Employers Association of New Jersey

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For Discussion Purposes Only

Implementing the Affordable Care Act in New Jersey

President Obama acknowledged on Monday, February 28th during a meeting with state governors at the White House that states might need more flexibility in implementing the Affordable Care Act.

He highlighted a part of the law that would allow states to tailor their own solutions to healthcare reform in 2017 if they fulfilled the same goals as his reform push and said he supported a measure put forward in Congress to move that date up to 2014.

In either case, states would be required to apply for a waiver.

"If your state can create a plan that covers as many people as affordably and comprehensively as the Affordable Care Act does - without increasing the deficit - you can implement that plan," Obama told the governors.

"And we'll work with you to do it," he said.

States are charged with carrying out many of the reforms, including establishing exchanges where individuals and small employers can buy health insurance in 2014. According to the guidance issued to the states by the U.S. Department of Health and Human Services:

> An Exchange is a mechanism for organizing the health insurance marketplace to help consumers and small businesses shop for coverage in a way that permits easy comparison of available plan options based on price, benefits and services, and quality. By pooling people together, reducing transaction costs, and increasing transparency, Exchanges create more efficient and competitive markets for individuals and small employers. Historically, the individual and small group health insurance markets have suffered from adverse selection and high administrative costs, resulting in low value for consumers. Exchanges will allow individuals and small businesses to benefit from the pooling of risk, market leverage, and economies of scale that large businesses currently enjoy.

> Beginning with an open enrollment period in 2013, Exchanges will help individuals and small employers shop for, select, and enroll in high-quality, affordable private health plans that fit their needs at competitive prices. Exchanges will assist eligible individuals to receive premium tax credits or coverage through other Federal or State health care programs. By providing one-stop shopping, Exchanges will make purchasing health insurance easier and more understandable.

There have been few empirical studies examining the ability of health care purchasing pools to reduce premiums. In one of the few studies available, researchers at the Rand Institute concluded, "pooling does not seem to have enhanced the accessibility or affordability of insurance to employers." *See* Kaiser Permanente Report, "The Role of Health Care Purchasing Pools in Improving the Function of the Small Group and Individual Markets" (2001). *See also* Robert Wood Johnson Foundation (1999) ("These arrangements appear to have little effect on insurance costs for participants."); The Commonwealth Fund, "Task Force on the Future of Health Insurance" (2002) ("With few exceptions, premiums for employers have not been lower than those available to small employers elsewhere.").

Nevertheless, the Affordable Care Act relies on such pools but with the added push by the personal mandate to purchase insurance and tax breaks for small business.

In New Jersey, Governor Christie continues to resist joining a lawsuit seeking to have the Affordable Care Act declared unconstitutional. Instead, the administration has accepted all of the federal money that has been offered to date to implement the law.

For example, New Jersey received federal money to set up a reinsurance program that covers individuals who are not eligible for Medicare but who cannot otherwise get insurance. The program has been reimbursed over $30 million by the federal government the first year.

In important ways, New Jersey has a small employer health benefits law that tracks the federal law. Like the Affordable Care Act, state law requires guaranteed issued policies regardless of pre-existing conditions. Basic coverage must be provided on a modified community rated basis, meaning that everyone within a band can purchase insurance for the same price regardless of medical condition. In return, the law requires employers to cover 75% of all eligible employees and carriers must meet medical loss ratios. To increase rates, an insurance carrier must submit a certified actuarial report but premium increases are automatic if the basic criteria are met.

On March 10, 2011, the U.S. Departments of Health and Human Services and Treasury proposed regulations allowing states to implement their own health care reforms as long as certain federal guidelines are met. If states can meet federal criteria, federal regulations could waive even the law penalizing employers for not offering health care insurance to their employees.

Assuming that New Jersey will have flexibility in implementing the Affordable Care Act, what would a reformed small employer market look like? A key feature would be the insurance

exchange or some other pooling arrangement, the success of which is dependent on insuring as many people as possible to leverage purchasing power.

