

2011 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1291

# 2011 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee  
Peace Garden Room, State Capitol

HB 1291

January 17, 2011

Job # 12977

☐ Conference Committee

Committee Clerk Signature



**Explanation or reason for introduction of bill/resolution:** Authorize the governor to enter the state in the interstate health care freedom compact.

## Minutes:

**Vice Chairman Kasper, Co-sponsor:** This bill allows the governor to enter into interstate health care freedom compacts. I would like to read some testimony that was emailed to me from Nick Dranias, Director of the Center for Constitutional Government at the Goldwater Institute in Phoenix. He or someone like him would be willing to come to Bismarck to testify.

What is an Interstate Compact?

An Interstate Compact is a contractual agreement between states that is similar to a treaty. It binds states contractually and the obligation created by a compact is protected from impairment by the contract's clause of the constitution.

What would the Interstate Healthcare Freedom Compact do?

The Interstate Healthcare Freedom Compact would support a strong legal argument that it is a federal crime for anyone including federal officials to interfere with a state's Health Care Freedom Laws. Enforcing the individual mandate of a Federal Health Care Freedom Law would be illegal within enforcing the individual mandate of the Federal Health Care Freedom Health Care Law would be illegal within the compacting states.

Why an Interstate Freedom Health Care Freedom Compact?

Because it can actually work. Unlike efforts to nullify the individual mandate of the Federal Health Reform Law, Rep Kreidt's bill is an effort to nullify the PPAC. The Interstate Health Care Freedom Compact would have the ability to displace the individual mandate as a matter of state and federal law. This is because the compact is authorized by an existing federal statute that gives preapproval to Interstate Compacts that coordinate criminal laws. Federal courts have ruled that Congress can effectively preapprove interstate compacts. Federal courts have also ruled that congressionally approved interstate compacts are the equivalent of federal law. These court rulings support a strong legal argument that the Interstate Health Care Freedom Compact will trump conflicting federal laws such as the individual mandate when the compact becomes effective. The Health Care Freedom

Compact combines state sovereignty with the power of federal law to restrain the federal government.

What will make the Interstate Health Care Freedom Compact effective?

For the compact to be effective a compacting state must

- a. Enact a health care freedom law
- b. Make it a crime for anyone to interfere with its health care freedom law
- c. Authorize and direct the Governor to enter into the Interstate Health Care Freedom Compact with at least one other state
- d. Lodge the compact with Congress when at least two states adopt it

The latest information I have is that there are at least 4 other states (Arizona, Oklahoma, Montana, and Louisiana) looking at implementing a compact such as this. Under the constitution, interstate compacts that regulate matters within the enumerated powers of the federal government require congressional consent. That consent can be expressed an affirmative majority vote in Congress or even implied by congressional acquiescence. I've also learned that these compacts could have the force of law if they do not try to make it a federal law but just a state law without congressional approval. So we could have the compact that would be effective if our Governor decided to enter into a compact with Montana, as an example. It would be effective for our states not trying to impose this federally without Congressional approval. If Congress does approve it, then it is sort of the force of a treaty which is one of the most powerful things we can have under our Constitution.

The history of Interstate Compacts:

During the Colonial Period, Interstate Compacts were used in regular intercolonial affairs. Two centuries later more than 200 Interstate Compacts are in force woven invisibly into the fabric of our society. The Port Authority of New York and New Jersey is an Interstate Compact. So is the Washington Metropolitan Area Transportation Authority that runs the subways and buses in our nation's capital. So are a myriad of agreements that regulate criminal background checks, environmental standards and educational benefits across state lines.

