

2010 Special Session
FISCAL ANALYSIS OF PROPOSED LEGISLATION
Prepared by the Oregon Legislative Fiscal Office

MEASURE NUMBER: HB 3632 **STATUS:** Original
SUBJECT: Directs the Oregon Health Authority to study the viability of implementing a pay or play system of employer-based health insurance coverage in Oregon
GOVERNMENT UNIT AFFECTED: Oregon Health Authority (Department of Human Services)
PREPARED BY: Kim to
REVIEWED BY: John Britton
DATE: February 2, 2010

	<u>2009-2011</u>	<u>2011-2013</u>
EXPENDITURES:		
Professional Services		
General Fund	\$ 280,600	
Federal Funds	\$ 179,400	
Total Funds	<u>\$ 460,000</u>	

EFFECTIVE DATE: On Passage

INTERIM JOINT COMMITTEE ON WAYS AND MEANS: The budgetary impact of this bill was not reviewed and approved by the Interim Joint Committee on Ways and Means Committee and is not included in the omnibus budget bill to be introduced by the committee.

LOCAL GOVERNMENT MANDATE: This bill does not affect local governments' service levels or shared revenues sufficient to trigger Section 15, Article XI of the Oregon Constitution.

ANALYSIS: House Bill 3632 directs the Oregon Health Authority (OHA) to study the viability of implementing a pay or play system of employer-based health insurance coverage in Oregon. The Authority is required to report the results of the study to the interim legislative committees on health care by no later than October 1, 2010. If OHA determines that such a system is viable, the Authority is instructed to include a proposed implementation plan in this report.

The Department of Human Services (Oregon Health Authority) estimates the cost of a viability study and proposed implementation plan to be \$460,000 Total Funds (280,600 General Fund and \$179,400 Federal Funds). Allocation of funding source is based on a blended rate for the work of the Oregon Health Fund Board and components of the Oregon Health Policy and Research Office. This blended rate is 61 percent General Fund and 39 percent Medicaid Federal Funds.

Based on economic modeling and consulting work performed for the Oregon Health Fund Board during the spring of 2009, the agency anticipates that \$400,000 Total Funds would be required for contracted economic modeling, analysis and consulting. Contractor(s) will be paid on a deliverable basis and not on hours performed for the work. The contractor(s) would be expected to develop and analyze economic models of various policy scenarios regarding employer pay or play requirements and work with the agency to evaluate the implications for implementation. The agency estimates that \$50,000 Total Funds would be required to fund a quarter-time contractor to manage the plan development portion of the work. In addition the federal Employee Retirement Income Security Act (ERISA) of 1974 establishes standards for private employers that offer employer-sponsored health insurance coverage and other benefit plans to

employees. While ERISA permits states to regulate insurance, it preempts state or local laws that would regulate employer benefit plans. Because any potential employer assessment could face tough ERISA scrutiny, any study of the viability of a pay or play system will need resources to examine ERISA implications and other legal considerations. Based on contract work the Oregon Health Policy and Research (OHPR) Division received from a national expert on ERISA in the previous biennium, DHS estimates the cost of external advice for navigating ERISA to be \$10,000 (80 hours of work at \$125 per hour).

The Legislative Fiscal Office notes that historically ERISA has raised problems for state pay or play laws. Although federal law typically prevails if it conflicts with state law, ERISA contains an unusually broad preemption clause providing that federal law supersedes state laws that “relate to” private-sector employee benefit plans. The purpose of this broad federal preemption was to encourage voluntary employer-sponsored benefits by relieving plan administrators from complying with multiple, and potentially conflicting, state laws. Responsibility to interpret ERISA’s preemption clause is left to the courts, which have relied on this stated congressional intent to apply preemption broadly to invalidate state laws with sometimes even minimal impacts on employer-sponsored plans, even if they do not directly conflict with federal law. In 2007, ERISA preemption defenders successfully overturned pay or play taxes in Maryland and Suffolk County, New York, on ERISA grounds. Industry analysts also predict that pay or play systems in San Francisco, Vermont and Massachusetts face potential legal challenges on ERISA grounds. In light of this environment, the agency’s costing for ERISA related expenses may be an underestimation.