The Supreme Court's ACA Decision and Its Hidden Surprise for Employers

Without Medicaid Expansion, Employers Face Higher Tax Penalties Under ACA

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Key Findings

- States that do not expand Medicaid leave employers exposed to higher "shared responsibility" payments under the Affordable Care Act (ACA).

- The associated costs to employers could total $876 million to $1.3 billion each year in the 22 states that have opposed, are leaning against, or remain undecided about expanding Medicaid. By way of example, the decision in Texas to forego the Medicaid expansion may increase federal tax penalties on Texas employers by $299 to $448 million each year.

- Any projections of the "net" costs of Medicaid expansions should reflect the very real costs of the shared responsibility penalties to employers in any particular state.

Background and Context

While upholding other provisions of the ACA in June 2012, the U.S. Supreme Court ruled that the federal government could not compel states to expand Medicaid for certain low-income adults. Federal and state law prior to the enactment of the ACA limited Medicaid eligibility to very low income persons who are aged, blind, disabled, minor children, pregnant women and parents. Congress attempted under the ACA to force states to expand Medicaid to all categories of low-income adults under age 65 who were at or below 138% of the federal poverty level (FPL).[1] Under the Court's ruling in *NFIB v. Sebelius*,[2] though, states now have the option rather than an effective requirement to expand Medicaid to such adult residents.

Coverage options for low income adult residents may be limited in states that do not expand Medicaid. In drafting the ACA, members of Congress assumed that individuals under 138% FPL would be eligible for the Medicaid expansion. They consequently limited access to the

[1] § 1902(a)(10)(A)(i) of the Social Security Act (42 U.S.C. § 1396a) as added by § 2001(a)(1) of the ACA. While this provision references a 133% FPL income limit, a subsequent amendment to § 1902(e)(14)(I) by § 1004(e)(2) of the Health Care and Education Reconciliation Act (HCERA) of 2012 adds an additional five percent income disregard. For reference, the federal poverty level (FPL) is a construct that varies by household size: 138% FPL in 2013 is $15,856 for a household of one and $32,499 for a household of four.

[2] 567 U.S. __ (2012).

premium assistance tax credit programs to eligible individuals between 100% and 400% FPL. In states that do not expand Medicaid, then, otherwise-ineligible persons under 100% FPL will not be eligible for a subsidized coverage option under the ACA. Those between 100% and 138% FPL would be eligible for the premium assistance tax credits, but they will have to pay a monthly premium for coverage through a qualified health plan.[3]

The coverage options are also tied to employer penalties. Employers will generally not face penalties because their employees enroll in Medicaid.[4] Under the "shared responsibility" provisions of the ACA,[5] though, employers that offer health coverage and have 50 or more full-time equivalent employees must generally pay up to $3,000 penalties for each employee who enrolls in the premium assistance tax credits.[6] The "shared responsibility" provision also caps an employer's total liability at approximately $2,000 multiplied by the total number of employees.[7]

Some Governors have expressed concern about the future costs associated with an expansion of Medicaid in their states.[8] While the ACA ensures that the federal government will pay 100% of the costs of the Medicaid expansion through 2016, states the expand Medicaid become responsible for some portion of the costs thereafter (rising to 10% of the total costs in and after

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[3] See FAQ #31 in Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services, "Frequently Asked Questions on Exchanges, Market Reforms and Medicaid" (December 10, 2012), available at http://cciio.cms.gov/resources/files/exchanges-faqs-12-10-2012.pdf, accessed on March 1, 2013.

[4] Under § 4980H(a) of the Internal Revenue Code, employers with 50 or more full-time equivalent employees will be liable for employer shared responsibility payments if they do not offer coverage and at least one of their employees is eligible for a premium tax credit. In this sense, employers could face penalties for employees who enroll in Medicaid – but the penalty is unrelated to the employee's enrollment in the Medicaid program and is instead triggered by another employee who enrolled in the tax credit program. Also, see note 14.

[5] § 4980H(b) of the Internal Revenue Code (IRC) as added by § 1513 of the ACA, as amended. See Internal Revenue Service, "Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act," December 28, 2012, available at http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act accessed March 1, 2013; Congressional Research Service Report R41159, "Summary of Potential Employer Penalties Under PPACA" (June 2, 2010), available at http://www.ncsl.org/documents/health/EmployerPenalties.pdf, accessed March 1, 2013.

