



Free Ride: The Senate Health Bill's Approach to "Employer Responsibility" Means Some Large Employers Get to Take It Easy

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Leaders in both the House and the Senate have committed to "shared responsibility" as a basic principle of health care reform. Shared responsibility means the costs of health care coverage are shared by individuals, businesses, and the public sector. Failure to ensure that employers fairly share in the responsibility for providing health coverage can result in a "free rider" problem. Responsible employers who provide good jobs will share in the costs, while less responsible employers who mostly provide low-wage jobs with limited benefits will seek to shift their share of the costs to others, including taxpayers, their employees, and other businesses.

The most efficient and equitable way to limit this kind of employer free-riding is to require all employers to either provide affordable health insurance to all of their workers or to contribute to the costs of providing publicly subsidized affordable health insurance to uninsured workers. Broad-based employer responsibility of this kind is more equitable and efficient than an approach that allows substantial numbers of employers to avoid any responsibility or to limit their responsibility relative to other employers.

Health care reform legislation passed by the House earlier this year includes a sensibly designed employer-responsibility provision that is consistent with the shared-responsibility approach and limits employer free-riding. The House bill gives employers the option of providing affordable health insurance to their workers or contributing a percentage of their payroll to the public sector to cover part of the costs of providing publicly subsidized insurance to their workers.¹

The version of the health bill currently being debated in the Senate also includes an employer responsibility provision, but the Senate provision is designed in a way that would make it easy for many large and profitable employers, particularly the ones paying poor wages, to shirk their

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responsibilities. In essence, many large, low-wage employers could avoid paying their fair share of health insurance costs by shifting a portion of their share to the public, other more responsible businesses, and individual workers.

"Shared Responsibility" Not So Shared in the Senate Bill

Table 1 (on the next page) provides an analysis of how responsibility for health insurance costs is shared in the Senate bill between workers and other individuals, employers, and the public. Under the Senate bill, these responsibilities vary depending on a worker's family income and, for workers with family incomes between 133 and 400 percent of the federal poverty line, whether they are employed on a full-time or part-time basis, and whether they receive a tax credit that reduces the cost of premiums for insurance purchased through the new health insurance "exchange" established by the legislation.

For employees with family incomes below 133 percent of the federal poverty line, there is no employer responsibility. Similarly, for employees with family incomes over 400 percent of the federal poverty line, there is no employer responsibility, although employers generally do provide health coverage for most employees with incomes in this range.

For employees with family incomes between 133 and 400 percent of the federal poverty line, there is employer responsibility, but it is limited to full-time employees.² Under the Senate bill: 1) employers who *do not* provide health insurance to their employees would pay an assessment equal to \$750 per full-time employee (the fee would be based on the total number of full-time employees, including those who did not receive a premium tax credit for purchasing insurance through the exchange),³ and 2) employers who do provide health insurance would also pay an assessment if one or more of their employees opted out of the employer plan because the premiums were unaffordable (more than 10 percent of the employee's family income). This assessment would be equal to the lesser of \$3,000 for each full-time employee who received a premium tax credit or \$750 per full-time employee (including those who didn't receive a credit).⁴

TABLE 1
The Not-So Shared Responsibility for Health Care Coverage in the Senate Health Bill

	<i>Individual Responsibility</i>	<i>Employer Responsibility</i>	<i>Public Responsibility</i>
<i>Employees with Family Income under 133 percent of Federal Poverty Line</i>	Individual must obtain qualifying health coverage. This requirement can be met by enrolling in Medicaid, which will be available to all individuals with incomes up to 133% of the federal poverty line (FPL).	No responsibility.	Public pays cost of Medicaid.
<i>Full-Time Employees (30 hours or more) with Family Income Between 133-400 percent of Federal Poverty Line</i>	Individual must obtain qualifying health coverage. If employee purchases insurance (through the exchange established by the legislation), they are eligible for a premium tax credit that would limit their premium payments according to a sliding scale that goes from 2.8% of income for someone at 100% of FPL to 9.8% of income for those between 300 and 400% of FPL. If an employee opts out of employer-provided coverage and purchases insurance through the exchange, the employee is only eligible for a premium tax credit if the employee's share of premiums is 9.8% of their income or higher, or if the employer plan has an actuarial value of less than 60%.	No responsibility to provide affordable coverage. Employers with more than 50 full-time employees must pay assessment if one or more of their full-time employees receives a premium tax credit. For employers that <i>do not</i> offer health insurance, the assessment is equal to \$750 per full-time employee (including employees who do not receive premium tax credits). For employers that <i>do offer</i> coverage but have one or more employees receiving a premium tax credit (because the coverage did not meet minimum standards and the employee opted out of it), the assessment is \$3,000 for each employee receiving a tax credit or \$750 for each full-time employee (including those not receiving credits), whichever is less.	Public pays cost of premium tax credit, but cost may be partially or fully offset by penalty on employer. Public partially subsidizes cost of employer-provided insurance through individual tax exclusion for employer-provided health benefits.
<i>Part-Time Employees (less than 30 hours) with Family Income Between 133-400 percent of Federal Poverty Line</i>	Same as above.	No responsibility.	Public pays cost of premium tax credit. Public partially subsidizes cost of employer-provided insurance through individual tax exclusion for employer-provided health benefits.
<i>Employees with Family Incomes Above 400 percent of FPL</i>	Individual must obtain qualifying health coverage. Not eligible for premium tax credit.	No responsibility.	Public partially subsidizes cost of employer-provided insurance through individual tax exclusion for employer-provided health benefits.

