ANNALS OF HEALTH LAW
Advance Directive

VOLUME 22 FALL 2012 PAGES 60-70

The California Health Benefit Exchange: Will California Learn From Its Past Efforts To Create A HealthCare Exchange?

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I. INTRODUCTION

There are currently over 48 million people in the United States who do not have health insurance, accounting for 15.7% of the U.S. population.[1] One of the mechanisms by which the Patient Protection and Affordable Care Act (the PPACA) plans to decrease the number of uninsured persons in the United States is the implementation of State healthcare exchanges (exchanges).

While universal healthcare proponents were disappointed by the lack of a public option in the PPACA, state healthcare exchanges will be either state or federal-run programs designed to provide health insurance to many uninsured persons, by increasing competition among insurers.[2] Exchanges will be online marketplaces where individuals and small businesses can find and compare private health insurance options.[3] Comparisons have been made to web sites like Travelocity or Amazon, which allow consumers to compare products and services in one location.[4] Exchanges will be designed

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1. Jason Kane, *More Americans Insured: What's Behind the Numbers?*, PBS NEWSHOUR (Sept. 12, 2012, 3:54 PM), http://www.pbs.org/newshour/rundown/2012/09/number-of-uninsured-americans-drops-for-first-time-in-four-years.html.

2. U.S. DEP'T OF HEALTH & HUMAN SERVS., CREATING A NEW COMPETITIVE MARKETPLACE: AFFORDABLE INSURANCE EXCHANGES 1 (2011), *available at* http://healthcare.gov/news/factsheets/2011/05/exchanges05232011a.html.

3. *Id.*

4. Victoria Colliver, *Health Care Exchange Will Offer Policies*, S.F. CHRON., June 29, 2012, at 1, *available at:* http://www.sfgate.com/health/article/Health-care-exchange-will-

to bring a new level of transparency to the healthcare insurance market, allowing individuals to compare plans based on both price and quality.[5] Insurance prices could decrease by increasing competition among insurers as well as allowing individuals and small businesses to come together to purchase insurance.[6] An estimated twenty-two million individuals could enroll in exchange programs nationally by 2014.[7] In an attempt to bolster public confidence in the exchange programs, as well as to set an example for public use of the exchanges, members of Congress will even be required to get their health insurance through an exchange.[8]

While the PPACA in its entirety has been met with resistance from the public, due in large part to the individual mandate included in the law, commentators and the general public support many of the individual provisions, including state healthcare exchanges.[9] Recent polls show that even eighty percent of Republicans favor the creation of state healthcare exchanges.[10]

The PPACA gave the States the option to establish a State-based exchange, operate in a State partnership exchange, or allow the Secretary of the Department of Health and Human Services to operate a Federally-

offer-policies-3675063.php (quoting Peter Lee, executive director of the California Health Benefit Exchange).

5. U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 2

6. *Id.*

7. Sara R. Collins & Tracy Garber, *State Health Insurance Exchange Legislation: A Progress Report*, THE COMMONWEALTH FUND, May 30, 2012, http://www.commonwealthfund.org/Blog/2011/Jun/State-Health-Insurance-Exchange-Legislation.aspx

8. CTR. FOR CONSUMER INFO. AND INS. OVERSIGHT, AFFORDABLE INSURANCE EXCHANGES, http://cciio.cms.gov/programs/exchanges/index.html (last visited Oct. 1, 2012).

9. Greg Sargent, *Republicans Support Obama's Health Reforms – As Long as His Name Isn't On Them*, WASH. POST. (June 25, 2012 at 1:09 PM), *available at* http://www.washingtonpost.com/blogs/plum-line/post/republicans-support-obamas-health-reforms—as-long-as-his-name-isnt-on-them/2012/06/25/gJQAq7E51V_blog.html.

