

# How to Get a State Single Payer Opt-Out as Part of Reconciliation

By: [Jon Walker](#) Monday March 8, 2010 6:06 pm

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The current Senate health care bill has a provision ([Section 1332. Waiver for State Innovation \(PDF\)](#)) that will allow states to opt out of the current reform structure if they can provide the same level of care for the same amount or cheaper with a different plan. Given how poorly designed the Senate bill is, that shouldn't be hard on a policy level. In theory, this could allow for state-based single payer plans, and reconciliation could deal with two major problems with the provision.

## **Delayed Until 2017**

The first problem is the date of implementation. States can't apply for the waiver until 2017, which is completely ridiculous. There is no reason for the delay, and it would make state innovation very difficult to implement. It would first require states to go through all the work of setting up the new system of exchanges for 2014, only to turn around and try to replace it with another new system three years later.

The other big problem with the date is that 2017 would be right after Obama left office (assuming that he served two terms). Since it is very rare for one party to hold the presidency for three straight terms, it will likely be a Republican in the White House in 2017. Assume their HHS secretary would not be open to granting the waiver for a state-based single payer system, it would likely not be until 2020 or 2024 that this provision could be used for creating state single payer, and that assumes a supportive Democratic president is elected. This is completely unacceptable.

## **Getting Around ERISA**

The other major impediment is the scope of the waiver, which I interpret to mean it can't be used for a waiver of ERISA. From the Senate bill (with Secretary defined as Secretary of HHS and Treasury):

*(c) Scope of Waiver-*

*(1)IN GENERAL- The Secretary shall determine the scope of a waiver of a requirement described in subsection (a)(2) granted to a State under subsection (a)(1).*

*(2)LIMITATION- The Secretary may not waive under this section any Federal*

*law or requirement that is not within the authority of the Secretary.*

ERISA falls under the jurisdiction of the Departments of Labor and Treasury. I don't think this provision could be used waive ERISA without further action by Congress, at least I think it would become a potential legal mess if that were tried.

ERISA prevents states from telling employers or labor unions what kind of insurance they must offer. Not having an ERISA waiver would make adopting a true state-based single payer system incredibly difficult, if not impossible, and make implementing a [very cost effective](#), Hawaii-style, strict employer mandate system impossible in other states.

### **Dealing with the Problem Through Reconciliation**

To solve the problem, the start date would need to be moved up to as early as possible, and the Secretary of Labor would need to be added to the waiver. To make the changes possibly qualify under the Byrd rule would require a slight redesign for how the federal money is passed through if a state gets a waiver. Instead of providing the state with 100 cents on the dollar, the state would be required to prove its new plan would be at least 5% more cost effective for the federal government, with federal government able to keep that 5% of cost savings. This would make the provision deficit reduction (actual numbers could be changed as needed to qualify). Ideally, the waiver and the way the money is spent by the federal government could be changed so that it is calculated over a five- or ten-year window, potentially giving the most cost effective state single payer plans the ability to start in 2012 or 2013, with the first year of cost paid for with long-term savings.

### **Conclusion**

The Senate bill spends a large amount of money on a very inefficient way of expanding coverage. With modest modifications, the state waiver provision could allow individual states to use that money to pursue single payer systems, a move that would potentially save the states and the federal government a large amount of money. Despite what [Obama is telling Dennis Kucinich](#) (D-OH), the current state waiver provision can't do that.

A better state waiver redesign would not just allow for state-based single payer, but other systems like a German-style all-payer system, a Hawaii-style strict employer mandate system, a Singapore-style system of HSAs combined with catastrophic insurance, etc. The current Senate bill is unpopular with a broad spectrum of people, and a true waiver for states to try something better should appeal to people across ideological boundaries. Even

if the changes can't be crafted to steer clear of the Byrd rule, it might still be possible to get 60 votes in the Senate for a waiver of the Byrd rule, or even convince [Joe Biden to play hardball](#) with reconciliation.

These slight modifications that could potentially be part of the reconciliation sidecar should be a rather small request. A small group of House Democrats/Progressives could easily demand the changes in exchange for their vote—if they don't follow [Lynn Woolsey's example](#) of throwing away all negotiating leverage in return for nothing. Personally, I consider the inability of the single payer movement to actively force members of Congress into including a properly designed state waiver provision one of the most serious failings of the health care fight.