



Republican governors shouldn't help implement Obamacare

By Philip Klein - November 9, 2012

For several years, opposition to President Obama's health care law focused on its mandate that forces individuals to purchase government-approved insurance. By upholding the mandate as a constitutional exercise of Congress's taxing power in June, the U.S. Supreme Court maintained the provision that helped hold the law together. But if the mandate is the cement, the law's expansion of Medicaid and establishment of subsidized health insurance exchanges is the house itself. It's these two provisions that will be responsible for \$1.7 trillion of spending over the next decade, according to the Congressional Budget Office. Together, they are expected to provide insurance to 30 million Americans and create the infrastructure that liberals hope to use to transition the nation, over time, into a fully government-run, or single payer, health care system. With the election over and Obama reelected, repealing the law is not going to happen over the next four years. So 30 Republican governors will have to make a decision about whether they want to help the federal government implement Obamacare, or keep the onus on the Obama administration.

One of the silver linings of the Supreme Court decision is that it gave states the ability to opt out of the Medicaid expansion. Medicaid is one of the programs that is crushing state budgets and if implemented as intended, Obamacare will add 18 million beneficiaries to the program's rolls. Though the federal government lures states with a honey pot in the short term – covering all of the expansion through 2016, by 2020 the states will be asked to kick in 10 percent of the cost, amounting to billions of dollars of spending imposed on states nationwide each year. It would be to the long-term benefit of governors to opt of the expansion.

Separately, the health care law was designed to coerce governors into embracing exchanges on which individuals will be provided with federal subsidies to purchase insurance. If a state doesn't establish its own exchange, the law specifies that the federal government will step in and set one up for them. Given that Republicans typically favor more state and local control, there's a clear temptation for them to cave in, assuming that the lesser of two evils by implementing the exchanges themselves. But they should resist that temptation.

Though the law creates the veneer of providing states with flexibility on the exchanges, the reality is that all of the major decisions – from the broad structure of the exchanges to the details of what kind of health care plans will be offered in the exchanges and how they will be marketed – will be made from Washington. A careful reading of the law finds that all of the sections about state “flexibility” are filled with caveats that render them useless in practice, because Secretary of Health and Human Services Kathleen Sebelius will be running the show. For instance, Obamacare specifies that, “The Secretary shall, by regulation, establish criteria for the certification of health plans as qualified health plans.” And later orders that “An Exchange may not make available any health plan that is not a qualified health plan.” In other words, Sebelius will get to decide what type of health care plans can be offered on these state exchanges.

The law dictates that states must “assign a rating to each qualified health plan offered through such Exchange in accordance with the criteria developed by the Secretary” and “utilize a standardized format for presenting health benefits plan options in the Exchange.” The law also specifies that health plans must disclose certain information in plain language. Who determines what constitutes plain language? Well: “The Secretary and the Secretary of Labor shall jointly develop and issue guidance on best practices of plain language writing.” Then, there’s this dandy: “An Exchange may not establish rules that conflict with or prevent the application of regulations promulgated by the Secretary under this subtitle.”

Given that governors will have no real control over the exchanges anyway, they may as well let Obama administration officials sleep in the bed they made for themselves. It’s highly doubtful that the same administration responsible for implementing the failed economic stimulus package will be able to competently operate dozens of exchanges. Republican governors should allow the feds to live with the mess they created rather than clean up for them.

Another reason Republican governors should hold off on setting up exchanges is that there’s still a pending lawsuit that could drastically affect their implementation decision. Obamacare penalizes businesses up to \$2,000 per employee if they don’t provide insurance and one of their employees obtains subsidies to purchase insurance on an exchange. Yet as Cato Institute health policy scholar Michael Cannon and Jonathan Adler of Case Western Reserve University School of Law outlined this past July, the way Obamacare was drafted, the subsidies for individuals to purchase insurance apply to state-based insurance exchanges, rather than ones created at the federal level. In September, Oklahoma Attorney General Scott Pruitt filed a complaint in court arguing that businesses should not be subject to the penalty if it’s a federal exchange for which subsidies shouldn’t be available. Cannon argued to me that if this case is successful, it would force Congress to reopen Obamacare. For instance, he explained, if Illinois sets up an exchange and Missouri does not, a favorable ruling in this law suit would mean that Missouri businesses would be exempted

from taxes that would be imposed on businesses in Illinois. Thus, even Democratic governors would want to see changes in the law.

On Friday, Sebelius wrote a letter to governors extending the deadline for them to make a decision until December 14, though Cannon argues that it will keep getting extended again, just as has been the case with other legislation.

In one good sign, chair of the Republican Governors Association, Virginia Gov. Bob McDonnell, has said he would not create a state exchange or participate in the Medicaid expansion. Though in Ohio, Gov. John Kasich has been wavering.

For more reasons why Republican governors shouldn't implement the exchanges, check out Cannon's piece in the National Review.