10. *Id.*

facilitated exchange.[11] States were required to submit plans for how they intend to operate their exchanges or whether they will be participating in a state partnership exchange by November 16, 2012, in order to have the exchanges fully operational by the deadline of January 2014.[12]

This paper will discuss the state of healthcare coverage specifically in the state of California, and the challenges the state faces in providing healthcare to its population. This paper will then discuss the progress made by the state of California in establishing a healthcare insurance exchange, and the structure of this exchange. This paper will also explore the past efforts by California to create an exchange, and whether the current effort to create an exchange will be more successful than previous efforts.

II. THE STATE OF HEALTHCARE COVERAGE IN CALIFORNIA

The attempt to create a successful and efficient exchange in California will likely be highly scrutinized.[13] California's healthcare troubles are a microcosm of issues prevalent throughout the U.S. healthcare system. California has the highest number of uninsured people in the United States, at over seven million, and one of the highest percentages of uninsured people in the United States, at sixteen percent.[14] Budgetary problems also

11. CTRS. FOR MEDICARE AND MEDICAID SERVS., AFFORDABLE INSURANCE EXCH. 1 (2012), *available at* http://cciio.cms.gov/resources/files/Exchangeblueprint05162012.pdf.

12. Collins, *supra* note 7; Nicole Lewis, *HHS Proposes Health Insurance Exchange Rules*, INFO.WEEK (July 12, 2011 at 1:54 PM), http://www.informationweek.com/healthcare/policy/hhs-proposes-health-insurance-exchange-r/231001432. If states are unable to demonstrate complete readiness to create a state-based exchange by January 2013, the federal government will "step in to establish a state exchange to meet the January 2014 deadline." *Id.*

13. Abby Goodnough, *California Tries to Guide the Way on Health Law*, N.Y. TIMES, Sep. 14, 2012, *available at* http://www.nytimes.com/2012/09/15/health/policy/california-tries-to-lead-way-on-health-law.html?pagewanted=all&_r=0.

14. KAISER FAMILY FOUND., HEALTH INSURANCE COVERAGE OF THE TOTAL POPULATION, *available at* http://www.statehealthfacts.org/comparetable.jsp?typ=1&ind=125&cat=3&sub=39.

make California an interesting case study.[15] Because of these problems, Anthony Wright, executive director of the advocacy group Health Access California believes that "If it can be done here, it can be done anywhere".[16]

California has been proactive when it comes to implementing its exchange.[17] In September of 2010, California became the first State to sign its exchange into law, creating the California Health Benefit Exchange (HBEX).[18] As of September 14, 2012, the HBEX has already hired fifty employees, and plans to hire at least fifty more.[19] California has also been proactive in acquiring federal grant money to establish the HBEX, receiving $236 million before the Court made its ruling on the constitutionality of the PPACA.[20]

Expectations for the HBEX are high. Estimates have put the number of uninsured individuals in California who will purchase health insurance through the HBEX at around five million.[21] Of this five million figure, three million are expected to do so with the help of federal subsidies, while two million are expected to do so without federal assistance.[22]

III. STRUCTURE OF THE CALIFORNIA HEALTH BENEFIT EXCHANGE

California chose to create its exchange as a freestanding governmental

15. Goodnough, *supra* note 13.

16. *Id*.

17. Victoria Colliver, *California is Most Prepared for Health Care Law*, S.F. CHRON., June 29, 2012, at 1, *available at* http://www.sfgate.com/health/article/California-is-most-prepared-for-health-care-law-3672109.php.

18. KAISER FAMILY FOUND., STATE EXCHANGE PROFILES: CALIFORNIA (2012), http://healthreform.kff.org/State-.Exchange-Profiles/California.

19. Goodnough, *supra* note 13.

20. Colliver, *supra* note 4

21. Colliver, *supra* note 17; *but see* CA. HEALTHCARE FOUND., BRIEFING FOR THE CALIFORNIA HEALTH BENEFIT EXCHANGE, Oct. 21, 2010, *available at* http://www.chcf.org/events/2010/briefing-california-health-benefit-exchange.

