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State Legislation and Actions Challenging Certain Health Reforms, 2010 [Excerpt]

Updated: January 5, 2011 - subject to additions

by: Richard Cauchi, Program Director, NCSL Health Program

States have an extensive and complicated shared power relationship with the federal government in regulating various aspects of the health insurance market and in enacting health reforms.

In response to federal health reform legislation and enacted law, some members of at least 40 state legislatures proposed legislation to limit, alter or oppose selected state or federal actions, including single-payer provisions and mandates that would require purchase of insurance. In general most of the measures, in both 2009 and 2010:

- ▶ Focus on not permitting or not implementing or enforcing mandates (federal or state) that would require purchase of insurance by individuals or by employers and impose fines or penalties for those who fail to do so.
- ▶ Seek to keep in-state health insurance optional, and instead allow people to purchase any type of health services or coverage they may choose.
- ▶ Contradict, some would say challenge, some policy features contained in the new federal law.
- ▶ The language varies from state to state, often using provisions from [Arizona](#), as cited below.

State-Based Actions: November 2010 - January 2011

Major court cases. These actions by executive branch officials and private parties are provided for information only. They are legally separate from state lawmaking but may affect state deliberations:

◆ **Virginia's** federal district court ruled December 13, 2010 that the individual mandate to purchase insurance is unconstitutional. In a 42-page opinion issued in Richmond, Va., Judge Henry Hudson wrote that the law's central requirement that most Americans obtain [health insurance](#) exceeds the regulatory authority granted to Congress under the Commerce Clause of the Constitution. The ruling does not by itself enjoin or halt any part of the federal law, pending rulings by higher courts. [[Text of ruling](#) | [Case details below](#)] **NEW**

◆ **Michigan:** In the first decision among more than 20 cases filed against the new law, a federal district judge in Detroit, Michigan dismissed one case and ruled in favor of the federal reform law; that decision has been appealed and does not in itself alter the status of the law. [Read [news summary of court action](#)]

◆ **Florida:** [Judge Allows Part Of Suit Against Health Reform Law To Proceed](#) --Federal District Judge Roger Vinson ruled on October 14 that two of six counts, those about the individual mandate and the Medicaid expansion, can go to trial. Motions for summary judgment were heard December 16, 2010.

◆ Also in **Virginia**, a private party suit by Liberty University was rejected in another federal district court on November 30; the judge's 54 page ruling upheld the federal law. [[read news article](#)] Additional information and cases are in an [appendix table](#) at the back of this report.

November 2 ballot questions. With 45 state legislatures out of session, the focus of attention shifted to the three states with proposed constitutional ballot questions facing voters in Nov. 2, 2010, elections:

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Related NCSL Resource Pages

- ▶ [Health Reform Implementation](#)
- ▶ [Constitutional Issues and the Patient Protection and Affordable Care Act \(PPACA\)](#)-presentation to NCSL Legislative Summit, July 25, 2010
- ▶ [States Push Back.](#) State Legislatures Magazine, June 2010

Arizona - passed by voters, 55.4% Yes to 44.7% No [[results](#)]

Colorado - rejected by voters, 53% No to 47% Yes. [[article 11/3/10](#)]

Oklahoma - passed by voters 64.73% Yes to 35.27% No [[state results 11/3/10](#)]

