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## Statement on the Massachusetts Individual Health Care Mandate ACLU of Massachusetts — January 2009

### Introduction

In 2006, Massachusetts passed the Access to Affordable, Quality, Accountable Health Care Act, which mandates that every Massachusetts resident over the age of eighteen hold a minimum level of health insurance. This approach to ensuring universal health care coverage is unique, as it does not rely upon the traditional approach for providing public services – using taxpayer funds. Instead, it requires most individuals to purchase health insurance from third-party insurance providers, or face a monetary penalty.

As this is a new program – and the first of its kind in the nation – the Massachusetts health care mandate has received a lot of attention, both laudatory and critical. A number of people have contacted the American Civil Liberties Union of Massachusetts (ACLUM) and raised questions about whether this broad mandate is a problematic extension of government power.

Because of these concerns, we have reviewed the statute closely to assess the constitutionality of the Massachusetts approach.<sup>1</sup> At this point, we do not believe that grounds exist for a viable legal challenge to the mandate itself, and we are not planning to challenge the law as it is written. However, we will continue to monitor the implementation of this program to ensure its constitutionality in operation.

### What does the mandate require?

The law requires residents aged eighteen or older to “obtain and maintain creditable coverage so long as it is deemed affordable” under the pricing schedule set by the Commonwealth. If a resident allows his or her coverage to lapse for more than 90 days in a calendar year, the resident is subject to financial penalties.

The law exempts individuals who have strongly-held religious beliefs in opposition to “medical health care” from the requirement to hold health insurance coverage. For individuals and families whose annual income falls below certain thresholds, the Commonwealth will provide subsidized health care coverage. There are also several “hardship” exemptions that allow individuals to avoid the penalty for not holding health insurance. Eligibility for these exemptions is determined on a case-by-case basis by the Commonwealth.

If an individual without an approved exemption does not “obtain and maintain creditable health care coverage,” the Commonwealth will impose a financial penalty. For 2008 and beyond, this penalty is an amount “not [to] exceed 50 per cent of the minimum insurance premium” for coverage for which the individual would have otherwise qualified. The penalty is imposed through the Commonwealth’s income tax form.

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<sup>1</sup> Please note that ACLUM takes no position regarding the wisdom or efficacy of the new law as a matter of public policy.

## Can the mandate withstand constitutional challenge?

Under existing law, a facial challenge to the mandate as drafted would be difficult.

### *Individual Liberties*

- *Religious Freedom.* The statute expressly exempts from the obligation to obtain health insurance individuals who hold “sincerely-held religious beliefs” against the use of “medical health care” (a term defined by regulation). This important exemption language would appear to protect the religious freedom of those who oppose health care on religious grounds.
- *Right to Refuse Medical Care.* ACLUM supports the right of individuals to exercise personal autonomy by making their own decisions about whether or not to receive medical care. The individual mandate does not appear to operate in a way that would expose it to a constitutional challenge. Because the statute only mandates that an individual hold health *insurance* – and does not mandate that an individual submit to medical *care* – a court would be likely to conclude that the statute does not interfere with an individual’s right to make medical decisions for him or herself.

### *Other Constitutional Considerations*

- *Takings.* Under the federal and state constitutions, the government cannot take private property without due process of law and just compensation. However, the U.S. Supreme Court has previously held that certain government programs (such as zoning) constitute an “adjust[ment of] the benefits and burdens of economic life to promote the common good” as opposed to a taking of private property. In the context of the individual mandate – where the Commonwealth has a “public purpose” in requiring health insurance coverage and has provided an appeal process for those individuals who believe they should be exempt – a facial challenge to the individual mandate as an unconstitutional “taking” would be difficult.

- *Taxing.* Only the Legislature has the authority to tax Massachusetts residents, and some people have suggested that requiring individuals to purchase health insurance – presumably from private third party insurance companies that set and collect premiums – constitutes an impermissible delegation of the Legislature’s constitutional taxing authority to insurers. However, the individual mandate does not exhibit a key feature of a tax. The failure to pay a tax both carries a penalty (such as a fine) and also requires the taxpayer to pay the underlying tax owed. In contrast, the mandate statute only imposes a fine if an individual decides not to purchase insurance; it does not require an individual to purchase insurance after having paid this penalty. Because of this distinction, a court would be unlikely to view the individual mandate as a “tax”.

## Is ACLUM monitoring how the mandate is implemented?

Yes. The uneven application of a statute that is constitutional on its face can still lead to constitutional civil rights violations. Therefore, ACLUM is working with other advocates to monitor the new appeals process that was instituted in conjunction with the individual mandate. The statute authorizes appeals by individuals who have been denied a waiver of the requirement to obtain health insurance despite having suffered one of the “hardships” for which the statute provides an exemption.

ACLUM will continue to monitor whether these hearings provide individuals with adequate due process protections, and whether the hearings are conducted in a consistent and constitutional manner.

### Questions or concerns?

If you have been denied a waiver of the mandate *based on your religious beliefs*, please contact the ACLU of Massachusetts at 617-482-3170 or [info@aclum.org](mailto:info@aclum.org).

If you have questions or concerns about the *waiver process, or the process for appealing the denial of a waiver*, please contact Health Law Advocates at 617-338-5241 or online at [www.healthlawadvocates.org](http://www.healthlawadvocates.org).