22. Colliver, *supra* note 17.

body, unaffiliated with any existing agency.[23] This type of formation may help to keep the HBEX free from political influence or interest group influence.[24] As is required by law, a governing board will oversee the HBEX.[25] All five of the initial board members are current or former government employees.[26] While some states have included representatives from large insurance providers, California prohibits any insurance representatives from serving on the board.[27] Although there will be no representation on the governing board, a significant portion of the HBEX will be implemented by the private sector. In June 2012, California awarded Accenture a contract to implement the eligibility and enrollment system of the HBEX.[28] California will use an active purchaser model in order to determine which insurance providers will be included in the HBEX.[29] This selective contracting model will be used in order to maximize consumer value and shape the healthcare delivery system by keeping low-quality providers out of the HBEX.[30] One concern with this type of contracting model is that it could cause the HBEX to be too exclusionary, minimizing the number of insurers and decreasing

23. Mark A. Hall & Katherine Swartz, *Establishing Health Insurance Exchanges: Three States' Progress*, COMMW. FUND PUB., July 2012, at 1, *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2012/Jul/1611_Hall_establishing_hlt_ins_exchanges_three_states_progress.pdf.

24. KAISER FAMILY FOUND. ESTABLISHING HEALTH INSURANCE EXCHANGES: AN OVERVIEW OF STATE EFFORTS 2 (2012), *available at* http://www.kff.org/healthreform/upload/8213-2.pdf.

25. Dep't of Health and Hum. Serv. Notice of Rulemaking, 45 C.F.R. 155 and 45 CFR 156.

26. Hall, *supra* note 23 at 2.

27. *Id.* Because California will be using an active purchaser model in order to select the health plans to be included in the exchange, there is no insurance company representation on the Board. *Id.* The active purchaser model is discussed further in note 29.

28. HEALTHCARE IT NEWS, *ACCENTURE SELECTED TO IMPLEMENT CALIFORNIA HEALTH INSURANCE EXCHANGE*, June 28, 2012. http://www.healthcareitnews.com/press-release/accenture-selected-implement-california-health-insurance-exchange.

29. KAISER FAMILY FOUND., *supra* note 24, at 3.

30. Hall, *supra* note 23, at 2.

competition within it.

While the HBEX will be able to actively include or exclude insurers from the exchange, federal law has established minimums for what an insurance plan must provide in order to be included in it.[31] The health insurance market can be complicated to most buyers, as insurers confuse buyers with a wide array of benefits, co-pays, deductibles, and premiums.[32] Under the PPACA, an insurance plan must provide ten essential benefits, including hospitalization, lab services, maternity care and prescription drugs.[33] In order to further simplify the insurance-purchasing experience for buyers, the PPACA requires participating insurers to offer plans at four levels: bronze, silver, gold, and platinum.[34] Mandates such as these are included in order to increase the transparency of insurance plans as well as insure that buyers are receiving quality care through the HBEX.

IV. THE HPIC/PACADVANTAGE AND LESSONS FOR THE FUTURE

The California HBEX will not be the first attempt to create a healthcare exchange. In 1992, California established the Health Insurance Plan of California (HIPC).[35] It was started with similar goals in mind as the current healthcare exchange provisions of the PPACA – to give small businesses in California the collective power to negotiate for lower insurance premiums.[36]

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31. Kevin Yamamura, *California Health Care Exchange Prepares for 2014 Launch*, SACRAMENTO BEE, JULY 17, 2012, at 2, *available at* http://laborcenter.berkeley.edu/press/sacbee_july12.shtml.

32. Michael Hiltzik, *Will U.S. Learn its Healthcare Reform Lesson From California?*, L.A. TIMES, Sept. 14, 2009, at 2, *available at* http://articles.latimes.com/2009/sep/14/business/fi-hiltzik14.

33. Yamamura, *supra* note 31.

34. Hall, *supra* note 23 at 6.

35. HIPC-PACADVANTAGE, CALIFORNIA'S PREVIOUS SMALL EMPLOYER EXCHANGE, http://Californiahealthbenefitadvisers.com/hipc_pacadvantage.htm.

