Making History:
Maryland's Fair Share Health Care Law

On January, 12th, 2006, Maryland's much-anticipated Fair Share Health Care (FSHC) bill became law. That was the day that the Maryland legislature voted overwhelmingly to override the governor's May 2005 veto of the legislation. Maryland thus became the only state—with the exception of Hawaii and Massachusetts—to require large employers to either pay a share of their payroll toward their employees' health insurance or pay into a state fund to expand coverage.

How Does Fair Share Health Care Work?

- The Fair Share Health Care Fund Act will take effect in 2007.
- The law applies only to those employers with 10,000 or more employees in the state.
- Fair Share Health Care imposes a tax on affected employers equal to 8 percent of payroll (6 percent for large nonprofits) to help fund the state's Medicaid program.
- Employers can avoid paying some or all of this tax by qualifying for a tax credit that is based on how much they spend on employee health care. If they spend less than 8 percent (or 6 percent for large nonprofits) of payroll, they can choose to either pay the difference to the state's Medicaid program or increase the amount they spend on health care for their employees.
- Affected employers must report their average number of in-state full-time and part-time employees to the Secretary of Labor, Licensing and Regulation. They must also report the total amount they spend on health care coverage for workers, dependents, and retirees in terms of both gross dollars and percent of payroll in order for the Secretary to calculate the tax credit due them.
- Eligible health care expenses include only those deductible for federal tax purposes, such as payments for medical care, prescription drugs, vision care, medical savings accounts, and any other costs related to health benefits as defined by the Internal Revenue Service (IRS).
- When calculating their payrolls, employers may exempt wages paid to each employee above the median household income in the state ($55,213 in Maryland when the bill passed) and wages paid to employees who are eligible for Medicare.

Maryland Advocates' Decisions and Strategies

Why did Maryland advocates choose to expand coverage through employer-based legislation rather than through other means?

In order to understand why advocates chose this route, it is important to know a little bit about recent health care advocacy in Maryland.

In 1999, the Maryland Citizens' Health Initiative (MCHI), a health advocacy organization, formed the Health Care for All! Coalition to educate the public about the need for quality, affordable health care for all Marylanders. One of the projects that the coalition worked on from its early days was designing a bill that would provide health coverage for all state residents. This work took the form of the comprehensive Health Care for All! Plan, of which Fair Share Health Care was just one part.

The Health Care for All! plan included multiple ways of expanding access to health care: an employer "pay or play" provision, an "individual mandate" for high-income earners, a significant Medicaid eligibility expansion, a small group market expansion, a prescription drug buying pool, and the creation of a quasi-public insurer for those who have no other private sector option.

Since MCHI released the Health Care for All! plan in 2002, many parts of it have been enacted (for details, see the group's Web site at http://www.healthcareforall.com). MCHI also recognized that their 1,100-member coalition, along with state legislators and key members of the business community, strongly supported the elements of the Fair Share Health Care plan as a way to expand health coverage. With such broad-based support already secured, advocates rallied behind the Fair Share Health Care plan.

Why does the legislation affect only businesses with 10,000 or more employees?

In the Health Care for All! plan, the Fair Share Health Care component was divided into two parts—one that applied to large employers (those with 10,000 or more employees) and one that applied to smaller employers (those with fewer than 10,000 employees). It was the part of the Fair Share Health Care design that focused on expanding coverage through large employers that attracted new business support. Since these partners were not yet ready to endorse the entire Health Care for All! plan, advocates decided to focus their efforts on large employers.

Did legislators and advocates directly target Wal-Mart?

No. In fact, there are currently four employers in Maryland that have 10,000 or more in-state employees and are therefore subject to the Fair Share Health Care law: Giant Food, Johns Hopkins University, Northrop Grumman, and Wal-Mart. Of these four companies, only Wal-Mart testified that it might not meet the requirements of the Fair Share Health Care bill. In no way was this law targeted at any single company—it is designed to prevent *all large companies* from dumping their employee health care costs on the state.

Why the 8 percent threshold?

As noted above, the Fair Share Health Care law was part of a more comprehensive health care reform plan from the start. During development of that plan, experts analyzed how much funding would be needed to provide subsidized health care for all lower-income residents. Once they determined appropriate funding levels, MCHI and its experts concluded that it would be fair to tax large companies at a higher level than small companies given that large companies, on average, spend a higher percentage of payroll on health care than smaller companies. In addition, MCHI decided that nonprofits should be treated differently because for-profit entities receive a tax deduction for their health insurance expenditure while nonprofits get no such tax break (because they do not pay taxes). Given these facts, the MCHI plan included different requirements for large and small companies and for for-profit and nonprofit companies. When the Fair Share Health Care component was separated out from the whole plan as a stand-alone bill, legislators decided that the threshold amount that would have to be spent on health care (8 percent) should remain at the same level as it was in the original, more comprehensive bill.