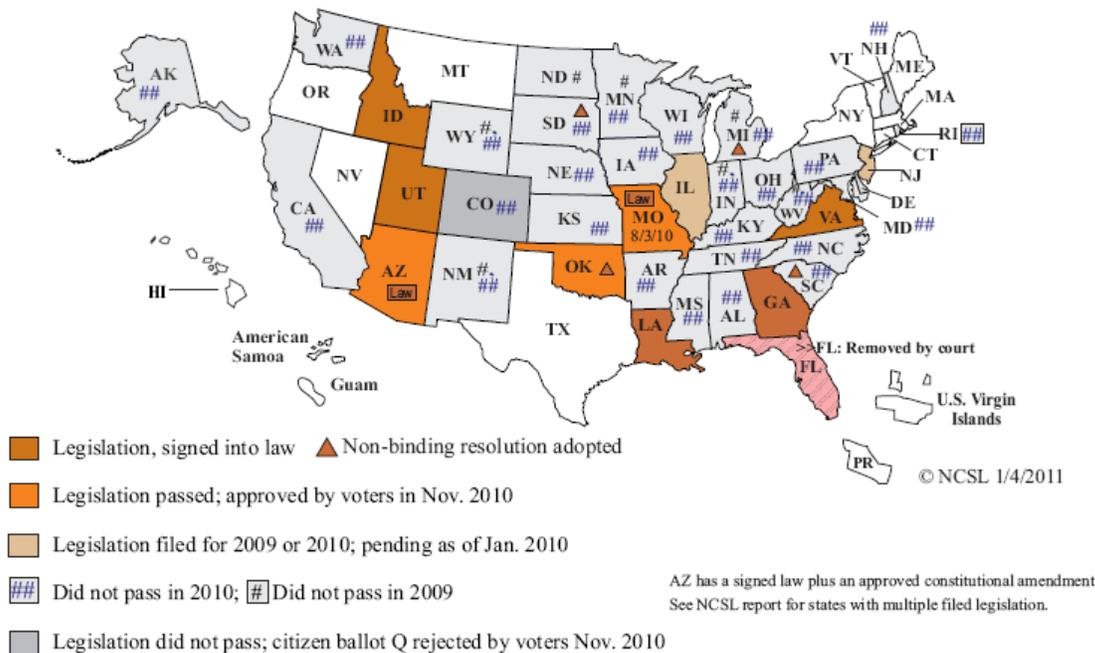
State constitutional amendments: In 30 of the states, the filed measures included a proposed constitutional amendment by ballot question. In a majority of these states, their constitution includes an additional hurdle for passage--requiring either a "supermajority" of 60 percent or 67 percent for passage, or requiring two affirmative votes in two separate years, such as 2010 and 2011.

Federal constitutional amendment: Idaho called for adding a U.S. 28th Amendment that Congress shall make no law requiring citizens of the United States to enroll in, participate in or secure health care insurance or to penalize any citizen who declines to purchase or participate in any health care insurance. This was adopted by both Senate and House on March 29, 2010. Florida adopted a non-binding resolution referencing a federal constitutional amendment process.

Changing state law: In at least 16 states, proposed bills aimed to amend state law, not the state constitution. These require a simple majority vote and action by the governor; they also can be re-amended or repealed by a future state law. So far in 2010, seven states have enacted such laws. Virginia became the first to enact a new statute section titled, "Health insurance coverage not required." It became law on March 10, 2010. Georgia, Idaho, Louisiana, Missouri, Utah and Arizona also each enacted similar statutes.

40 States with 2009-2010 Legislation Opposing Certain Health Reforms

NOTES: FLORIDA's proposed ballot question was removed from the ballot by the state court on August 31.



As of December 31, 2010 more than 115 formal resolutions or bills had been considered in **Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, Wisconsin** and **Wyoming**. Additional states were reported in media or association articles to have discussed future action or intentions; examples are [listed below](#).

New Laws: Seven states have signed or enacted statutes in 2010, based on final actions as of November, 2010:

- ▶ A **Virginia** law passed both Senate and House, was amended by the Governor and both branches of the legislature and became law as Chapter 106 on March 10, becoming the first such statute in the nation.*
- ▶ **Idaho** enacted a similar statute, signed as Chapter 46 on March 17.
- ▶ A **Utah** statute, signed March 22, prohibits any state agency from implementing health reform unless state agencies recommend action or the legislature passes a provision.

