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Employment Discrimination in the Senate Health Care Bill

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The Senate health care bill includes a well-known “employer mandate” provision that would require employers to either offer a “qualified” health plan and pay 60 percent of the premium or pay an annual tax penalty of \$750 per full-time employee.

What is less well-known is that the provision would also tax companies even if they do offer insurance—but *only* if they hire people from low- and moderate-income families who qualify for, and elect to accept, premium subsidies. And the tax penalty for hiring those employees—arguably the people who need jobs the most—would be a whopping \$3,000 per employee per year.

The combination of this tax penalty and the rules for determining who qualifies for premium subsidies would encourage companies to engage in some new and repulsive forms of employment discrimination.

Who Would Qualify for a Subsidy? There are two criteria for qualifying for a subsidy under the Senate bill:

1. Family income—not how much this employee is paid by this company, but total family income—would have to be below four times the federal poverty level (FPL). The FPL depends primarily on family size;¹ for 2009, four times the FPL would be \$43,320 for a single adult with no children and \$88,200 for a family of four (regardless of whether it is a single parent with three children or two parents and two children).
2. The premium share to be paid by the employee would have to be more than 9.8 percent of family income.

Note that in both cases, whether a company has to pay the \$3,000 tax depends not on how much that company pays the employee but on the total income of all the employee’s family members from all sources. (Normally employers do not know the income of their employees’ family members, but the Senate bill calls for the IRS to tell employers which employees fall into this category on a monthly basis.)

Here are some examples of how these provisions would play out.

- *The Single Parent v. the “Second Income.”* Suppose an employer is faced with two applicants for the same job at the same pay: a single parent of three children and a married parent with two children and a working spouse.

In this case, the “four times FPL” threshold is about the same for both applicants, since they both have the same family size.² However, once hired, the applicant with the working spouse will have a higher family income, so the single parent is more likely to qualify for a premium subsidy—which means the company is more likely to face a \$3,000 penalty if it hires the single parent. Which means, of course, that it is more likely to hire the applicant with the working spouse.

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- *The Teenager v. the Adult.* Now suppose a company has an entry-level job, and the two applicants are a teenager and an adult. Suppose the teenager has one or two working parents and is still a dependent on their tax return.

In this case, the teenager may have a larger family size (unless the adult has children) but most likely has a much higher family income. The teenager may be covered under a parent's health plan, but even if not, the teenager's "family income" includes the parents' income. The teenager is not likely to generate a \$3,000 tax penalty for the employer, but the adult is—especially if the adult has children to support. So the employer has a clear incentive to hire the teenager rather than the adult—especially if the adult is a single parent.

- *The Illegal Alien v. the Legal Resident.* The bill contains provisions that bar illegal aliens from receiving premium subsidies. Putting aside the controversy over whether those provisions would be enforceable in practice, consider them at face value and assume that an employer faces two applicants, one of whom is an illegal alien and the other a U.S. citizen or legal resident alien.

Of course, the employer is not supposed to hire the illegal alien in the first place, but the presence of millions of employed illegal aliens means such laws are not effectively enforced. However, if one must prove legal residence to receive a premium subsidy, the illegal alien is not likely to apply for, much less receive, the subsidy. If there is no subsidy, there is no \$3,000 tax penalty for the employer. If the job is low-paying and any (legal resident) employee is likely to qualify for a subsidy, the employer's incentive is to hire the illegal alien rather than pay a \$3,000 tax penalty for hiring a U.S. citizen or legal immigrant.

- *The Double Layoff.* Suppose an employee has a working spouse, and their combined income is high enough for their family size that they do not

get a subsidy and do not generate a \$3,000 penalty for each employer. Then, suppose one spouse loses his or her job and with it the family's health insurance—and the other spouse's income is, by itself, low enough to qualify the family for a subsidy.

In that case, the IRS will notify the other spouse's employer that they now have to subsidize an employee and that they have to start paying the \$3,000-a-year tax (monthly, at the rate of \$250 per month). This sudden increase in employment cost will encourage the other spouse's employer to lay off the second spouse as well, leaving both of them unemployed.

The only way for the couple to avoid this outcome would be to go without insurance—but that would require them to pay an individual tax penalty of \$1,500 a year for both of them going uninsured (more if they have children, up to a maximum of \$2,250 per year)—and with one fewer job, they would have less money available to pay the penalty.

The Bottom Line: Taking Jobs from People Who Need Them the Most. In each case, the bottom line is that the Senate health care bill punishes employers who hire people who need jobs the most—and by doing so makes it harder for people who need jobs the most to find employment. Because of the way the employer mandate for health insurance is structured, employers in effect face a \$3,000-per-year incentive to hire people from higher-income families and smaller families over those from poorer and larger families.

The result would be a particularly insidious and repulsive—but legally encouraged—form of job discrimination against applicants who need the jobs the most. Congressional leaders may call this "health care reform" but for many poor families, it would be a one-way ticket to unemployment.

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1. U.S. Department of Health and Human Services, "The 2009 HHS Poverty Guidelines," at <http://aspe.hhs.gov/poverty/09poverty.shtml> (December 16, 2009).
2. There are two slightly different federal definitions of FPL, and the bill is unclear as to which would apply for purposes of determining subsidies. However, the difference in this case is only \$100 (or for four times the FPL, \$400). This is vastly outweighed by the size of the tax penalty (\$3,000).