36. Hiltzik, *supra* note 32, at 1.

It began as a state-operated health insurance purchasing pool.[37] In 1999, the HIPC was contracted out to the Pacific Business Group on Health, who renamed the project PacAdvantage.[38] The program was not successful. Although the initial plan of the HIPC was to enroll 250,000 individuals in the first two years, only 150,000 individuals enrolled within the first five years.[39] This lack of enrollment accounted for only two percent of the small-market group, the very group for which HIPC was intended to provide insurance.[40]

There were several problems that ultimately doomed the HIPC/PacAdvantage. The main problem was that the HIPC/PacAdvantage did not maintain the enrollment volume required to be effective, and, in turn, did not maintain enough interest from insurers.[41] The second major problem of the HIPC/PacAdvantage was that insurers began to use the exchange solely to appeal to high-risk buyers, a process known as "adverse selection".[42]

Changes in the healthcare landscape brought about by the PPACA, as well as changes in the structure and method of implementation by the California HBEX should alleviate these two major problems. One of the factors that limited the number of enrollees in the HIPC/PacAdvantage was that individuals were not required to purchase health insurance. The individual mandate, the provision that requires all individuals to purchase health insurance, becomes effective in 2014, the same year as the

37. *Id.*
38. Micah Weinberg & Bill Kramer, *Building Successful SHOP Exchanges: Lessons from the California Experience*, PACIFIC BUS. GROUP ON HEALTH (2011) 2, *available at* http://www.pbgh.org/storage/documents/PBGH_SHOP_05.pdf.
39. *Id.*
40. Hiltzik, *supra* note 32.
41. *Id.*
42. *Id.*

exchanges.[43] The other key provision of the PPACA that will increase the California HBEX's likelihood of success is the subsidies provided by the federal government.[44] These federal credits, which will assist low and moderate-income individuals in purchasing insurance, will only be accessible within an exchange.[45] The influx of several million new customers, many of whom will have their health insurance plans subsidized by the government, should make the HBEX attractive to insurers.[46]

Another key to maintaining enrollment in the Exchange is to increase awareness of the program. According to a California Field Poll, seventy-five percent of those surveyed who are currently uninsured and would be purchasing insurance through the private market expressed an interest in doing so through the HBEX.[47] However, only seventeen percent of those surveyed were even aware of the HBEX.[48] In order to increase awareness, the HBEX is beginning to market itself aggressively, and, given the great diversity within the state, creative strategies will have to be employed. Ogilvy Public Relations Worldwide was awarded a $900,000 contract to market the HBEX, and they have already begun to implement creative marketing strategies.[49] Strategies have ranged from advertising on coffee cup sleeves at community colleges in order to reach adult students to

43. Liz Goodwin, *Supreme Court Upholds Obamacare Individual Mandate as a Tax*, ABC NEWS, June 28, 2012, http://abcnews.go.com/Politics/OTUS/supreme-court-upholds-obamacare-individual-mandate-tax/story?id=16669186#.UJgA2445hE8.

44. Sarah Lueck, *States Should Structure Insurance Exchanges to Minimize Adverse Selection*, CTR. ON BUDGET & POL'Y PRIORITIES, Aug. 17, 2010, *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=3267.

45. *Id.*

46. Kathy Robertson, *California Health Care Reform Goes Into Overdrive*, SACRAMENTO BUS. J., August 29, 2012, (quoting Gary Cohen, General Counsel for the California Health Benefits Exchange).

47. Mark DiCamillo & Mervin Field, *Californians Strongly Support Nation's Health Reform Law but Believe More Changes are Needed to the Health Care System*, THE FIELD POLL, 2, *available at* http://field.com/fieldpollonline/subscribers/Rls2423.pdf.