- ▶ A **Georgia** statute addition was substituted during a conference committee and passed by Senate and House on the last day; it was signed into law by the governor on June 2.
- ▶ **Louisiana** enacted a statute, declaring that residents "shall be free from governmental intrusion in choosing or declining to choose" health coverage; signed July 2.
- ▶ **Arizona** enacted a separate statute, similar to their constitutional ballot question for November 2010. (Explained below)

Statute by Ballot Question approved in Missouri

- ▶ **Missouri's** Legislature passed a proposed statute, but required that it be put to voters for approval or disapproval on their primary election day, Tuesday August 3, 2010. It was approved by a 71.1 percent yes vote.

Constitutional Ballot Questions passed in two states:

- ▶ **Arizona's** resolution of June 2009 was the first [constitutional ballot question](#) measure to have passed the legislative process; it was approved by voters on November 2, 2010. (Also see statute, listed above). **NEW**
- ▶ **Oklahoma's** [constitutional amendment ballot question](#) was approved by the Senate and House in May 2010; it was approved by voters on the November 2, 2010 ballot. **NEW**

Question Rejected by Voters

Colorado: Although the legislature rejected a resolution on the topic, a citizen initiative [proposed constitutional amendment](#) was placed on the November 2, 2010 ballot; it was rejected. **NEW**

Question Rejected by Court:

Florida's legislature was the second state to approve a constitutional amendment ballot question, on 4/22/10, for a decision by voters on Nov. 2, 2010. However, in late July a Florida District court ruled the question wording as inappropriate; on August 31 their State Supreme Court agreed that the question must **be removed** from the ballot.

Non-binding measures:

South Dakota passed a resolution opposing "government take-over" of health care. **South Carolina** adopted a resolution opposing health mandates and directing the attorney general to challenge such provisions in federal health reform. A **Michigan** Senate resolution urging removal of financial obligations passed in January 2010. **Idaho** called for adding a U.S. Constitutional Amendment to provide that Congress shall make no law requiring citizens of the United States to enroll in, participate in or secure health care insurance or to penalize any citizen who declines to purchase or participate in any health care insurance.

Measures That "Did Not Pass:"

For the 2009-2010 legislative sessions, so far **29 states** have not passed or have rejected bills and resolutions (27 states in 2010, one in 2009)

For 2010 sessions, the states are: **Alabama, Alaska, Arkansas, California, Colorado, Delaware, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Washington, West Virginia, Wisconsin** and **Wyoming**. A 2009 **North Dakota** constitutional proposal did not pass by the end of their session. If additional special sessions, reintroductions or reconsideration motions are filed, they will be added to this report.

An "interim study proposal" resolution was not acted on in Arkansas; in Indiana a resolution passed the Senate but did not pass the House. States with discussions but no known legislation are listed separately; information in the examples list below is based on media statements by individual legislators or legislative associations.^[1]

Attorneys General in at least 20 individual states have also taken some [actions](#) related to constitutional challenges to health reform, listed below. In addition individual governors in 3-4 states have urged such legal challenges.

The issue has garnered state legislative interest in 2009-2010 in part due to the American Legislative Exchange Council's [\(ALEC\) model](#) "Freedom of Choice in Health Care Act," which the organization described as "How Your State Can Block Single-Payer and Protect Patients' Rights." The ALEC-endorsed language mirrors Arizona Proposition 101, which was narrowly defeated in 2008.

Legal experts have expressed widely varying pro and con opinions on the validity of this approach. [See [Appendix 2](#) for commentary and quotes.]

Based on actions initially in **Arizona in 2009**, 29 other states considered proposed state constitutional amendments, using language such as:

"To preserve the freedom of all residents of the state to provide for their own health care... A law or rule shall not compel, directly or indirectly, any person, employer or health care provider to participate in any health care system ... A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for paying directly for lawful health care services..."

B. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule"

[see full text in [Appendix 1](#)]

According to The New York Times, "Conservatives and libertarians, mostly, have been advancing the theory lately that the individual mandate, in which the government would compel everyone to buy insurance or pay a penalty, is unconstitutional." (NY Times, 9/26/09)

Missouri votes: August 3, 2010



Photo: NY Times (c)

**Table 1:
Filed Bills and Resolutions for 2009-2010**

Table 1 indicates 1) Activity and status for measures filed;
2) the percentage of affirmative votes in the legislature required for approval;
3) the earliest date that a proposed constitutional amendment can appear on the statewide ballot. Timing and parliamentary steps vary among states.

The State Constitutional process:

In 35 states, the legislature can enact a proposed constitutional amendment during a single session. [Appendix 3] This would allow passed measures to appear on the state ballot in 2010 or later. In 12 states the legislature must enact a proposed constitutional amendment during two sessions, which would make 2012 the earliest date for voter decisions.

State	Activity/Legislation	Required for passage
Alabama	HB 42 by Rep. Bentley; HB 47 by Rep. Gipson; HB 498 by Rep. Galliher; SB 233 by Sen. Beason. Would propose a constitutional amendment to prohibit any person, employer, or health care provider from being compelled to participate in any health care system. (HB 42 prefiled 11/5/09 for 2010 session; sent to Health Committee 1/12/10; did not pass by end of session 4/22/10) (SB 233 filed 1/13/10; Passed Senate, sent to House 4/1/10; did not pass by end of session 4/22/10)	60% both legislative chambers + 2010 ballot vote
Alaska	HJR 35 by Rep. Kelly filed for 2010 session Would propose a state constitutional amendment prohibiting passage of laws that interfere with direct payments for health care services and the right to purchase health care insurance from a privately owned company, and that compel a person to participate in a health care system. (Filed 1/19/10; favorable House committee reports 3/12/10; failed passage 22y-18n 4/15/10)	2/3rds both legislative chambers + 2010 ballot vote
	HR 14 by Rep. Chenault Would urge the United States Congress to oppose federal health care reform bills. (Filed 2/17; re-referred to House Comm. 3/19/10)	Non-binding resolution; majority vote
	Resolution HCR 2014 of 2009 by Rep. Barto Refers to the November 2010 ballot a proposed amendment to the State Constitution "which provides that no law or rule shall compel any person or employer to participate in any health care system, a person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for doing so, a health care provider may provide directly purchased lawful health care services; prohibits the terms or conditions of a health care system from imposing certain mandates or limitations." [full text in Appendix 1 below]	50% both legislative chambers (Passed)

Illinois	examine the provisions of the federal health care reform law to determine the fiscal impact of the provisions on the state budget, with a report due July 1, 2010 for use with the FY1011 budget. <i>(Filed and sent to Rules Committee, 3/26/10; held in comm. as of 9/7/10)</i>	Non-binding resolutions
Iowa	SB 2097 Would affirm the intent of the General Assembly to exercise those powers reserved to the states; includes but not limited to providing state-based regulation of the health insurance market; provides aggressive oversight of this market; enforces consumer protection and a local, responsive presence for consumers. <i>(Filed; sent to Senate Committee on Judiciary 1/27/10; did not pass by end of session 4/10)</i>	
Michigan	SR 106 by Sen. George Memorializes the President, the Congress, and the Secretary of HHS to remove provisions from the final version of the federal health care reform legislation that would increase financial obligations for states, whether through expanded Medicaid requirements or other mandates. <i>(Filed; Adopted by Senate 1/16/10)</i>	Non-binding resolutions
New Hampshire	SB 417 by Sen. Bradley Would amend state law to prohibit the expansion of the Medicaid program if Congress passes a national health insurance plan unless the expansion is approved by the NH Legislature or is paid for by the federal government. <i>(Filed and sent to Senate Finance Committee 1/6/10; did not pass; voted as "inexpedient to legislate" , 14y-10n, 3/3/10)</i>	Proposed statute: majority both legislative chambers



Sources: NCSL research; State legislative web sites; StateNet for selected features.