So that's just a little bit of a background. If we can get that individual to come here, he is a genius when it comes to explaining Interstate Health Compacts

If you go to the bill on line 6, "the governor may enter the interstate health care freedom compact on behalf of the state in a form substantially as follows:" So if our Governor chose not to enter, we have no compact. Our Governor can choose to have other compacts. We could have an energy compact; we could have a greenhouse compact. Any type of compact you can think of if 2 or more states would enjoin together, we would have a compact. What the rest of the bill does is it outlines the guidelines to set this compact up. You can see it is all new language. It sets forth the structure of what the bill would do. The fact that the Governor may enter into it if he/she desires. Then it gives the powers and authority to the various states in the areas that they can regulate based upon the Health Care Freedom Compact. If you flip over to page 5, line 16, "This compact is deemed accepted when at least two states deliver a notice of confirmation, which is duly executed

by their respective authorized representatives, acknowledging complete agreement to the terms of this compact, to each other's governor, the office of the clerk of the United States house of representatives, the office of the secretary of the United States senate, the president of the United States senate, and the speaker of the United States house of representatives."

There is a sample verbage of how the interstate compact might look. I have a bunch of information that I can make available to the committee that shows the sample compacts which I did not have time to prepare for today. I would urge to consider the implementation this bill. It's enabling. It's not mandatory. It is another arrow in the quiver of state's rights supporting the Constitution of the United States.

**Representative N Johnson:** Could you provide us with where you get the information that said "if any state enters into interstate compact that it is automatically pre approved"?

**Vice Chairman Kasper:** Yes. I will get that information and make it available to the committee. It's deemed approved if we do not try to make it federally approved. So there is a difference between a Congressional approval and an approval by just the two governors when they enter into the compact. If two governors enter into a compact, then it is binding on those two states. But it is not binding on the federal government. So the federal government would not like the compact. If we submit the compact, and get approval from the Congress for the compact, then it has Federal status and now it becomes the power of a treaty in the whole country.

**Representative Sukut:** Is this a model bill? You mentioned four other states that are doing the same thing. Are they working with a similar model?

**Vice Chairman Kasper:** Yes, this is a model statute that other states are entering into. They are trying to make them as close to each other as possible. It originated in the ALEC Organization in one of their model statutes.

**Representative Amerman:** As far as withdrawing, after four years there is some sort of joint resolution. If a state wants to withdraw, who has the power to withdraw from this?

**Vice Chairman Kasper:** I can't say for sure that I have that answer. If it says in here that after years, I'm assuming it is the Governor because the Governor has the authority to enter into it. But it may be that after the Governor enters into the compact, it takes legislative approval. I don't know that answer but I can find out.

**Representative Amerman:** I was just reading from line 23 on page 6.

**Vice Chairman Kasper:** It appears that's the way it would be if we adopted it that way. It would be a four-year commitment.

**Chairman Keiser:** On the same page if you look at line 15-17, I think it suggests the governor.

**Vice Chairman Kasper:** Yes.

**Representative Clark:** If this requires approval of Congress, does the President have veto power over that?

**Vice Chairman Kasper:** To reiterate, there are two ways for this to be approved.

1. If we want the federal approval of a federal power, then we would ask for approval from the Congress. I don't think the President can veto it. I think it is Congressional action. That is another question I need to find out. However, from my understanding and reading, if the Montana Governor and the North Dakota Governor decided to enter into this Health Care Freedom Compact and did not wish to submit it to the Congress for approval, it would have the authority of law in North Dakota and Montana but not the authority of law federally. I will make those articles available to the committee.

**Chairman Keiser:** I believe one of the technical issues is that if you have the compact and the federal government using whatever means they choose deemed to suggest that the compact is not valid then you have to go to court and you have to have standing to go to court. To have standing, you have to have passed the compact so you can be considered to be one of the defendants or one of those bringing action.

**Vice Chairman Kasper:** That is precisely correct. At our conference in December, "standing" was talked about. That is one of the reasons you want the compact is to have the standing.

**Representative Nathe:** Say we pass this and we give the authorization to the Governor for this compact and we don't use it but down the road we still have it in law and we get a governor that doesn't want to do this but yet the legislative body does are we still able to enact this?

**Vice Chairman Kasper:** The way I understand the compact, it authorizes the governor to enter into the arrangement. So if the Governor is unwilling I don't know how we can override it. I believe it is the Governor takes the action. We could pass the bill and the Governor takes no action then that's his prerogative.