[6] Employees eligible for coverage through their employer may still qualify for the premium assistance tax credits if their employer plan is "unaffordable" in that it costs more than 9.5% of the employee's household income, the plan does not cover the essential health benefit package as defined by HHS, or the plan does not provide "minimum value" (e.g., the plan's deductible and other cost-sharing are too high). § 36B(c)(2)(C) of the IRC as added by § 1501(a) of the ACA, as amended; 77 Fed. Reg. 30377, 30388 (May 23, 2012) (to be codified at 26 CFR § 1-36B-2(c)(3)); 78 Fed. Reg. 7264, 7265 (Feb. 1, 2012) (to be codified at 26 CFR § 1-36B-2(c)). See Congressional Research Service Report R41137, "Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (ACA)" (December 30, 2011), available at http://www.tn.gov/nationalhealthreform/forms/CRS11-12-30.pdf, accessed March 1, 2013.

[7] A helpful flow chart in this regard is available from the Kaiser Family Foundation at http://healthreform.kff.org/the-basics/employer-penalty-flowchart.aspx. Note that employers that do not offer coverage are subject to a different set of related penalties under § 4980H(a) of the Internal Revenue Code; however, the proportion of employees working at such firms is relatively low. See note 14.

[8] See, e.g., Letter from Governor Bob McDonnell of Republican Governors Association to President Barak Obama (July 10, 2012), available at http://www.rga.org/homepage/rga-letter-on-medicaid-and-exchanges-to-president-obama/, accessed on March 1, 2013.

2020).[9] These costs have generated substantial discussion among state policy-makers as to the feasibility of such expansions of the Medicaid program.[10]

Paradoxically, state government efforts to constrain Medicaid costs growth in and after 2017 may lead to higher net taxes for employers in such jurisdictions beginning in 2014. If a state foregoes the Medicaid expansion, then eligible employees between 100-138% FPL may enroll in the premium assistance tax credits. In such circumstances, their employers will face liabilities for the "shared responsibility" tax penalties discussed above.[11]

Methods

We used data from Current Population Survey 2011-12 from the U.S. Census Bureau to estimate the number of uninsured adults working full-time under age 65 by state who are between 100-150% FPL. To estimate the number of such individuals who may be eligible to enroll in the premium tax credit programs, we assumed that:

- Persons between 100% FPL and 150% FPL are equally distributed (i.e., they are equally likely to be at 124% FPL as 139% FPL);[12]
- 46% of uninsured individuals who are employed full-time and earn between 100-138% FPL work for companies with 50 or more employees;[13] and
- 91% of the firms at which these employees work would offer some form of health coverage.[14]

Results

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[9] § 1905(y) of the Social Security Act (42 U.S.C. 1396d) as added by § 2001(a)(3)(B) of the ACA and amended by § 1201(1)(B) of the HCERA.

[10] See, e.g., Bovbjerg, Randall, Barbara A. Ormond, and Vicki Chen, "State Budgets under Federal Health Reform: The Extent and Causes of Variations in Estimated Impacts," Kaiser Family Foundation Issue Brief, February 2011, available at http://www.kff.org/healthreform/8149.cfm, accessed March 1, 2013.

[11] See e.g., Radnofsky, Louise, "In Medicaid, a New Health-Care Fight," *Wall Street Journal*, February 11, 2013, p. A1; Millman, Jason, "Lack of Medicaid expansion could penalize employers," *Politico*, August 29, 2012.

[12] Using this assumption, the proportion of the population below between 100% FPL and 138% FPL would be represented as: # uninsured, full-time employed between 100-150% FPL * (138-100) / (150-100).

[13] Avalere Health analysis of the Current Population Survey, Annual Social and Economic Supplement, United States Census Bureau, 2012.

