

Employers Should Pay Their Fair Share for Health Care

While the debate continues about how to cope with this country's ever-growing numbers of uninsured, one solution has captured the spotlight. This solution is known as "employer responsibility" legislation, also called "pay or play" and "fair share health care." Whatever its name, politicians and experts with diverse political perspectives are exploring whether this kind of legislation is right for their state. And because this solution involves a unique private-public partnership, advocates for the uninsured and for businesses both small and large are coming together to explore employer responsibility legislation.

What Is Employer Responsibility Legislation?

Employer responsibility legislation requires that employers either provide health insurance to their employees or pay a fee to the state that will be used to increase health coverage for residents. Depending on how the legislation is framed, employer fees may be used to bolster the state's Medicaid program, implement a statewide purchasing pool, or increase coverage through a variety of other mechanisms. There are many different ways to structure employer responsibility efforts, depending on the size and type of employers affected, the status of those employer's workers (full-time or part-time), and the types of coverage that are offered.¹ It is important to note that, because of a federal law called the Employee Retirement Income Security Act (ERISA), states cannot simply require employers to provide health insurance.

Reasons to Consider Employer Responsibility Legislation

- It can level the playing field among businesses of different types and sizes
- Expanding employer-based coverage decreases the number of uninsured, which reduces overall health care costs
- It can expand health coverage among low-income workers, who are less likely to be offered health insurance by their employers
- It can lessen the strain on public health programs and state budgets
- It can help preserve employer-based health coverage and stem further losses

Concerns about Employer Responsibility Legislation

- Unless it is carefully drafted, It may violate federal ERISA law
- Employers may decrease wages and other benefits
- It might harm small businesses if it requires them to spend more money on health coverage than they can afford
- It might encourage businesses to move out of state
- Like employer-based coverage, this kind of coverage is not portable—it cannot follow a person from job to job
- Employer-based coverage is on the decline

Reasons to Consider Employer Responsibility Legislation for Your State

- **It can level the playing field among businesses of different types and sizes**

Employers that do provide health coverage to their workers are at a competitive disadvantage compared to those that do not provide such coverage. This is because employers that provide coverage incur an extra set of costs and assume an extra administrative burden compared to employers that do not provide coverage. If businesses of all types and sizes were required to spend a certain percentage of funds on health coverage—or pay into a state fund that offered coverage to uninsured workers—that financial disadvantage would be eliminated.

Small businesses are far less likely to offer insurance to their workers, but this problem also involves bigger companies. Many uninsured Americans are employed by large businesses that do not offer health coverage. More than 25 percent of the nation’s uninsured—nearly 10 million Americans—work for firms with 500 or more employees (or are dependents of these workers).²

“All we ask for, and what we need, is a ‘level playing field’ where every employer pays their fair share, and where a company’s competitive advantage is achieved by means other than avoiding the provision of medical care coverage and shifting the costs towards those companies who do provide that coverage.”

– Dick Baird, CEO, Giant Food³

- **Expanding employer-based coverage decreases the number of uninsured, which reduces overall health care costs**

Employer responsibility legislation would lead to a decrease in the number of uninsured people in the state and a reduction in health insurance costs for everyone in the state. This is how: Such legislation expands workers’ health coverage, reducing the overall number of uninsured. Reducing the number of uninsured workers, in turn, reduces the health care dollars that are spent on their care. It is important to keep in mind that uninsured workers still obtain medical care (often more expensive emergency care) even though they have no health coverage. Without insurance to pay the tab, uninsured workers pay about one-third of their expenses out-of-pocket. The remainder of the cost is paid by two sources: Roughly one-third is reimbursed by government programs, and the rest is considered “uncompensated care.” How do physicians

and hospitals recoup their losses when providing uncompensated care? One way is by charging more for health services paid for by private insurance. Higher costs for private insurance translate into higher rates for employers purchasing insurance and higher premiums for the insured. A recent study found that, on average, health insurance premiums for families with employer-based coverage are \$922 (\$948 in Maryland) higher in order to cover the cost of providing health care for the uninsured.⁴ So, expanding employer-based coverage helps interrupt the vicious cycle that leads to more uninsured workers and higher costs for the insured.