**Representative Sukut:** I thought you said there was a situation here with the compact that if it was registered, it would usurp federal regulations? Did I understand that correctly?

**Vice Chairman Kasper:** The way I understand it, if the governors of two or more states enter into the compact and submit it to the congress for approval, if the Congress does in fact approve the compacts, the way I understand the hierarchy of law, the strongest law of the land besides the Constitution is a treaty. From what I understand about compacts, the compacts are right up there with a treaty which would supersede laws that the Congress has passed that do not have the status of a treaty or in this case a compact. I believe in certain instances, if the Congress approves it could in fact supersede Congressional laws that are already there.

**Chairman Keiser:** This is targeted to the requirement that an individual must purchase health insurance ultimately. The federal government has taken the position relative to PPACA that because it is interstate commerce they have the authority to require or mandate health insurance coverage. This is at the state level in effect saying it's not interstate commerce. It's a compact between states and it would give them standing in a court case. I never know how a court is going to rule.

**Vice Chairman Kasper:** I can also make available to the committee an article by---I have numerous articles about the commerce clause and the supremacy clause and the tenth amendment. One professor, I believe Professor Barnhardt, who spoke in Washington in December is a constitutional expert and he has written a treatise on the constitutional issues of the supremacy clause and the commerce clause. It is about 60 pages but anyone who would like a copy, I have it in email form.

**Chairman Keiser:** Support, opposition, neutral? We will continue the hearing on HB1291 to a date uncertain but within the next two weeks.

# 2011 HOUSE STANDING COMMITTEE MINUTES

House Industry, Business and Labor Committee  
Peace Garden Room, State Capitol

HB 1291  
January 19, 2011  
13110

☐ Conference Committee

Committee Clerk Signature

*Ellen LeTang*

## Explanation or reason for introduction of bill/resolution:

Authorize the governor to enter the state in the interstate health care freedom compact.

## Work Committee Minutes:

**Chairman Keiser:** Reopens the hearing on HB 1291.

**Vice Chairman Kasper:** Introduces Nick Dranias.

**Nick Dranias~Goldwater Institute:** I here as a private citizen and thrilled to be here to talk about the Interstate Freedom Compact. This is a new concept. It is an idea that took some considerable time for a number of constitutional scholars in the state policy think tank groups to really wrap their brain around. If anything is difficult to grasp, that is a natural phase to go through.

Here is the bottom line, under the current federal case law, interstate compacts, which are nothing more than an agreement between states, to exercise their sovereign powers in certain ways. When approved by congress, are treated as the subtenant equivalent of federal law. That means that two states agree to exercise their police powers to do acts and they secure approval from congress, it becomes subtenant federal law. The clearest example we have is the Colorado River Compact. This is a Supreme Court case from 1980, which involved a dispute between a federal agency and a local water district that had control over water rights. The federal agency tried to take away some of the water rights that the local agency had. Under the Colorado compact, pointing to federal law, ultimately, the Supreme Court said "no, those rights were protected by the compact" trumped prior federal law and had the effect of subtenant federal law.

Additionally to that, we have a DC circuit case from 1987, where a tri-state DC compact that run public transportation, there was a conflict between the rules of liability that were established by that compact in the federal employment liability act and the court held that the compact trumped the prior federal law.

The current federal law is, if you have a compact between the states agreeing to things that are within the power of the states to agree to and is approved by congress; it is as if you promulgated federal law.

As you can imagine, this is incredibly powerful. The trick is getting congressional approval. The interesting thing that we discovered in our research is that since the beginning of the republic, congress has given approval in advance to certain kinds of compacts. In the early stages of a republic, it tended to deal with water and boundary disputes, ferry rights, things of that nature, but overtime it has expanded beyond that. Currently, there are several dozen preapproval statues at the federal level for compacts between the states from, doing hazardous wastes, to water in the great lakes, you name it.

All of these compacts have one feature in common except for one compact. This is the compact that is at the heart of the concept. All these preapproval statues that congress has given to interstate compacts all say that the compact cannot conflict with existing federal law. You can think of the reason why they included that, if the compact has the power, when preapproved by congress, to trump federal law; you might, as congress not want that compact to trump federal law.

