



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 16, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Relating to the Idaho Health Care Freedom Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

A. Introduction

The proposed initiative ("Initiative") seeks to create a new chapter of Idaho Code called the Idaho Health Care Freedom Act. The Initiative seeks to preserve the freedom

of an individual or entity in Idaho to determine to purchase health care or not, and to prevent coercion to buy a health insurance policy. The Initiative intends that:

1. No law or rule shall directly or indirectly compel any person, employer or health care provider to participate in any health care system.
2. A person or employer may pay directly for lawful health care services and shall not be required to pay penalties or fines for doing so.
3. A health care provider may accept direct payment for lawful health care services and not be penalized or fined for accepting direct payment from a person or employer for lawful health care services.
4. Subject to reasonable and necessary rules that do not substantially limit a person's options, the purchase or sale of health insurance in private health care systems shall not be prohibited by law or rule.
5. Health care services a health care provider or hospital is required to provide are not affected.
6. Health care services permitted by law are not affected.
7. Services provided pursuant to Title 72, Idaho Code, or any statutes relating to worker's compensation are not prohibited.
8. Laws or rules in effect as of December 1, 2009, are not affected.
9. The "terms of conditions" of any health care system do not have the affect of punishing a person or employer for directly paying for lawful health care services, or for a health care provider or hospital from accepting such payment.
10. Any federal law, code, or mandate contrary to the Act is null and void, as are any actions taken by any federal employee or agent of the federal government who actively attempts to enforce laws nullified by this Act.
11. Any legislation, code, or administrative action whose enforcement or threatened enforcement might have the indirect effect of violating the Act shall be null and void. For example, if an individual or business is required to file income tax returns and the effect of filing would have the same economic effect of penalties or fines for not purchasing health insurance, the requirement to file would be null and void, and no civil or criminal enforcement for failure to file such income tax returns could take place.

12. An individual who attempts to compel a person in Idaho into surrendering a right or property guaranteed by the Act by directly or indirectly threatening enforcement of a law or code which would be nullified by the Act shall be subject to penalties detailed in the Act.
13. A county attorney or the attorney general can prosecute an arrest, search, seizure, or attempts at such actions, with kidnapping, trespass, theft or applicable homicide. Individuals involved can also be charged with other applicable criminal offenses in Title 18, Idaho Code. Prosecution for extortion or other criminal offenses is provided for. Victims of crimes prosecutable under this section are entitled to pursue independent concomitant civil actions.

B. A Constitutional Basis for Idaho Health Care Freedom Act May Become a Question

Proposed section 41-6001 provides as its purpose the preservation of freedom of an individual or entity in Idaho to determine whether to purchase health care or not. Further, the public policy of Idaho is stated as preventing any and all forms of coercion that might compel persons in the state to buy a health insurance policy. Included in any such coercive action by the federal government "to the extent such violates standards enumerated in the ninth and tenth amendments to the United States Constitution or any other Constitutional standards which might apply to a specific Public Law."

The Ninth Amendment to the U.S. Constitution states that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Tenth Amendment states that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The undersigned is not aware of any federal requirements that would be in conflict with the Initiative. There are currently penalties in federal code for seniors who do not timely enroll in Medicare Part A, hospital insurance (42 U.S.C. § 1495r), or for not being enrolled in Medicare Part D or otherwise having prescription drug coverage after their enrollment periods (42 U.S.C. §1395w-113). However, those provisions would appear to fall under exception (C)(4) of proposed section 41-6003, for laws or rules in effect as of December 1, 2009. If the Initiative passes and there is a new congressional enactment, questions of potential conflict and preemption will have to be addressed.

C. Terms Are Not Consistent in the Proposed Legislation

A number of terms are used throughout the Initiative that creates ambiguity about who is the intended actor or health care entity. The Purpose statement in proposed

section 41-6001 preserves the freedom of an individual or entity to decide whether to purchase health care. The definition of "person" in proposed subsection 41-6002(6) includes individuals and various corporate, public, private, municipal bodies and the state. In the definition of "Health care system" in proposed subsection 41-6002(3), the reference is to "any public or private entity" that performs various health care functions.

In the Prohibitions contained in proposed subsection 41-6003(A)(1), the right against compulsion to participate in any health care system belongs to "any person, employer or health care provider." Proposed subsection 41-6003(A)(2) allows for a "person or employer" to pay directly for lawful health care services, and a "health care provider" to receive direct payment from a "person or employer" for those services. "Employer" and "health care provider" are not defined. In proposed subsection 41-6003(C)(1), there is a reference to a health care provider or hospital, also undefined. Proposed subsection 41-6003(C)(5) reiterates the prohibition on punishing a person or employer for paying directly for lawful health care services, or punishing a "health care provider or hospital" from accepting direct payment. It is not clear why there are differences in these various provisions.

Likewise, the authority cited in various sections differs, and does not reflect Idaho's practice that the use of the term "regulation" refers to a federal regulation, while "rule" is a promulgation of an Idaho state agency. Proposed subsection 41-6002(4) defines "Lawful health care services" as those that are permitted or not prohibited by law or regulation. Proposed subsection 41-6002(5) defines "Penalties or fines" as actions established by law or rule. Proposed subsection 41-6003(C)(4) states that the prohibitions do not affect laws or rules in effect as of December 1, 2009, which would omit federal regulations.

Proposed subsection 41-6004(A) makes "any federal law, code, or mandate" null and void if contrary to the provisions of the Act. How "code" and "mandate" differ from federal law and regulation is not clear. In proposed subsection 41-6005, the Act nullifies "[a]ny legislation, code or administrative action" whose enforcement might have the indirect effect of violating the Act.

As in proposed section 41-6003, the Initiative provides that a law or rule shall not compel a person, employer or health care provider to participate in any health care system "directly or indirectly." The concept of an indirect effect is also contained in proposed section 41-6005. The concept of "indirect effects" from statutory regulatory actions leaves the scope of the proposal indefinable.

MATTERS OF FORM

Idaho Code § 34-1801A sets out requirements for the form of an initiative. The Initiative includes the warning set out in that Code section, stating that it is a felony for anyone to sign any initiative or referendum petition with any name other than his own, or to knowingly sign his name more than once for the measure, or to sign such petition when he is not a qualified elector. This Initiative contains two signature pages, one of

which has 20 signatures; the other, 15. There is an individual in Coeur d'Alene who has signed both pages, in apparent violation of the requirement.

In addition, Idaho Code § 34-1804 requires that each signature sheet shall contain signatures of qualified electors from only one county. The signatories to the Initiative live in Hayden, Coeur d'Alene, Athol, Post Falls, Bonners Ferry, and Moscow, not all of which are in Kootenai County, where the majority of them reside.

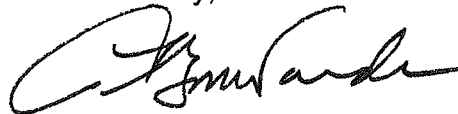
The numbering scheme used in the proposed new chapter is not internally consistent, nor is it generally the numbering usually used for Idaho statutes.

House Bill No. 391 has been introduced into the Legislature, adding a new title 39, chapter 90, Idaho Code. It is also called the Idaho Health Freedom Act, with provisions that are significantly different from the Initiative, but with the same concepts of public policy. Should this bill pass this legislative session and the Initiative passes in the November election, it is not clear how the differences in language and placement in Idaho Code would be reconciled.

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Wasden", written over a horizontal line.

LAWRENCE G. WASDEN
Attorney General

Analysis By:

JEANNE T. GOODENOUGH
Deputy Attorney General