

ALEC

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

Talking Points AZ HB 2423

ALEC supports HB 2423, which would ensure transparency and accountability in the practice of state government officials hiring outside attorneys. The principles reflected by this language are shared by the ALEC model bill, *The Private Attorney Retention Sunshine Act*.

HB 2423 would:

- **GUARD AGAINST ABUSE.** Following the landmark recoupment lawsuits against the tobacco industry, the lack of transparency in the hiring process of contingency fee attorneys has led to some well documented abuses. Private lawyers have different incentives than officials charged with protecting the public interest, and it is the responsibility of the legislature to protect taxpayer dollars from inefficient or inappropriate use. **This legislation guards against the potential for abuse in attorney generals hiring outside attorneys to litigate on behalf of the state.**
- **INSTILL ACCOUNTABILITY.** Attorney generals would be required to make a written determination that hiring outside attorneys is both cost effective and in the public interest. The attorney general must then receive proposals from attorneys in a competitive bidding process. **This instills the same accountability standards to the process of hiring outside attorneys as apply to hiring other contract services.**
- **PROTECT TAXPAYER DOLLARS.** When the attorney general pursues litigation on behalf of the state, financial awards are for the benefit of taxpaying citizens. **This legislation limits on a percentage basis the amount that can be awarded to private attorneys, ensuring that millions of dollars are directed to the appropriate beneficiary.**
- **PROVIDE TRANSPARENCY.** The state government will be required to post written records of the cost effectiveness and fairness of the process so that media and citizens can actively serve their watchdog role. **This legislation shines public light on to the process and builds citizen confidence in the attorney general's office as one that acts in the public interest.**

Talking Points: States Triumph over Federal Mandate
ALEC's Freedom of Choice in Health Care Act

The *Freedom of Choice in Health Care Act* protects the right of patients to pay directly for medical services, and it prohibits penalties levied on citizens and businesses for declining participation in a particular health plan.

Look how far we've come in just one year:

- Twenty-six states are suing the federal government for unconstitutional mandates
- Eight states have passed legislation against ObamaCare
- Over 900 waivers have already been granted
- The U.S. House of Representatives voted to repeal ObamaCare
- Public opposition to the new health restrictions remains strong

Damaging affects of ObamaCare's federal mandate:

- If left unchecked, ObamaCare is calculated to result in more than \$600 billion in new or increased taxes within the next ten years.
- To comply with the new regulations, thirty-three states will see their Medicaid rolls jump by 20 to 30 percent. Some states will see their Medicaid rolls jump by 50 percent or more.
- The "maintenance of effort" requirement, which prevents states from cutting Medicaid eligibility, will force states to slash funding priorities like education, law enforcement, and Medicaid benefits for existing enrollees.

About the Bill

The *Freedom of Choice in Health Care Act* will:

- Ensure a person's right to pay directly for medical care.
- Ensure that patients—not government officials—should decide which doctor to see, what treatments to get, and whether or not to get a second or third opinion.
- Would block legislation that imposes costly, bureaucratic penalties for choosing to obtain or decline health coverage.

Purpose or goal of the Act if passed by statute:

- Gives a state standing in the current lawsuits against the federal individual mandate.
- Allows a state to launch additional, 10th Amendment-based litigation if the current lawsuits fail.
- Empowers a state attorney general to litigate on behalf of individuals harmed by the mandate in 2014.

Purpose or goal of the Act if passed by constitutional amendment:

- *The three points listed above, PLUS...*
- Will prohibit a Canadian-style, single-payer healthcare system at the state level if ObamaCare is upheld
- Will prohibit a state requirement to purchase health insurance if ObamaCare is repealed

The Act does not nullify ObamaCare:

- It challenges those provisions of the law that are arguably unconstitutional—the federal requirement to purchase health insurance, and related restrictions on the sale and purchase of health services.
- Citizens may still choose to participate in other provisions of the law, including the new health insurance exchange subsidies or the Medicaid expansion. They just can't be forced into those choices.
- To the extent that the rest of the federal legislation is severable from the mandate, the law would likely remain in effect.

The Constitutional Defense:

- Even without the *Freedom of Choice in Health Care Act*, ObamaCare is vulnerable to constitutional challenge:
 - Congress does not have the authority to regulate inactivity under the Commerce Clause. SCOTUS has ruled this way in *U.S. v. Lopez* (1995) and *U.S. v. Morrison* (2000).
 - Congress does not have the authority to penalize certain individuals—in this case, individuals who don't buy health insurance—and then call it a "tax" under Congress' taxing power.
 - Congress does not have the authority to commandeer states to do their bidding. SCOTUS has ruled this way in *New York v. United States* (1992).
- The *Freedom of Choice in Health Care Act* makes ObamaCare even more constitutionally vulnerable.
 - Objections that the Act would be trumped by the Supremacy Clause are unfounded. As affirmed recently by SCOTUS in *Gonzales v. Oregon* (2006), state law may go above and beyond federal law in protecting constitutional rights, especially as related to health care choices.
 - This kind of legal argument is not present in the current legal challenges, so the Act provides states with an additional layer of protection against federal overreach.

Additional Information

Health insurance vs. auto insurance:

- Owning an automobile is a choice—a choice many people don't exercise (think: New York City). Some of these people use public transportation, but many others also hire taxis or bike or walk.
- Auto insurance exists to protect other drivers. Health insurance exists to protect the individual who purchases it. Not all passengers in a car are required to have auto insurance.

- Auto insurance mandates only apply to those who drive on public roads, not private property. The government is constitutionally charged with providing public roadways. No such constitutional provision exists regarding health care.
- Caution from the Congressional Budget Office (1994):

“A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.”

ObamaCare places a tremendous financial burden on the states, including:

- A budget-busting Medicaid expansion, coupled with a “maintenance of effort” requirement, which will force states to slash other funding priorities, like education or law enforcement; and
- An individual mandate that requires massive government subsidies to purchase the required health insurance, and that will also raise health insurance premiums and push more Americans onto government healthcare programs funded by the states; and
- Job-killing employer mandates that will cripple small businesses and postpone economic recovery, and that will require states themselves to pay federal penalties if they don’t provide federally-dictated health insurance to state workers; and
- A federal takeover of health insurance regulation, which has been traditionally been the purview of states, and will require states to expend limited state resources to comply with the new law.