One of the statues however, does not have that language. One of the statues gives blanket, open ended, limitless authority to states to enter compacts. The significant of the fact that it does not have the caveat that all the other dozens of statues have legally implies, under current interpretations, that a compact exercised under the authority of the statue, has the status of federal law and can trump prior federal law.

and it literally says, quote "The consent of Congress is hereby given to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the respective criminal law and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts" end quote. This is very broad language authorizing interstate compacts, dealing criminal law, anything convenient to making those compacts effective.

We submit to you that this is very powerful legal grounding for an effort to reinvigorate state sovereignty. If there is one thing that defines state sovereignty, it's the power to define rights and to protect them under the police powers, particularly under the civil and criminal law. As a think tank that believes strongly in reasserting a balance of power between federal state governments, as an individual, who also is constitutional scholar, concerned about reestablishing a balance of power. It is important to emphasize, that states have it within their power to define freedoms, protect freedoms and criminalize interferences of freedoms.

What Vice Chairman Kasper is purposing based on outline that we have developed in forthcoming work called "the federalism tool kit" is to have states adopt the health care freedom act which protects freedom of choice in health care services, to criminalize that violation of that right, and to compact with other states with similar such rights, to mutually enforce and give full faith in credit to the respective criminal laws preventing the interference with the freedom to choose among health care services. We believe and this is the opinion of a constitutional scholar, that under existing case law, if the state of North Dakota were to; A~adopt a health care freedom act, B~criminalize interference with that by any governmental agent, C~compact with another state, such as Arizona, to do the same and lodge it with congress. You have a legal argument based on current case law that that



compact has the status of federal law and that compact will trump the individual mandate of the health care reform bill, the Obama care law.

This is incredibly powerful medicine and unlike efforts to simply exerts sovereignty with the declaration of the 10<sup>th</sup> amendment, for which I have no dispute with. This is not purely symbolic and it is not in a field of case law that is adverse to it because this would be a question of applying the case law that currently exists, in a way that is already settled and for the courts not to give effect to this interstate compact, as if it were federal law, the courts would have to deviate from the logic and precedent that already exists.

As an institution and as a person, my attitude towards this is if you believe in state sovereignty, if you believe that you need balance in the relationship between the federal government and the states, this is far more powerful than a type amendment resolution, nothing wrong with it, far more powerful. You can make a plausible legal argument, a strong legal argument in federal court and defend your state against the individual mandate. In the essence this is the ultimate weapon, next to amending the constitution under article 5 for states to rebalance the power of the federal government.

**Vice Chairman Kasper:** You mentioned that it is important to have the exact language, for example, the state of Montana is working in their legislation to adopt a compact like this; do we have to have the exact language as any other state that we wish to compact with. What if we missed 2 or 3 words? Can we not compact? Where does that issue lie?

**Nick Dranias:** Yes, they have to be identical. The way to think of a compact is like a contract, if you make an offer and if it's different in substantial ways from the person who accepts the offer, then you are not going to have a contract. The way that states enter into compacts, the way they make their offers to go into this kind of contract, is through the enactment of authority such as the draft statue that you drafted. In order for a meeting of the minds to occur between the states on the same subject matter, they have to be nearly identical as possible. I think that the version that I have seen is materially different from the one that have been drafted in Arizona. There are a few things that you should probably amend to insure that there is no loss of identity, if there is interest in this issue.

**Vice Chairman Kasper:** We have the enabling language, line 6, page 1, "the governor may enter", what if we pass this statue but the governor chooses not to enter. Could we, without materially changing the ability to compact, say the legislature may enter as opposed to the governor or must we keep it the governor?

**Nick Dranias:** Every state has its own conception of separation of powers. I'm not an expert nor am I licensed to practice law in North Dakota in regarding its constitution and its understanding of separation of powers, but in Arizona, it is usually considered an executive function to enter into a contract. A compact is a kind of contract; so ultimately, the governor must effectuate the compact. Now of course, if the governor signs the bill, that could be construed as authorizing the compact. The tricky bit is if you're the first two states compacting, you need to be able communicate that to the other state. You need to make sure there is a process whereby the executive branch transmits its compact proposal to another state that has an identical compact proposal so that the communication, the manifestation of consent is mutual.