Massachusetts enacted its reform in 2006. Its insurance regulations were similar to New Jersey's and the 2006 law was the model for the Affordable Care Act, including the personal mandate to purchase insurance and the creation of an insurance exchange. Coverage increased from about 88% to 96% the first year but the cost of insurance still increased, more so for small employers. When insurance companies announced premium increases in 2010 up to 30%, Governor Deval Patrick authorized a price-fixing inquiry.

Carriers in Massachusetts argued that hospitals and big medical practices held too much bargaining power and therefore they had no choice but to pay them monopoly rates for medical care. The premium increases were necessary to stay in business, they said.

In January, 2011, the Patrick administration introduced a bill to create an 18-member board to regulate how much providers should be paid for what service. Some have called this an attempt to impose price controls, a regulatory strategy to mitigate price inflation.

The Massachusetts health care law, like the Affordable Care Act relies on tax breaks, subsidies, penalties, the personal mandate and the insurance exchange to expand care and create consumer purchasing power. Two courts have found the Affordable Care Act unconstitutional, although three courts have upheld the law. But whether the U.S. Supreme Court upholds or invalidates the law, New Jersey will still have a health insurance system that is unsustainable over the long haul.

In New Jersey, about 3 in 4 residents are insured under an employer-sponsored plan. While 96% of employers with 50 or more employees sponsor a health care plan, most working New Jerseyeans are employed by a small employer and receive health care insurance and dependent coverage through a small employer health care plan.

The state has about 250,000 small employers (defined as 500 or less employees) and 8 of 10 New Jersey employees work for a small employer, or nearly 1.36 million people. According to federal statistics, 54.3% of these small employers provide health care coverage. This represents about 135,550 employers that employ 737,500 people, down 16.5% from 2000.

Before the enactment of the Affordable Care Act, state senator Joseph Vitale had offered some suggestions on increasing the number of New Jersey residents. The so-called Vitale Framework, which was developed in part by David Knowlton, N.J. Health Care Quality Institute, envisioned expanding Medicaid as the primary means of providing care to the state's 1.3 million uninsured.

Employers that did not offer health insurance would have been required to establish Section 125 flexible spending accounts in order for their employees to obtain health coverage using pre-tax dollars. (A Section 125 plan is a "premium only" plan created under section 125 of the Internal Revenue Code not subject to the Employee Retirement Insurance Security Act "ERISA").

As part its reform, Massachusetts enacted a similar reform but employers with 11 or more full-time employees that did not offer health insurance paid an annual "fair share" assessment of $295 per employee. Today, such a tax would be untenable in New Jersey as the state is still struggling economically. Expanding Medicaid is equally untenable. Thus, the lack of financial resources poses a major challenge to health care reform innovation.

Meanwhile New Jersey's small employer health care market is reaching an unsustainable point. The recession has taken a toll on employer-sponsored health care in the state. In the first quarter of 2010, the small employer group market had about 775,000 covered lives, down 16.5% from 2000, as small employers have dropped coverage.

Because the pool of insureds has dropped, the costs of insurance have gone up. According to the N.J. Business and Industry Association Health Insurance Survey, the average cost per employee increased 80% since 2002.

The Vitale Framework assumed:

> Employers who currently provide coverage will likely continue to do so because premium costs should stabilize as more people become insured. This plan embraces New Jersey employers as partners. While never required, employers today can be credited for providing seventy percent of New Jersey residents with health coverage. Their reasons for doing so are expected to remain the same and the impact this plan has on employer's decision to provide coverage will be closely monitored.

However, the cost per employee is already about $7,800. Many small employers report that they are passing the costs of higher premiums onto employees and some report that employees are dropping insurance because it is unaffordable, thereby increasing the ranks of the uninsured.

But the Affordable Care Act may still present the best opportunity to increase health care access and mitigate premium increases. With a personal mandate and subsidized coverage, health care can be de-linked from employment and made portable, thus unleashing business activity. In addition, an Insurance Exchange can use its buying power to drive down premium costs.