Table 2: State Attorneys General or Governors Seeking to Block Healthcare Law in Court

These actions are listed for information only. Unless otherwise noted above, they may have no connection to actions or decisions by the state legislatures.

<p>Can Congress compel Americans to engage in specific commercial transactions?</p> <p>In early April, 13 state attorneys general filed a lawsuit seeking to repeal health care reform in federal court in Florida; by June a total of at least 20 states had some role in support of this legal challenge. Virginia Attorney General Ken Cuccinelli is pursuing a similar suit in his home state. The cases center on health care reform’s mandate that Americans, starting in 2014, purchase insurance. If they don’t, they will stand to pay a fine of \$750, or 2 percent of their income, whichever is greater.</p> <p>Key ACA Provisions Challenged</p> <p>Collectively the litigation raises constitutional challenges to four provisions of the ACA, as analyzed in a brief by the George Washington Law Center, updated 12/6/2010:</p> <ul style="list-style-type: none"> ▸ Individual responsibility – The law’s requirement that beginning January 1, 2014, non-exempt individuals either maintain health insurance coverage (termed “minimum essential coverage”)^[10] or pay a penalty in the form of a tax.^[11] ▸ Medicaid expansion – The law’s requirement that states participating in Medicaid expand their programs, beginning January 1, 2014 to cover non-elderly persons with incomes below 133 percent of the federal poverty level (FPL), including individuals previously ineligible for federally assisted Medicaid benefits.^[12] ▸ Insurance market reforms – Federal reforms aimed at curbing certain practices by health insurers, specifically: reforms that require insurers and self-insured group plans to issue and renew health insurance coverage without regard to the health status of individuals or groups, and to offer coverage that is not subject to annual or lifetime limits and that 	<p>List of States Attorneys General (or Governors*) acting to pursue lawsuits opposing health provisions. - as of October 2010</p> <p>Note: Statements and actions by state executive officials are listed for background information only. This report does not evaluate the role or claims of such officials.</p>
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complies with certain other requirements.^[13]

- ▶ Employer responsibility – The law’s minimum employer contribution responsibilities in the case of employers that either offer no plan or a plan with inadequate subsidies, with contribution responsibilities tied to the number of employees that qualify for a subsidy.^[14]

On April 6th, the Thomas More Law Center asked the U.S. District Court for the Eastern District of Michigan (Case No. 2:10-cv-11156-GCS-RSW) for a preliminary injunction preventing the implementation of the health care reform provision that would require all Americans to purchase health insurance.

The Center, in its [motion for preliminary injunction](#), claimed that health care reform, particularly the individual mandate, “represents an unprecedented encroachment on the liberty of all Americans, including plaintiffs, by imposing unprecedented governmental mandates that restrict their personal and economic freedoms in violation of the Constitution.” Read more: <http://www.politico.com/news/stories/0510/37155.html#ixzz0pA3z7Of3>

As of January 2011 there are two distinct state-based federal court challenges and three other private party suits with judges' rulings: **NEW**