Why are wages above the state's median household income exempt when calculating an employer's total wages?

MCHI's team of health care experts suggested, for equity reasons, a limit on the income considered in determining the percentage of payroll employers would be taxed. Those experts concluded, after careful study, that 8 percent would constitute a disproportionate burden for employers that pay significantly higher wages. Based upon this expert advice, MCHI proposed capping the wages that would be counted toward the percentage at the amount taxed for federal FICA purposes, now $90,000. However, business advisors argued that this FICA limit was actually too high, especially given that Congress was considering plans to raise the FICA limit even higher. It was suggested that a more equitable limit might be the Maryland median income, which was approximately $55,000. Thus, this change was incorporated in the final proposal based upon valid economic considerations and with the support of experts.

Timeline of Critical Events That Made Fair Share Health Care Possible

1999	The Maryland Citizens' Health Initiative (MCHI) established the Maryland Health Care for All! Coalition. Today, that coalition is the state's largest health care consumer coalition, with more than 1,100 diverse member groups.
2000	The MCHI held town hall meetings throughout the state, met with key health care stakeholders, commissioned polls, and hired experts from the area's flagship institutions to help them craft an economically sound health care for all plan with input from the coalition and the public.
2001	The MCHI released a draft plan and asked coalition members and the public for feedback.
2002	The MCHI introduced the Health Care for All! plan in December.
2003	Maryland legislators introduced the Health Care for All! plan in the Maryland House Government Health and Government Operations Committees and the Senate Finance Committee; the bill died in the house.
2004	Legislators introduced the Health Care for All! plan again. An alternative bill was introduced by the General Assembly leadership. That bill was designed to strengthen community health centers, but it also included the Fair Share Health Care component for large businesses. Both bills were killed.
2005	Taking a cue from the General Assembly leadership, Fair Share Health Care was introduced as a stand-alone bill and the Health Care for All! bill was also introduced. While the Health Care for All! bill died in house committee, the General Assembly passed the Fair Share Health Care Fund Act, but the Republican governor vetoed it.
2006	The Maryland House and Senate overwhelmingly voted to override the governor's veto.

What Strategies Did Advocates Use?

The Health Care for All! Coalition was crucial in forging the path toward the Fair Share Health Care victory. Since its formation in 1999, the coalition worked on several different health care issues, so it had years to hone its ground-level advocacy and alliance building. The time the coalition and its partners spent on building relationships and doing grassroots organizing was one of the key reasons they were successful in passing Fair Share Health Care.

At the height of the legislative battle in the fall of 2005, there were about a dozen Wal-Mart lobbyists working the Maryland capital. They made financial contributions to the governor and several state legislators. In response, coalition members made the bill their number one priority for that legislative session.

Advocates also knew that they needed meaningful support from key health care stakeholders, so they worked diligently to bring those groups on board.

Key Support:

Businesses: The campaign for expanding health care reached a tipping point when advocates were able to win unprecedented support from the business community. At the center of this community was Giant Food, the largest and most respected grocer in Maryland, and its unionized employees, who stood hand-in-hand with management in advocating for this bill.

Giant Food became a very strong ally in this fight for several reasons. First, the company already does its fair share by providing comprehensive, union-negotiated health care benefits to its employees. As a result, the company felt that it was at a competitive disadvantage because it was paying for health coverage while some competitors weren't. What's more, Giant recognized that it was, in effect, subsidizing those companies and individuals that do not pay their fair share for health care: Currently, hospitals raise the rates they charge to their customers (insurance companies, individuals) to make up for the "free" care they provide to the uninsured patients who cannot pay. Specifically, when an uninsured person is treated at a Maryland hospital but cannot pay the bill, the costs are "paid for" through inflated hospital rates charged to insurers and other paying hospital consumers. Insurers then pass these costs on to companies and insured individuals by charging higher premiums. So, employers who pay for health insurance for their workers would end up paying less if the number of people who were uninsured decreased.

Like large businesses, small businesses also recognized the potential for a similar gain. And as advocates began to see the wellspring of other resources in the business community that could be tapped, they arranged for small businesses to star in many radio advertisements and write newspaper editorials in support of Fair Share Health Care.

