



# REUTERS

## Of states and health insurance exchanges

By: Michael F. Cannon - DECEMBER 18, 2012

---

Reuters reports that a recent Congressional Budget Office letter “could complicate” efforts to stop the Internal Revenue Service from imposing “Obamacare’s” employer mandate in states that refuse to implement a health insurance “exchange.”

In fact, the CBO’s letter devastates the IRS’s already weak case.

The Patient Protection and Affordable Care Act imposes a \$2,000-per-worker charge on employers *only if* one of their employees receives a “premium assistance tax credit,” and the act authorizes those credits *only if* states create their own exchanges.

If a state opts instead for a federal exchange, as more than 30 states have, the IRS has zero authority to penalize employers there. “As even some health law supporters concede,” Kaiser *Health News* reports, “the claim that Congress denied to the federal exchanges the power to distribute tax credits and subsidies seems correct as a literal reading of the most relevant provisions.”

Yet the IRS is attempting to issue those tax credits — and penalize employers — where it has no authority to do so. Oklahoma’s attorney general has filed suit to protect its employers from this illegal tax.

The IRS says it is carrying out congressional intent — a curious claim from an agency violating the express language of a duly enacted statute. The only piece of legislative history the IRS has offered to support its action is the CBO’s cost projections of the bill. The CBO predicted there would be tax credits issued in all states.

That does not, however, establish congressional intent to offer tax credits in federal exchanges, much less statutory authority to do so. The CBO was merely assuming, as most everyone did in 2009, that all states would establish their own exchanges.

To support its argument, the IRS would need the CBO to say it based those projections on assurances it received from the bill’s authors, or its own analysis, that tax credits would be available through federal exchanges. Yet the CBO said no such thing.

Instead, its Dec. 6 letter acknowledges that CBO analysts “did not perform a separate legislative analysis of that issue.” When projecting the cost of the Senate bill that ultimately became Obamacare, the CBO merely “anticipated ... that the tax credits would be available in every state.” Just as they did with the bill that came from the House of Representatives, despite the very different language in the two bills.

That is devastating to the IRS case. Before this letter, the CBO’s projections offered no support to the IRS, because they merely reflected the assumption that all states would

establish exchanges. Now the CBO has admitted that it didn't read the bill closely enough to notice the law doesn't authorize credits through federal exchanges.

Critics of the IRS have produced lots of legislative history indicating the statute's language reflects congressional intent. The IRS never had the law on its side. Now it has nothing to support its theory of congressional intent.

If that "complicates" efforts to stop the IRS from imposing illegal taxes on employers, please let's have more complications.