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Reimbursement Roulette

The Baucus Bill's Too Playful Approach to "Play-or-Pay" in Health Care Reform

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Two of the three leading health care reform proposals being considered by Congress—the House "Tri-Committee" health care reform legislation and the Senate Health, Education, Labor and Pensions (HELP) Committee's reform legislation—include sensibly designed "play-or-pay" provisions that require employers to pay an assessment if they do not offer insurance to some or all of their employees. The third leading health care reform proposal—the bill proposed by Sen. Max Baucus and currently under consideration by the Senate Finance Committee—also includes a play-or-pay requirement, but it is poorly designed and would be unfair to employers, harmful to employees, and impose wasteful expenses on taxpayers.

The Baucus Bill's "Reimbursement Roulette" Approach to Employer Play-or-Pay

The Baucus bill would expand eligibility for Medicaid to all non-elderly individuals and families with incomes below 133 percent of the poverty line. Individuals and families with incomes between 100 and 400 percent of poverty who enroll in health insurance plans offered through a state exchange would be eligible for a new health-insurance tax credit. All individuals would be required to have health insurance.

The two other leading bills include similar expansions of health-insurance assistance, with the important difference that both would make coverage generally more affordable for individuals and families than the Baucus bill. They also include conventional play-or-pay provisions that require employers who do not provide health care to pay an assessment based on either on their payroll (House version) or the total number of employees who are not offered affordable coverage (Senate HELP version).

Three Big Problems with the Baucus Play-or-Pay Provision

1) Creates a new financial incentive for employers to convert full-time jobs that middle- and working-class families rely on to part-time jobs.
2) Doesn't fairly or accurately target "free-rider" employers. Many of the worst free riders would experience limited or no penalties.
3) Would likely result in a massive increase in costly lawsuits and complaints filed by unsuccessful job applicants and terminated employers with family incomes between 100 and 400 percent of the federal poverty line.

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By contrast, the Baucus bill adopts a more complicated and limited version of play-or-pay. It would require employers with more than 50 employees that do not offer affordable coverage to pay an assessment to the federal government for each *full-time* employee (defined as more than 30 hours a week) who receives coverage that is *subsidized through the individual tax credit* created by the legislation. This assessment would not apply to uninsured part-time employees or employees who receive other forms of publicly subsidized coverage, such as Medicaid or the Children's Health Insurance Program.

For each full-time employee enrolled in a state exchange and receiving a tax credit, the employer would be required to pay a flat dollar amount equal to the average tax credit provided to people insured through the state exchanges. The total amount an employer would be required to pay would be capped at $400 multiplied by the total number of employees, including those who do not receive tax credits and/or are covered though Medicaid or other public programs.

Because it seemingly attempts to more closely target the "pay" requirement of play-or-pay on free-rider employers who do not provide health insurance, the provision is sometimes referred to as a "free-rider" penalty. But "reimbursement roulette" would be a more accurate description of the provision's actual effect. Instead of narrowly targeting free-rider employers, the provision will lead to a lottery-like penalty system that is difficult to rationalize. Whether or not an employee is eligible for a subsidy that is subject to the penalty depends both on the income they receive from their employer and the amount of income of other family members. Because employers cannot legally base decisions to hire or fire on the income of other members of a potential hire's family,[1] they have only partial control over the precise extent to which they "free ride." Thus, two employers with identical numbers of employees, compensation costs, and profits could end up paying widely different amounts in penalties based on a fact—the income of other members of an employee's family—over which they have no control and may have no knowledge.

A related issue that limits the targeting precision and equity of the Baucus provision is that it excludes employees whose health insurance is subsidized through various other public programs, including those with incomes under 133 percent of the poverty line who receive insurance that is publicly subsidized through Medicaid. Thus, there is no penalty for one major category of free-riding, one that is likely associated with the lowest-paying employers and, often, the largest public subsidization. There is no sound economic basis for this distinction if the purpose is to target free-rider employers.

Targeting Free Riders or Making More Workers Part-Timers?

Another major problem with the Baucus provision has to do with its limitation to uninsured full-time workers. This creates an incentive for employers who want to free ride to increase the hiring of part-time and temporary workers and reduce the hiring of full-time ones.

Research conducted on Hawaii's employer mandate to provide coverage to full-time employees suggests that "employers' primary response to the mandate was increased reliance on the exempt class of workers who are employed for fewer than 20 hours per week."[2] Both the Senate HELP and House provisions avoid creating this kind of perverse incentive by applying play-or-pay to all employees.

Targeting Free Riders or Job Creation for Lawyers?

The "reimbursement roulette" provision would likely result in a massive increase in costly discrimination lawsuits and complaints filed by potential job applicants and terminated employees with family incomes below 400 percent of the federal poverty line. This is because Title VII of the Civil Rights Act of 1964 prohibits employment practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex, even if the practices are not motivated by any intent to discriminate on the basis of race of other protected categories. Given existing racial, ethnic, and gender disparities in income, there is little question that employers who try to avoid free riding penalties by basing their hiring decisions on the income of family members of a potential employee would violate Title VII.[3] Even in cases where employers didn't overtly try to obtain information about spouses or other family members, lawsuits would be inevitable as well as costly and difficult to defend.

Finally, the Baucus provision is considerably less efficient than the other two provisions because it would be much more costly to administer per dollar of revenue realized. As former CBO director Robert Reischauer explains:[4]

> If we're talking about systems in which the employer that doesn't provide health insurance has to pay a set fee of "x" dollars or "y" percent of payroll to the subsidy-granting entity or to the exchange, those are fairly simple kinds of payments to work out and aren't particularly intrusive. When we think of going down to the individual level, which is in effect what the [Baucus] proposal would do, it gets administratively horrendously complex as well as quite intrusive. We're in a situation in which we're trying to have an exchange figure out how much is owed to it for subsidies from hundreds, possibly thousands, of different firms. It has to accurately identify the workers with the firms and differentiate workers who have subsidies from those who don't.

Conclusion

Instead of reimbursement roulette, the Senate Finance bill should adopt a fair and conventional play-or-pay provision. The House bill provides the best alternative. It would require employers who do not offer coverage (and contribute at least 65 percent of the premium cost of family coverage and 72.5 percent of individual coverage) to pay 8 percent of their payroll into a Health Insurance Exchange Trust Fund. The assessment would be reduced for employers with annual payrolls of less than $400,000 ($750,000 in the version of the bill approved by the House Energy and Commerce Committee), and eliminated completely for employers with payrolls below $250,000 ($500,000 in the Energy and Commerce Committee version). As a result, the House would be fair for employers and workers, and not impose wasteful expenses on taxpayers.

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1 See discussion below of Title VII of the Civil Rights Act of 1964.

2 Tom Buchmuller, John DiNardo, and Rob Valletta, Employer Health Benefits and Insurance Expansions: Hawaii's Experience, Federal Research Bank of San Francisco, June 29, 2009, http://www.frbsf.org/publications/economics/letter/2009/el2009-21.html.

3 Title VII also prohibits decisions to hire based on whether or not someone is a sole income earner in a two-parent family or a single parent, if the decisions have a disparate impact on a protected class.

4 Remarks of Robert Reischauer at August 5, 2009 press briefing, quoted in Robert Greenstein and Judith Solomon, "Employer Requirement in Baucus Health Reform Plan Would Pose Larger Problems than Previously Realized," Center on Budget and Policy Priorities, September 16, 2009.