Organized labor, community and advocacy groups, and the faith community: The vital role that organized labor played in this campaign cannot be understated. As true partners in this struggle with the Health Care for All! Coalition, they were determined to see Fair Share Health Care pass and made it clear that this one bill was the centerpiece of their legislative agenda. Maryland for Health Care (a project of SEIU), SEIU, UFCW, AFSCME, and the AFL-CIO led the way and mobilized members and the public to actively push for change. The Maryland Health Care for All! Coalition also included religious leaders, the NAACP, and grassroots organizations such as Progressive Maryland and Democracy for America, which all played a major role in advocating for Fair Share Health Care. Coalition members worked to synchronize their lobbying efforts, as well as their media and field strategies.

Key Activities:

Field and Media Strategies: The coalition used a variety of "earned media" events, including multiple press conferences with political leaders, coalition groups, and a Wal-Mart worker, as well as paid media (TV and radio advertisements). Field actions included patched-through calling and post card campaigns. The TV advertisements were funded by the unions, while the radio ads were paid for by the 501(c)(4) arm of the MCHI. These activities showcased their strongest supporters, such as small business owners, Giant Food, the faith community, and the health care community.

Polling: As they lobbied the legislature, advocates realized that if they could get polling data showing that Marylanders overwhelmingly supported Fair Share Health Care, it would bolster their case significantly. The MCHI commissioned two different polls that asked a variation of the question "Would you favor or oppose a state law requiring all Maryland companies with 10,000 or more employees, such as Wal-Mart and Giant, to spend at least 8 percent of their payroll cost on heath care coverage for their employees?" Both polls, one conducted in January 2005 and the second conducted in August 2005, clearly showed tremendous support for Fair Share Health Care. According to the August poll, even districts that had overwhelmingly voted for the Republican governor supported Fair Share Health Care by at least at 60 percent. In fact, one of the most conservative voting districts supported the measure by a whopping 78 percent.

These poll results were used extensively in field and media strategies. The polling was paid for by the Maryland Citizens Health Initiative, Inc., the 501 (c)(4) partner of MCHI. MCHI, Inc. is financed by contributions from individuals, businesses, and unions, as well as an annual fundraiser.

The Battle Isn't Over

On February 7, 2006, almost a month after the legislature passed Fair Share Health Care, the Retail Industry Leaders Association (RILA) filed two lawsuits challenging both Fair Share Health Care and another employer-based expansion law in New York. The RILA board, which included a Wal-Mart executive, voted unanimously to file the suits. The lawsuits asked the federal court to strike down the Fair Share Health Care bill. RILA asserted that the reason behind their challenge was that Fair Share Health Care is an "irrational and arbitrary regulation of commercial activity." MCHI responded to the RILA suit with an amicus brief refuting RILA's arguments. The MCHI argued that Fair Share Health Care will actually foster a better business climate in the state by leveling the playing field between those businesses that spend their fair share on health care and those that don't, eliminating the competitive advantage held by firms that do not provide health insurance.

The RILA suit also claims that the Maryland law conflicts with the federal Employee Retirement Income Security Act (ERISA). (For more on ERISA, see Chapter 5 of the Families USA tool kit, *Ideas that Work: Expanding Health Coverage for Workers*.) Under ERISA, states are prohibited from directly requiring employers to provide health coverage for their workers. However, MCHI responded in the amicus brief that the bill was crafted specifically to avoid preemption. Fair Share Health Care avoids ERISA preemption in three ways: 1) it does not require employers to establish an ERISA plan or require any plan that employers might establish to provide a particular level of benefits; 2) it allows employers to either provide no health benefits or to provide health benefits through an ERISA plan; or 3) it allows any combination of the three. At the request of Maryland House Speaker Michael Busch, J. Joseph Curran, Maryland's Attorney General, wrote a letter back to House Speaker explaining why the Fair Share Health Care legislation is not preempted by ERISA. (That letter is available online at http://www.healthcareforall.com/parameters/healthcareforall/uploads/dl/Main/curranERISA.pdf.)

Additionally, the RILA lawsuit asserts that the Fair Share legislation is unconstitutional because it "arbitrarily singles out one company for discriminatory treatment," thereby violating the Maryland State Constitution. MCHI's amicus brief clarifies that Fair Share Health Care applies equally to every employer with 10,000 or more Maryland employees, without restriction. It further argues that Fair Share Health Care does not create arbitrary or unreasonable classifications; that large employers are more able to afford employee health insurance than small employers; and that it is reasonable for the General Assembly to choose to apply a new initiative to a small group of employers first, such as the small class of Maryland employers with 10,000 or more in-state employees. (For further arguments, please read the amicus briefs online at http://www.healthcareforall.com/Article119.phtml.)

The RILA suit is set to be heard in U.S. District Court on June 23, 2006. Several organizations, including those that support and those that oppose the RILA suit, have submitted amicus briefs in anticipation of the hearing date.

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