- **It can expand health coverage among low-income workers, who are less likely to be offered health insurance by their employers**

Employer responsibility legislation can help ensure that lower-income workers have access to health insurance on the job. Nearly half (46 percent) of all workers earning less than \$10 per hour lack health insurance coverage for at least part of the year.⁵ In addition, firms with a high percentage of low-wage workers (i.e., companies in which 35 percent or more of the workers earn no more than \$20,000 a year) typically ask workers to contribute significantly more toward their health coverage than firms with fewer low-wage workers.⁶ Employer responsibility legislation can help alleviate this inequity by requiring that employers, regardless of the wages they pay, make a fair contribution to the cost of health coverage. The legislation can be structured so that employees, regardless of their wages or the types of positions they hold, can obtain employer-based coverage.

- **It can lessen the strain on public health programs and state budgets**

Health care costs make up a large portion of state budgets. And according to National Association of State Budget Officers Executive Director Scott Pattison, “Even with strong revenue growth right now, health care expenditures continue to be a big problem for states.”⁷ In response to limited funds, many states have cut public health insurance benefits and/or imposed new or higher copayments. Employer responsibility legislation could help alleviate the situation by expanding health coverage to low-wage workers at a time when the strain on state budgets makes it difficult to expand public programs.

- **It can help preserve employer-based health coverage and stem further losses**

Employer responsibility legislation can help preserve existing employer-based health coverage and stem further losses in this area. Nationwide, between 2001 and 2003, the percentage of adults under the age of 65 with employer-based health coverage dropped from 67 to 63 percent.⁸ Low-income workers were particularly hard hit: During this same period, the percentage of low-income adults with employer-based coverage fell from 37 to 33 percent.⁹

Businesses of all sizes are dropping health coverage for employees. As employer-based coverage declines, workers turn to the individual market to buy health insurance. Individual coverage, however, is starkly different from the employer-based coverage many workers are used to. For example, older and sicker individuals often pay extremely high premiums or are not able to find coverage at all. Even people who are young and in perfect health may have difficulty finding affordable, comprehensive coverage. What’s more, individual insurance plans often provide skimpier benefits, have high deductibles, and require high co-insurance and copayments. Given that individuals without employer-based coverage are left with few viable options, it is important to preserve and expand employer-based insurance.

Concerns about Employer Responsibility Legislation

■ Unless it is carefully drafted, it may violate federal ERISA law

Under the federal Employee Retirement Income Security Act (ERISA) of 1974, states are prohibited from directly requiring employers to provide health insurance to their workers. However, employer responsibility legislation does not directly require businesses to provide coverage—it gives them a choice between offering coverage and paying a tax to the state to fund public health insurance programs.

There are currently three states (Hawaii, Maryland, and Massachusetts), two cities (New York City and San Francisco), and one county (Suffolk County on Long Island) where employer responsibility legislation has become law.

- Hawaii passed its employer responsibility legislation at about the same time that the federal ERISA law was passed in 1974. This timing made it easier for Hawaii's congressional delegation to successfully lobby for an exemption from ERISA. Obtaining a similar congressional exemption would be nearly impossible for any other state, so Hawaii's law does not offer much insight into this discussion.
- Almost a month after Maryland's Fair Share Health Care bill was passed, the Retail Industry Leaders Association (RILA) filed a lawsuit challenging it. RILA, whose board includes a Wal-Mart executive, is a trade association of the largest companies in the retail industry. RILA is comprised of more than 400 retailers, product manufacturers, and service suppliers that collectively account for more than \$1.4 trillion in annual sales. On July 19, 2006, the federal court in Baltimore invalidated Fair Share Health Care based on ERISA concerns. The decision is likely to be appealed by the Maryland Attorney General. At the same time that it filed suit against the Maryland law, RILA filed suit against the Suffolk County legislation. There has been no court decision regarding the Suffolk County case yet.
- The employer responsibility law that passed in Massachusetts in April 2006 has not been legally challenged and is on its way to being implemented.
- The New York City council overrode a mayoral veto and passed employer responsibility legislation, known as the Health Care Security Act, on October 11, 2005.¹⁰ The mayor has suggested delaying implementation of the law until the court rules on the Suffolk County case.
- San Francisco enacted the San Francisco Healthcare Access Program (SFHAP) on August 7, 2006. SFHAP is a universal health coverage law that includes an employer responsibility component.¹¹

Despite current legal obstacles in Maryland and Suffolk County, most ERISA experts believe there is room for states to create employer responsibility expansion plans by working around ERISA constraints. And no matter what the outcome in the Maryland and Suffolk County cases, the court opinions in each case will be instructive to advocates and legislators when crafting new employer responsibility laws that can withstand legal challenges.

