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GOP 'Obamacare' jihad takes on subsidies for working poor

By Jon Healey

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Congressional Republicans are so obsessed with the idea of repealing any or all of "Obamacare," they don't seem to care about the potential harm that might inflict on their constituents. The latest example comes from Tennessee Republican Reps. Phil Roe and Scott DesJarlais (both of them physicians), who introduced a resolution aimed at denying lower-income Americans in more than two dozen states, including their own, the subsidies the bill provides for health insurance.

The Patient Protection and Affordable Care Act requires virtually all adult Americans to obtain coverage, starting in 2014. To make the coverage affordable, it offers refundable tax credits on a sliding scale to those with incomes up to four times the federal poverty level. Those subsidies are to be administered by new insurance marketplaces, called exchanges, set up in each state.

So far, only 15 states have set up exchanges, California among them. The rest -- many of them governed by Republicans who oppose the Affordable Care Act -- have not. If they don't do so by January 2014, when the exchanges are supposed to be up and running, the law calls for the federal Department of Health and Human Services to establish a state exchange for them.

VIDEO: How health care exchanges will work

A new paper published by two critics of the law claims that the Affordable Care Act provides subsidies only in states that set up their own exchanges, not in those where the feds do it. The authors -- Michael Cannon of the libertarian Cato Institute and Jonathan H. Adler of Case Western Reserve University law school -- argue that the recently adopted IRS regulations that make the subsidies available through any state or territorial exchange, regardless of who set it up, are unlawful.

Roe and DesJarlais' bill would invalidate that regulation, forcing the IRS to write new rules for implementing the subsidies. In a letter to the IRS late last year, the pair and 22 other House Republicans argued that providing subsidies to states that did not set up their own exchanges (e.g., their own states) would contradict the "explicit statutory language describing individuals' eligibility" for the tax credits.

Except that it wouldn't. The section of the law that they and the authors of the paper cling to talks only about how the amount of the credit is calculated. The eligibility rules, which are laid out in another section, make no reference to where the policy is bought. Instead, they focus on the purchaser's income, citizenship and the type of policy obtained.

The law typically refers to "an Exchange" or "a state Exchange," making no distinction between ones that were set up by state officials and those established by the federal government. In one of the few sections of the law that makes a distinct reference to each type of exchange, both are ordered to submit reports on the amount of subsidies they pay in advance each year. Cannon and Adler contend, risibly, that this section "plainly requires federal Exchanges to report zero advance payments." A much more reasonable explanation is that lawmakers expected federally established exchanges to issue subsidies, and demanded annual reports on the amounts to guard against excessive advances.

Critics of the IRS argue that Congress meant to withhold subsidies from the states that didn't set up exchanges as a way to motivate them to do the work. Lawmakers did provide an incentive -- cash grants for planning and establishing exchanges. But it strains credulity to think that Democrats would want to punish low-income Americans in the states that, for whatever reason, decided not to meet the 2014 deadline.

I get the argument that "Obamacare" is bad policy and needs to be dismantled. But the case against the IRS' implementing rules is not just weak, it defies common sense. Beyond that, as long as the insurance mandate is in place, do Republicans really want to deny subsidies to constituents who are not quite poor enough to qualify for Medicaid? Isn't that just cruel?