1. **State of Florida v. U.S. Dep't of Health & Human Services**. (led by Florida A.G.; in Florida Northern District Court; Case No.3:2010-cv-0009) Filed March 23, 2010. Federal District Judge Roger Vinson ruled on October 14 that two of six counts, those about the individual mandate and the Medicaid expansion, can go to trial. Judge Vinson held a hearing on the merits for December 16..
2. **Commonwealth of Virginia v. Sebelius**. (led by Virginia A.G.; in U.S. District Court for the Eastern District of Virginia; Civil Action No. 3:10-cv-188). Filed March 23, 2010. Judge Henry Hudson in early August declined to dismiss the suit and heard oral arguments on October 18. He issued a ruling declaring the individual mandate unconstitutional on December 13, 2010. The insurance mandate is central to the law’s mission of covering more than 30 million uninsured because insurers argue that only by requiring healthy people to have policies can they afford to treat those with expensive chronic conditions.
 - > [Health Care Law Ruled Unconstitutional](#) (NY Times, 12/13/2010)
 - > [Virginia: Reply Memo Summary Judgment-Oct. 4](#) | [see "opinions" section below]
3. **Thomas More Center v. Obama**. (on behalf of 4 residents of S.W. Michigan; in U.S. District Court for the Eastern District of Michigan; Case No. 2:10-cv-11156-GCS-RSW) Filed March 23, 2010. On October 7, Judge George Steeh dismissed this case, stating that choosing not to obtain health insurance coverage qualified as an example of "activities that substantially affect interstate commerce." Plaintiff have indicated the case is being appealed.
4. **Liberty University v. Geitner**. Also in Virginia, a private party suit by Liberty University was rejected in the U.S. District Court for the Western District of Virginia on November 30; the judge issued a [54-page ruling](#) that granted the government’s request to dismiss the case. [\[read news article\]](#)
5. **US Citizens Assoc. v. Sebelius**. In another private party suit, the U.S. District Court for the Northern District of Ohio in a ruling Nov. 22 allowed part of a lawsuit challenging the constitutionality of the health reform law to move forward. Dismissing three claims brought by the U.S. Citizens Association, Judge David Dowd agreed to hear arguments that the law’s individual mandate violates the Constitution’s interstate commerce clause. The rejected claims asserted that the law violated plaintiffs’ freedom of association guaranteed by the First and Fifth Amendments, the due-process clause of the Fifth Amendment and plaintiffs’ right to privacy. “It is apparent to the undersigned that the controversy ignited by the passage of the legislation at issue in this case will eventually require a decision by the Supreme Court after the above-described litigation works its way through the various circuit courts,” Dowd wrote.
6. *Other* -- There are a variety of other private-party filed lawsuits related to the 2010 federal health law. [\[litigation list\]](#)

- ◆ **Legal Challenges to the Affordable Care Act** - Legal brief by [Katherine Hayes](#) and [Sara Rosenbaum](#) of the George Washington Law Center; updated December 6, 2010.
- ◆ **HHS Letter to State Governors in Response to Legal Challenges to Individual Mandate** - Letter from Secretary of the Department of Health and Human Services Katherine Sebelius to state governors - December 2010. **NEW**
- ◆ **Health Law Faces Threat of Undercut From Courts** - New York Times, November 27, 2010
- ◆ **Florida Attorney General Responds to Motion to Dismiss the Health Care Reform Act Lawsuit** - Statement by FL A.G. Bill McCollum, June 17, 2010.
- ◆ **Health Care Battle Heats Up** - National Law Journal (Law.com) - Aug 9, 2010
- ◆ **Overview of Litigation Filed to Stop Health Reform** - National Health Law Program (NHHeLP)- Jane Perkins, June 2010)
- ◆ **Court Schedules for Pending Cases -challenging health reform**- National Health Law Program (NHHeLP) - Updated November 5, 2010
- ◆ **Q & A: Update on Litigation Challenging the Affordable Care Act - National Health Law Program**

- ▶ Alabama
- ▶ Alaska
- ▶ Arizona (4/7/10) *
- ▶ Colorado §
- ▶ Florida ([news release 5/27/10](#))
- ▶ Georgia *
- ▶ Idaho
- ▶ Indiana (4/7/10)
- ▶ Louisiana
- ▶ Michigan §
- ▶ Mississippi (4/7/10) *
- ▶ Nebraska
- ▶ Nevada (4/7/10) *
- ▶ North Dakota (4/7/10)
- ▶ Pennsylvania §§
- ▶ South Carolina
- ▶ South Dakota
- ▶ Texas,
- ▶ Utah
- ▶ Virginia ([District Court ruling 8/2/10](#))
- ▶ Washington §

* = States where legal action was initiated by governors' offices.

§ = States where Attorney General initiated action but Governor publicly supports law, opposes challenge.

§§ = The Republican AG of Penn. was elected Governor on 11/2/2010.