48. *Id.*

49. Goodnough, *supra* note 13.

advertising at professional soccer matches to reach young Hispanic men.[50] There are even plans to incorporate the HBEX into mainstream television, through shows like "Modern Family" and "Grey's Anatomy".[51]

The other major problem that contributed to the end of the HIPC/PacAdvantage was adverse selection. As individuals who are in poorer health and who have higher health expenses begin to enroll in an exchange, and lower-cost individuals who have lower health expenses enroll outside of it, it becomes too expensive for insurers to participate in the exchange.[52] Insurers discontinue their participation in the exchange, decreasing competition within the exchange, and increasing the prices of premiums within the exchange.[53] A simplified way of putting it is that adverse selection occurs when purchasing or offering health insurance outside of an exchange becomes more attractive to purchasers and insurers than doing so within the exchange. In the HIPC/PacAdvantage, adverse selection caused the number of insurers offering health plans within the exchange to decrease from 24 to 3 from 1992 to 1996.[54]

There are several safeguards included in the California HBEX that are designed to lower the risk of adverse selection. California's decision to use an active purchaser model in selecting health plans to be included in the exchange will prevent the HBEX from becoming merely a dumping ground for high-risk plans. The active purchaser model will allow the HBEX to

50. *Id.*
51. *Id.*
52. Lueck, *supra* note 44.
53. Sharon Silow-Carroll et. al, *Health Insurance Exchanges: State Roles in Selecting Health Plans and Avoiding Adverse Selection*, THE COMMW. FUND PUB., Feb./Mar. 2011, *available at* http://www.commonwealthfund.org/Newsletters/States-in-Action/2011/Mar/February-March-2011/Feature/Feature.aspx#1.
54. Hiltzik, *supra* note 32.

maximize value for consumers by selecting high-performing plans.[55] California's requirement that insurers offer each of the PPACA's four metal levels will lower the risk of adverse selection taking place as well, as insurers will not be able to simply offer high-risk plans within the HBEX.[56] The other important provision in the HBEX legislation is the requirement that all products and plans offered within the exchange be consistent with those offered outside of the exchange.[57] This will prohibit insurers from offering vastly different plans within and outside of the HBEX, decreasing the likelihood of adverse selection taking place.

V. ADDITIONAL HURDLES

There are still significant obstacles to overcome in order for the California HBEX to be successful. The first, and most prevalent, is the cost to the state, whose budget is already being stretched significantly. Despite the fact that the federal government is financing a great deal of the exchange, California's contribution could exceed two billion dollars per year.[58] To help close a sixteen billion dollar deficit, Governor Brown has already cut over one billion dollars from Medicaid, and is now relying on voters to approve temporary tax increases in order to avoid more cuts.[59] If there is no improvement in the State's financial situation, the HBEX may fail. Political uncertainty also makes the future of the HBEX difficult to predict. Many Republicans have pledged to repeal the PPACA.[60] Even if attempts at a complete repeal are unsuccessful, there could be significant

55. Silow-Carroll, *supra* note 53.
56. Hall, *supra* note 23, at 6.
57. *Id.*
58. Goodnough, *supra* note 13.
59. Goodnough, *supra* note 13.
60. Mitt Romney, *Health Care – Repeal and Replace Obamacare*. http:// www.mittromney.com/issues/health-care, (last visited October 27, 2012).

changes to the exchanges that may require restructuring the way that the exchanges operate.

VI. CONCLUSION

Despite the failures of the HIPC/PacAdvantage, expectations for the California HBEX are high. With the chance to provide healthcare insurance to a large uninsured population, and to provide more affordable healthcare to those who already have insurance, California has been very proactive in their creation of the California HBEX. Many of the obstacles that doomed the HIPC/PacAdvantage have been removed by the PPACA, and others can be avoided through careful planning by the individuals charged with designing, implementing, and marketing the HBEX. The individual mandate, the requirement that insurance plans in the HBEX meet certain minimum requirements, and the requirement that the plans offered within the HBEX are similar to the plans offered outside of it will help to ensure that the California HBEX does not experience the adverse selection that doomed the HIPC/PacAdvantage and similar efforts in other states. The California HBEX could be a very valuable tool in curbing rising healthcare costs and helping to provide health insurance coverage to more people in a state with high healthcare costs and a large uninsured population.