Incentives to Free Ride Created by the Senate Bill

In general, the Senate bill would create an incentive for employers to free ride by increasing the number of people they employ in the "no-responsibility" categories and reduce the number of people they employ in the single "responsibility" category (full-time employees with a family income between 133 and 400 percent of the federal poverty line). The House does not create this kind of incentive for employers to free ride.

The nature and extent of the free-rider incentive in the Senate bill would depend on whether or not the employer provides affordable health coverage to their employees. For employers who do not provide *any* health coverage, the most troubling incentive would be to reduce the amount of their assessment by reducing the share of their employees who work full time and increasing the share working part-time. Research conducted on Hawaii's employer mandate, which was limited to employees working more than 20 hours a week, suggests that "employers' primary response to the mandate was increased reliance on the exempt class of [part-time] workers ..."⁵ The House bill avoids creating this kind of perverse incentive by ensuring that employers are responsible for all employees, not just those working above an hourly threshold set by the employer.

Employers who provide health insurance that is *unaffordable* for some of their employees—that is, insurance with premiums that would cost the employee more than 9.8 percent of their income, a level that is likely to be exceeded for a substantial number of workers who are poorly compensated by their employers—will also have strong incentives to free ride. These employers will have the same incentive as those who do not offer any health insurance to reduce the number of full-time workers and increase the number of part-time workers. Because their assessment is based on the number of full-time employees who receive premium tax credits for insurance purchased through the exchange, these employers will also have an incentive to employ workers who are likely to be eligible for Medicaid (ones with incomes under 133 percent of poverty) rather than workers who are likely to be eligible for a premium tax credit (between 133 and 400 percent of poverty). While it would be difficult (and almost certainly illegal) for employers to base hiring or firing decisions on a spouse's income, low-wage employers could, on average, reduce their assessments by paying low wages that maximize the number of employees who are eligible for Medicaid.

How worried should we be about this kind of an incentive to keep wage rates low enough to maximize Medicaid eligibility? Most households with one or more workers have family incomes above 133 percent of the poverty line, but a substantial number do not. According to the Census Bureau, some 10.5 percent of families with a worker—nearly 6 million families—had incomes below 130 percent of the poverty line in 2008.⁶ This included about 2.5 million families with a member who worked full-time the entire year. Another 1.5 million families with a worker had incomes between 130 and 150 percent of poverty, including nearly 1 million families with a member who worked full-time the entire year.

Particularly for employers in retail and other low-wage sectors, there is good reason to be concerned that the Senate bill would provide a significant incentive to limit wages in a way that maximizes the Medicaid eligibility of their workforce. The median hourly wage for the 4.4 million retail salespersons in the United States was \$9.86 in 2008. An employee who works 34 hours a week (the average for a full-time worker at Wal-Mart, according to the company) at this wage will earn \$17,298 a year. Such a worker will have income under 133 percent of poverty and be eligible for Medicaid as

long as they have a family size of two or more and no other family income (see **Table 2** for 133 percent of poverty line by household sizes).

TABLE 2
Multiples of the Federal Poverty Line (FPL), 2009

Household Size	100% of FPL	133% of FPL	400% of FPL
1	\$10,830	\$14,404	\$43,320
2	\$14,570	\$19,378	\$58,280
3	\$18,310	\$24,352	\$73,240
4	\$22,050	\$29,327	\$88,200
5	\$25,790	\$34,301	\$103,160

A New Incentive for Litigation

The Senate provision would also create a new incentive for litigation by potential job applicants and terminated employees with family incomes between 133 and 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 or other protected categories. Given existing racial, ethnic, and gender disparities in income, there is little question that employers who try to avoid paying their fair share of costs by basing their hiring decisions on the income of family members of a potential employee would violate Title VII.⁷ 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.

Conclusion

Final health care reform legislation should include employer responsibility provisions that are consistent with the principle of shared responsibility and do not create perverse incentives and free rider problems. The House bill passes this test; the Senate bill does not.

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- 1 Small businesses with payrolls below \$500,000 are exempt from employer-responsibility requirements. For larger employers, the employer-responsibility assessment phases in as payroll increases from \$500,000 to \$750,000. The assessment is 8 percent of payroll for employers with payrolls over \$750,000.
 - 2 In addition, employers with fewer than 50 full-time employees are exempt from employer-responsibility requirements.
 - 3 This assumes that at least one employee received a premium tax credit for insurance purchased through the exchange. Among employers of more than 50 full-time employees who do not offer health insurance, this condition will almost always be satisfied.
 - 4 A somewhat different set of assessments would apply to employers who provide health insurance but with a waiting period of more than 30 days.
 - 5 Buckmuller, Tom, John DiNardo, and Rob Valletta. "Employer Health Benefits and Insurance Expansions: Hawaii's Experience," Federal Reserve Bank of San Francisco, June 29, 2009, <http://www.frbsf.org/publications/economics/letter/2009/el2009-21.html>.
 - 6 Census Bureau, Annual Social and Economic Supplement, Table POV14: Families by Householder's Work Experience and Family Structure: 2008.
 - 7 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.