Sept. 9, 1993, at 2. The plan calls for a saving of $124 billion in Medicare and Medicaid in the years 1996 through the year 2000. *Id.*; H.R. 3600, *supra* note 34, Title IV, Subtitles B, C.

[51] *See Clinton Goal: Single Health Form*, CHI. TRIB., Sept. 18, 1993, at 4. The proposed form will ask a few basic questions, including patient's name, social security number, treatment required, type of plan, and final diagnosis. *Id.* The President said, "We want to create a single claim form — one piece of paper that everyone will use and all plans will accept." *Id.* The President's proposal would require all health plans to adopt a single standard form by January 1, 1995. *Id.*

According to the Commerce Department, administrative costs account for nearly 25% of total medical spending. *See* Robert Pear, *$1 Trillion in Health Costs is Predicted*, N.Y. TIMES, Dec. 29, 1993, at A12.

rently, money is spent on health care bureaucracy, not on health care. We could save billions of dollars on health care costs.

In the last five years, wages have been stagnant while health care costs have skyrocketed.[52] Unions and individuals alike have traded wage increases for maintaining their health care benefits. As health care coverage becomes more certain, wages will increase, and in turn, taxes paid to the treasury on these wages will increase. Most people agree on the merits of the programs the President is trying to implement.[53] The disagreement will arise in identifying the funds to pay for them. Choices will be made and certain aspects of the plan will be expanded or scaled back.

It really is an exciting time to be in government because we are finally confronting the most serious problems our nation faces. Inflammatory dialect and talk shows always excite, but congressional health care reform discussion uses real numbers and a smokescreen approach does not rule the day.

Hopefully, when this process of health care reform is complete, the public will once again believe that Washington can accomplish something. It so often appears we make a mess out of things. The frustration of being a relatively new member of Congress is wanting to change matters, and having to accept that changes are difficult to obtain and that the process is complicated. Nevertheless, viewing all the governments and changes around the world and knowing that other countries cannot afford the types of government we take for granted, we are fortunate to have the government we have. Moreover, I am fortunate to have the honor of serving in the House of Representatives.

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[52] *Id.* at A2. The Commerce Department has reported that without change, health care costs are expected to rise by an average annual rate of 13.5% for the next five years. *Id.*

[53] A November 4, 1993 USA Today/CNN/Gallup poll showed that 52% of American people approve of President Clinton's health care reform proposal. Judi Hasson, *First Lady Coming to Terms on Health Care*, USA TODAY, Nov. 9, 1993, at 2A.