[14] Among employees that work at firms with 50+ employees that also have a majority of low-wage workers, 91.4% work at firms that offer health coverage. Agency for Healthcare Research and Quality, Center for Financing, Access and Cost Trends. 2011 Medical Expenditure Panel Survey-Insurance Component, Table I.B.2(2011): Percent of private-sector employees in establishments that offer health insurance by firm size and selected characteristics: United States, 2011available at http://meps.ahrq.gov/mepsweb/data_stats/quick_tables_search.jsp?component=2&subcomponent=1&year=2011&tableSeries=1&tableSubSeries=B&searchText=&searchMethod=1 accessed March 6, 2013. Employers that offer health coverage would not be subject to broader penalties under § 4980H(a) of the Internal Revenue Code, but they would be subject to penalties for a smaller subset of employees under § 4980H(b).

Applying these assumptions to these data, we estimate that approximately 1.01 million full-time uninsured employees under age 65 could enroll in the premium assistance tax credits. If 100% of such employees were to enroll and no state were to expand Medicaid, the collective employer liability each year for the shared responsibility payments would be between $2.03 and $3.04 billion dollars.

Clearly, though, some states are expanding Medicaid. Indeed, the Advisory Board estimates that 24 states and the District of Columbia have moved forward with such expansions, and an additional four states are leaning towards expanding Medicaid. In contrast, 14 states are not expanding Medicaid, while three states are leaning against and another five states are undecided about such expansions.[15] If the 22 opposed and undecided states were to reject the Medicaid expansion and the eligible employees between 100-138% FPL were to enroll in the tax credits, then employers in those jurisdictions may incur liabilities for the shared responsibility penalties of up to $876 million to $1.31 billion each year. For reference, we shaded these "expansion averse" or undecided jurisdictions in Table 1 below. Please note, however, that some Governors may have indicated a willingness to expand Medicaid but have not yet received the required legislative authorization (e.g. Florida).

Table 1: Potential Employer Tax Penalties by State

State	100-138% FPL	Eligible for APTCs	Expansion Plans	Potential Employer Shared Responsibility Liabilities *(Assuming $2,000 to $3,000 per employee)*		
US	2,420,017	1,013,019		$ 2,026,038,299	to	$ 3,039,057,449
AL	35,429	14,831	No	29,661,092	to	44,491,638
AK	5,288	2,214	Leaning against	4,427,181	to	6,640,771
AZ	54,272	22,718	Yes	45,436,820	to	68,155,230
AR	30,541	12,784	Yes	25,568,590	to	38,352,885
CA	350,377	146,668	Yes	293,335,390	to	440,003,085
CO	32,045	13,414	Yes	26,827,773	to	40,241,659
CT	10,814	4,527	Yes	9,053,514	to	13,580,271
DE	3,905	1,635	Yes	3,269,166	to	4,903,748
DC	1,689	707	Yes	1,413,796	to	2,120,695
FL	174,075	72,868	Yes	145,735,557	to	218,603,335
GA	85,619	35,840	No	71,680,495	to	107,520,742
HI	3,874	1,622	Yes	3,243,078	to	4,864,618
ID	14,724	6,164	No	12,327,134	to	18,490,701
IL	84,291	35,284	Yes	70,568,291	to	105,852,437
IN	43,632	18,265	Undecided	36,529,012	to	54,793,518
IA	15,241	6,380	No	12,759,799	to	19,139,698
KS	19,407	8,124	Undecided	16,247,206	to	24,370,808
KY	38,611	16,163	Leaning toward	32,325,163	to	48,487,744
LA	61,780	25,861	No	51,722,551	to	77,583,826

[15] The Advisory Board Company, "Where each state stands on ACA's Medicaid expansion: A roundup of what each state's leadership has said about their Medicaid plans," available at http://www.advisory.com/Daily-Briefing/2012/11/09/MedicaidMap#lightbox/1/, accessed March 6, 2013.