- **Employers may decrease wages and other benefits**

One fear is that some employers might cut wages and/or other benefits in order to afford increased spending on health insurance. Because most employer responsibility legislation is so recent, little research has been done on this issue. However, a study was done in Hawaii, the state with the longest history of employer responsibility legislation. The study found that “industries most affected by the mandate had slower wage growth than other industries, but more rapid wage growth than the same industries on the mainland.”¹²

Another study examined how New York’s proposed employer responsibility legislation would affect the state’s economy. Some economists theorized that employers would lower wages in order to offset increased health care costs, while others found evidence for this theory inconclusive.¹³ The report concluded that the legislation would stimulate spending on health insurance and health care, ultimately creating between 7,380 and 38,744 new jobs.¹⁴

Overall, the evidence is inconclusive regarding whether employer responsibility legislation will end up affecting employee benefits. Even the Hawaii example is of limited use because the study looked only at wages and not at total compensation, which includes health coverage and other benefits.

- **It might harm small businesses if it requires them to spend more money on health coverage than they can afford**

Critics of employer responsibility legislation have claimed that if businesses are required to spend more on health care, they will lose profits and might need to downsize, or even go out of business. Small businesses, they assert, will be particularly hard hit. However, employer responsibility legislation can be structured in a way that is responsive to the needs of small businesses. For example, employer responsibility legislation can be constructed to require that smaller businesses spend a lower, more affordable amount on health coverage than larger businesses. The legislation could also be drafted to exempt small businesses altogether. Maryland’s employer responsibility legislation, for instance, applies only to businesses with 10,000 or more employees, clearly exempting small businesses.

- **It might encourage businesses to move out of state**

While employer responsibility legislation does not have a very extensive track record, research and history to date show that this type of legislation is unlikely to cause businesses to move away.

- A 1994 GAO study of Hawaii’s employer responsibility law and its effect on small businesses concluded that the mandate “has not created large dislocations in the small business sector.”¹⁵
- A study analyzing the proposed employer responsibility legislation in Massachusetts (before it passed) found that the bill would result in a net benefit for the state’s business community. The analysis concluded that, by an enormous margin, the firms that would save money on health insurance under the law outnumbered those that would be subject to new employer assessments.¹⁶ According to the report, “decisions

about where to locate a business are affected by many factors, including general business climate, . . . local workforce characteristics, the condition of the area's infrastructure, . . . and other factors," and the Massachusetts bill was unlikely to change the location decisions of more than a tiny number of firms.

Thus, to date, there is no evidence showing that enacting employer responsibility legislation would cause businesses to leave. What's more, research suggests that such legislation could actually stimulate state economies and create new jobs.

- **Like employer-based coverage, this kind of coverage is not portable—it cannot follow a person from job to job**

Employer-based coverage is, by its very nature, not portable. That is, if a worker gets his health insurance through his job, and he leaves or loses that job, he will also lose his health insurance. However, employer responsibility legislation can be structured to include programs that offer affordable health insurance to workers who are between jobs or who are not employed for other reasons. For example, the funds collected from employers that choose not to provide health insurance can be used to support subsidies for the purchase of COBRA coverage,¹⁷ Medicaid, and other public health programs. It is this contribution of funds to new or existing public programs (when employers are unwilling or unable to provide health insurance to their employees) that makes this kind of plan a unique public-private partnership.

- **Employer-based coverage is on the decline**

Some claim that employer-based health insurance is on its way out—many employers have dropped dependent coverage or have stopped offering health insurance altogether. So, why build on a model that some believe is becoming obsolete? While fewer employers are providing insurance for their workers, employer-based health insurance still covers more than 60 percent of nonelderly people in the U.S—more than 155 million people.¹⁸ And, although employer-provided insurance is not necessarily the perfect way to provide health coverage, the factors listed below make building on this type of coverage advantageous.

- Employer responsibility legislation often has broad public support, as well as support on both sides of the political aisle.
- It builds on an existing infrastructure.
- Lastly, it takes advantage of group bargaining power. With employer-based coverage, businesses are able to bargain with insurance companies for lower prices because they are purchasing insurance on behalf of a group of employees. When a worker has to buy a policy in the individual market, he or she has no such bargaining power, and the worker likely ends up paying much more out of pocket than would have been the case with employer coverage.

For more information, please see *Ideas that Work: Expanding Health Coverage for Workers* and *Making History: Maryland's Fair Share Health Care Law*, both available online at www.familiesusa.org.

