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Do State Governments Have the Authority to Enforce ObamaCare's Insurance Regulations?

Peter Suderman | August 16, 2010

As part of the new health care law, state governments are expected to enforce a host of federal government regulations on health insurers. Just one problem: It seems that a number of states do not have the authority to enforce those regulations.

Insurance commissioners in about half the states say they do not have clear authority to enforce consumer protection standards that take effect next month.

Federal and state officials are searching for ways to plug the gap. Otherwise, they say, the ability of consumers to secure the benefits of the new law could vary widely, depending on where they live.

...States have the primary role in enforcing many of the new standards. If a state fails to enforce a standard, the federal government will step in to do so — as it did in several states after passage of a health insurance law in 1996.

The federal government recently surveyed states to assess their enforcement capabilities, and the results suggest a patchwork of protections.

California, Florida, Hawaii, Michigan, Nebraska, Oklahoma, Virginia and Wyoming, among other states, said they did not have authority to enforce federal law.



The National Association of Insurance Commissioners is playing this down, arguing that even states that lack explicit authority to enforce the new regulations can use related powers to coax insurers into following the new rules. In a letter to the Department of Health and Human Services, the NAIC wrote that “almost all states can use their form approval process, investigative powers, and/or market conduct exam authority to hold

licensed insurers accountable for their compliance with the federal laws. This, combined with coordinated enforcement by the federal regulators, should be sufficient to ensure carriers comply with the new requirements." But notice the hedging: It's not all states, but *almost* all states. And those existing powers will only be sufficient in combination with federal enforcement. In other words, a number of states do not have the necessary powers to enforce the rules that the new health care law instructs them to enforce.

This is potentially a big problem for backers of the law. According to Roger Pilon, the Cato Institute's Vice President for Legal Affairs, it makes the state-led lawsuits challenging ObamaCare more somewhat likely to succeed. "If the federal government orders states to do things that the states are not authorized to do, then you've got a problem," he says. If states are limited by their own constitutions from performing as expected under the health care law, Pilon argues, that presents added legal complications for defenders of the new health care law. Now, the end result may be that the federal government enforces those provisions where the individual states do not have the authority. "This isn't a lethal impediment for ObamaCare," says Pilon. "But it raises one more aspect of the uncomfortable federalism that surrounds the law."

And even if it survives legal challenge, the potential for federal/state conflicts is almost certain to create a giant implementation headache. "It's easy to say that federal rules will preempt conflicting state rules under the Constitution's Supremacy Clause," Pilon says, "but what if state rules are more onerous for insurers than federal rules? Which rules then apply? Does federal law create a ceiling, or just a floor?" Add this to the list of the PPACA's complications and design flaws. There's a lot we still don't know about how the law will play out, but we can be pretty sure at this point that however it goes, it will be a mess.