State	100-138% FPL	Eligible for APTCs	Expansion Plans	Potential Employer Shared Responsibility Liabilities *(Assuming $2,000 to $3,000 per employee)*		
ME	4,170	1,746	No	3,491,224	to	5,236,837
MD	29,874	12,505	Yes	25,010,580	to	37,515,870
MA	6,885	2,882	Yes	5,763,988	to	8,645,982
MI	64,591	27,038	Yes	54,075,485	to	81,113,227
MN	21,250	8,895	Yes	17,790,165	to	26,685,248
MS	25,966	10,869	No	21,738,869	to	32,608,304
MO	39,867	16,688	Yes	33,376,920	to	50,065,380
MT	11,951	5,003	Yes	10,005,377	to	15,008,066
NE	11,744	4,916	Leaning against	9,832,311	to	14,748,467
NV	21,467	8,986	Yes	17,972,139	to	26,958,208
NH	4,328	1,812	Yes	3,623,569	to	5,435,354
NJ	53,597	22,436	Yes	44,871,810	to	67,307,715
NM	16,751	7,012	Yes	14,024,071	to	21,036,107
NY	110,962	46,449	Leaning toward	92,897,621	to	139,346,431
NC	78,315	32,783	No	65,565,285	to	98,347,927
ND	3,400	1,423	Yes	2,846,681	to	4,270,021
OH	70,441	29,487	Yes	58,973,507	to	88,460,260
OK	41,909	17,543	No	35,085,947	to	52,628,920
OR	26,421	11,060	Leaning toward	22,119,360	to	33,179,040
PA	67,708	28,342	No	56,684,836	to	85,027,254
RI	4,543	1,901	Yes	3,802,998	to	5,704,497
SC	36,368	15,223	No	30,446,888	to	45,670,332
SD	6,469	2,708	No	5,415,947	to	8,123,921
TN	71,153	29,785	Undecided	59,569,693	to	89,354,540
TX	356,627	149,284	No	298,568,091	to	447,852,136
UT	18,527	7,756	Undecided	15,511,039	to	23,266,558
VT	2,355	986	Yes	1,971,807	to	2,957,710
VA	49,917	20,895	Leaning toward	41,790,345	to	62,685,517
WA	50,594	21,179	Yes	42,357,263	to	63,535,895
WV	14,217	5,951	Undecided	11,902,740	to	17,854,110
WI	28,752	12,036	No	24,071,442	to	36,107,163
WY	3,285	1,375	Leaning against	2,749,968	to	4,124,951

Discussion

Our goal was to estimate the order of magnitude of the potential employer liabilities by state. While we acknowledge that data limitations require us to make simplifying analytical assumptions that affect the specific point estimates reported above, we believe these results to be directionally correct.

We have been relatively conservative in our assumptions, though we understand that policy-makers may want to refine the estimates with state-specific data that they may have at their disposal but which are not freely available to the public. For precisely this reason, we have attempted to be fully transparent about our methods.

The actual liabilities that employers incur will depend on the "uptake" or participation rates among eligible employees in the new premium assistance tax credit programs offered through the new insurance exchanges. Because we seek to quantify the potential liability, though, we do not adjust our estimates for estimates of participation rates (which vary widely among experts).

This analysis explicitly excludes employees who are currently insured. Data from the Current Population Survey in 2011-12 suggest that some 2.4 million adults are age 19-64, working full-time, are between 100-150% FPL, and have employer-sponsored health insurance. It is unclear how many of these individuals may drop coverage and migrate to the exchanges and the premium assistance tax credit programs. If this phenomenon were to become widespread, the potential shared responsibility payment liabilities for employers would only increase.

For the reasons discussed above, states that expand Medicaid may effectively lower the penalties for employers that do not provide health coverage. A state's decision to expand Medicaid, though, is unlikely to have a material effect an employer's incentive to provide employee coverage for several reasons.[16] We acknowledge, though, that Medicaid expansions could theoretically alter the employer's calculus in the provision of health coverage – and policy-makers should at least be aware of this issue.

Conclusion

These estimates suggest that employer liabilities for the shared responsibility payments may be substantial. Such costs could exceed $1 billion across those states that are now facing the decision about whether to expand Medicaid or that have thus far declined to do so. Any projections of the "net" costs of Medicaid expansions should reflect the very real costs of such liabilities to employers in any particular state.

[16] We believe this to be true for several reasons. First, employer plans cover a much broader group of employees than just those 100-138% FPL. Second, the employer's tax benefits for providing compensation in the form of health benefits remain intact. Third, an employer may not be able to accurately forecast the effect of the Medicaid expansion on the firm because the employer lacks complete information about each employee's household size and income (and cannot therefore estimate the number of employees who fall between 100% and 138% FPL).