

Mississippi Fast-Tracking “ObamaCare” Exchange for 2012

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Executive Summary

- The Affordable Care Act (ACA) has already been ruled unconstitutional by a federal district court, a decision that will be reviewed by the U.S. Supreme Court in mid-2012.
- Mississippi is party to a 26-state lawsuit arguing that ACA is unconstitutional.
- The Mississippi state legislature decided not to set up an ACA health exchange in 2011.
- Yet, the Mississippi Insurance Department (MID) is still setting up an exchange and has already entered into a contract with Leavitt Partners of Utah to set up an exchange by August 14, 2012.
- Very few states are moving as fast as Mississippi is in setting up an exchange. Federal law only requires that states show “measureable progress” in setting up an exchange by 2013, much less 2012.
- **An ACA health exchange will destroy the private market for health insurance in Mississippi.** Likewise, the exchange will be controlled from Washington and will be subject to onerous federal regulations.
- Mississippi should not set up an exchange until after the current constitutional challenges to ACA have been settled. Waiting has few risks, while moving forward sends the message that Mississippi supports ObamaCare and is committed to using state resources to implement an unconstitutional, costly law that will lead to lower quality health care for the people of Mississippi.

ACA is Unconstitutional

The “Affordable Care Act” (ACA), otherwise known as “ObamaCare,” was signed into law on March 23, 2010. On May 14, 2010, Mississippi joined a lawsuit with 25 other states challenging the constitutionality of ACA. Likewise, now-governor Phil Bryant is party to a lawsuit (*Walters v. Holder*) filed in April 2010 challenging the constitutionality of ACA.

Questions regarding the constitutionality of ACA are numerous. At the forefront are questions regarding Congress’ power to force Americans to buy a particular product – that is, health insurance. This provision of ACA, known as the “individual mandate,” was ruled unconstitutional by a federal district court on January 31, 2011. On August 12, 2011, a federal appeals court also ruled the individual mandate unconstitutional. The case (*Florida v. HHS*) will be taken up by the U.S. Supreme Court in mid-2012.

According to Judge Roger Vinson, author of the district court decision mentioned above:

Forest M. Thigpen, President

If Congress can penalize a passive individual for failing to engage in commerce [i.e., failing to purchase health insurance], the enumeration of powers in the Constitution would have been in vain for it would be difficult to perceive any limitation on federal power, and we would have a Constitution in name only.

Again, Mississippi is party to this lawsuit and so has taken the official position that ACA is unconstitutional. Accordingly, Mississippi should cease implementing any and all requirements of ACA, at the very least until the U.S. Supreme Court should decide on the constitutionality of the law.

ACA in Mississippi

One of the key mechanisms for forcing the states to participate in ACA is what is called a health care exchange. A health exchange is a government subsidized quasi-marketplace that provides insurance policies to individual and business consumers. The exchange differs from a private marketplace in that it is established by the government to facilitate the purchase of subsidized insurance. These subsidies are necessary precisely because ACA requires every American to purchase health insurance – in fact, a particular kind of health insurance that meets government standards for “essential health benefits.”

Contrary to claims made by advocates of the exchange, the exchange is not simply “a website, like Travelocity or Orbitz.” The exchange is also not the same as the free market health exchange previously advocated by other conservative groups, such as the Heritage Foundation, which has specifically repudiated the idea of cooperating in the creation of an ACA exchange.

In fact, the exchange is the primary mechanism by which the federal health care law is being implemented in Mississippi. For all practical purposes, it is ObamaCare in Mississippi.

Given Mississippi’s desire to uphold the U.S. Constitution, and given the unpopularity of ObamaCare, the Mississippi state legislature declined (HB 1220) to set up an ObamaCare exchange in Mississippi during the 2011 session.

In spite of the legislature’s decision, the Mississippi Insurance Department has moved forward in setting up a health insurance exchange anyway. The exchange is being set up under the auspices of the state’s high-risk pool (MCHIRPA) using broad language originally intended to serve a very select group of consumers unable to obtain health insurance on the private market. Under ACA, the state’s health exchange will offer subsidies to individuals earning up to 400 percent of federal poverty level, which is just under \$90,000 for a family of four.

Already, the state of Mississippi has received more than \$20 million in federal to implement ACA in Mississippi. According to a recent report by the Obama administration:

In total, Mississippi has received \$21.1 million to develop its Exchange. After legislation authorizing an Exchange failed to pass, the State determined in October 2011 that the previously authorized non-profit high-risk pool association could broaden its mission to run the State’s Exchange. The high-risk pool association is finalizing a contract to build the ‘shop and compare’ piece of the Mississippi Exchange by March. Once built, Mississippi will use it to visually demonstrate what the Exchange will do for its citizens while simultaneously building the functional pieces it will ‘plug into’ its Exchange.

This money is primarily being used to hire consultants and IT professionals who will have a vested interest in ensuring that ACA is neither overturned by the courts nor repealed by Congress after 2012. As of January 17, 2012, MID received approval from the Personal Services Contract Review Board to pay \$690,400 to Leavitt

Partners (of Utah) to assist the department in creating an exchange in Mississippi. Leavitt was the only bidder to respond to MID's Request for Proposals. While the ACA deadline for setting up an exchange is January 1, 2014, the state exchange is supposed to be ready as of August 14, 2012.

Reasons to Wait

There are many reasons the state should delay in setting up an exchange. The most important is that Mississippi is party to a lawsuit challenging the constitutionality of ACA. Accepting federal dollars to implement an unconstitutional law sends a contradictory message to the U.S. Supreme Court, as well as to voters. In addition, Mississippi's legislature declined to set up an exchange. Sidestepping the legislature's will in this matter is a cause for concern. Finally, the state is not required to set up an exchange. If Mississippi chooses not to set up an exchange, the federal government will set one up for us, thus bearing both the administrative costs to set up the exchange, as well as taking the blame when the exchange fails.

Given that ACA has already been declared unconstitutional by a federal court, the best option for Mississippi is to cease entering into contracts to implement an exchange and send back the federal grants being used to incentivize an unconstitutional mandate.