Endnotes

- ¹ For more information, see *Ideas that Work: Expanding Health Coverage for Workers* (Washington: Families USA, 2004).
- ² Sherry Glied, Jeanne M. Lambrew, and Sarah Little, *Growing Share of Uninsured Workers Employed by Large Firms* (New York: The Commonwealth Fund, October 2003).
- ³ *Fair Share Health Care Plan?*, *Maryland Citizens' Health Initiative, January 2005*, available online at <http://www.healthcareforall.com/parameters/healthcareforall/uploads/dl/Main/fairshareFINAL2.pdf>.
- ⁴ Kathleen Stoll, *Paying a Premium: The Added Cost of Care for the Uninsured* (Washington, Families USA, June 2005).
- ⁵ Sara R. Collins, Karen Davis, Michelle M. Doty, and Alice Ho, *Wages, Health Benefits and Workers' Health* (New York: The Commonwealth Fund, October 2004).
- ⁶ *Employer Health Benefits 2005 Annual Survey* (Washington: Kaiser Family Foundation and the Health Research and Educational Trust, 2005), Exhibit 6.1.
- ⁷ Pamela M. Prah, "State Finances Stable, but Governors Wary," *Stateline.org*, June 14, 2006, available online at <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=119510>.
- ⁸ Bradley C. Strunk and James D. Reschovsky, *Trends in U.S. Health Insurance Coverage, 2001-2003* (Washington: Center for Studying Health Systems Change, August 2004); Kaiser State Health Facts Online, "Percentage Point Change in Employer-Sponsored Insurance among Nonelderly, 2000-2004," available online at <http://www.statehealthfacts.org/cgi-bin/healthfacts.cgi?action=compare&category=Health+Coverage+%26+Uninsured&subcategory=Coverage+Trends+Among+Nonelderly&topic=Change+in+Number+with+ESI>, accessed on May 16, 2006.
- ⁹ Bradley C. Strunk and James D. Reschovsky, *op. cit.*
- ¹⁰ For more information about the New York City Health Care Security Act, see the bill's Web site at <http://www.nyhealthcaresecurity.org/news.html>.
- ¹¹ *Mayor Newsom Outlines Next Steps for Implementation of Universal Health Access Plan for San Francisco's Uninsured*, Press Release (San Francisco: San Francisco Mayor's Office of Communication, August 7, 2006), available online at http://sfgov.org/site/mayor_page.asp?id=44645.
- ¹² Norman K. Thurston, "Labor Market Effects of Hawaii 's Mandatory Employer-Provided Health Insurance," *Industrial and Labor Relations Review* 51, no. 1 (1997): 117-35, as cited in David West, *New York's Fair Share for Health Care: No Significant Employment Impact* (Seattle: Center for a Changing Workforce, May 2006).
- ¹³ David West, *op. cit.*
- ¹⁴ *Ibid.*
- ¹⁵ U.S. General Accounting Office, *Health Care in Hawaii: Implications for National Reform* (Washington: U.S. Government Printing Office, 1994).
- ¹⁶ *Proposed Health Reform in Massachusetts: Net Gain for the Business Community* (Washington: Families USA, January 2006).
- ¹⁷ The Consolidated Omnibus Budget Reconciliation Act (COBRA) provides workers (and their families) who lose their health benefits with the right to continue group health benefits provided by their former employer for limited periods of time under certain circumstances, such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events. For more information on COBRA, see the Web site for the Department of Labor at <http://www.dol.gov/dol/topic/health-plans/cobra.htm>.
- ¹⁸ Kaiser State Health Facts Online, "Health Insurance Coverage of Nonelderly 0-64, states (2003-2004), US (2004)," available online at http://www.statehealthfacts.org/cgi-bin/healthfacts.cgi?action=compare&category=Health+Coverage+%26+Uninsured&subcategory=Health+Insurance+Status&topic=Nonelderly+%280%2d64%29&link_category=&link_topic=&viewas=&showregions=0&sortby=&datatype=&welcome=0&printerfriendly+1, accessed on May 24, 2006.

This issue brief was written by:

*Leila Babaeva, Health Policy Analyst
Families USA*

**The following Families USA staff
contributed to the preparation of this issue brief:**

Kathleen Stoll, Director of Health Policy

Peggy Denker, Director of Publications

Ingrid VanTuinen, Writer-Editor

Jenelle Partelow, Editorial Associate

Nancy Magill, Design & Production Coordinator

Families USA

1201 New York Avenue NW, Suite 1100

Washington, DC 20005

Phone: 202-628-3030 ■ Fax: 202-347-2417

www.familiesusa.org