**Vice Chairman Kasper:** If the language is identical of the governors, do they email back and forth or do they sit down and have a negotiate to change the terms or do they negotiate to agree because the terms are already there, and sign another agreement that says that we have compacted. How does that work?

**Nick Dranias:** It is no different than any contract that might be authorized by the legislature. Obviously, there is a spectrum of possibilities. If you substantially change the language, you risk undermining the argument that there is a meeting of the minds. A little tweaking, that wouldn't frustrate a private contract or frustrate a compact, ideally though, you will have identical language, it will be literally transmitting your identical language to the other states executive branch, their executive branch transmitting theirs to you, and you have manifested mutual consent.

**Vice Chairman Kasper:** Getting back to the Governor compared to the legislature, if our law allows the legislature to enter in a compacts, then could we change this to say the governor or the legislature, would that potentially nullify a mutual compact with Montana if their statue says the governor?

**Nick Dranias:** Keep it in mind that a compact is between states. It's not a question of the legislature contracting for itself; you would have to have the authority under your constitution to contract on behalf of the state. If that's what the legislature has the power to do in North Dakota, then certainly you could compact as a state, through the legislature. That would be really unusual in my knowledge and experience.

**Representative Nathe:** Thanks for coming, this is great information. You talk the process of congressional approval. Sometimes they approve, sometimes they preapprove, can you explain that process and how that works?

**Nick Dranias:** There is a variety of congressional approval. There is a concurrent approval, where they will pass an actual statue, specifically incorporating the compact at the same time that it's be entered into by the states and presented to the President, basically following all the normal process of ordinary law making. There is also the enactment of federal laws that impliedly give consent to compacts. For example a federal law might describe, like the Colorado River Compact and imply that it's effective without actually approving it and courts will say that that implied consent. There are also cases where congress has given advanced consent as early as going back to the 1790's where they have said, when the states are formed, they can enter into this compact that they are contemplating. Then there is retrospective consent where literally 100 years later, congress has been deemed to approve compacts effectively. So the idea of congressional consent is a very flexible concept in case law going back hundreds of years. The real interesting question and it doesn't affect Vice Chairman Kasper proposal because he is leveraging an existing preapproval statue that has no qualifications to it. The real interesting question, in a think tank community, is whether presidential presentment is actually required and whether both houses in congress could simply consent on their own. The best case law and the best research suggest that presidential presentment is not required because congress is given the direct power in the constitution to consent. Normally this is not a law making power; this is more in the nature of contractual ratification.

Historically, there is no evidence that the founders intended for the President to have a role in that consensual process. One of the powers of the interstate compact devise, that many states are looking to depending who is in control executive branch, is the possibility down the road should both houses of congress fall into a certain hands, of promulgating all sorts of additional compact ideas that could rebalance power between the states and the federal government.

**Representative Ruby:** You mentioned that each state had to have identical contract for the compact, does that extend to the enabling legislation that each state has to put into to give the governor the authority to enter into the agreement. If that's somewhat different, wouldn't that allow them to enter into the identical agreement?

**Nick Dranias:** You have your finger on it. The form of how you enable your state to express its consent that can vary from state to state. The key thing is that the thing that you authorize the state to enter into be the same thing. That means the language of the compact itself, the obligations, the rights, the duties defined. That language should be as close to identical as you can possible can get. Any deviation from that risks creating a full time occupation for lawyers.

**Representative Frantsovog:** When you use identical language do you mean word for word or what the meaning is?

**Nick Dranias:** I would use word for word so you avoid legal argumentation over what the meaning really is.

**Representative Amerman:** You talked earlier about circumvent, go around the congressional approval, using some kind of provision. You mentioned crime or criminal, but in the case of the federal health care reform act, what would be the crime, who would be the criminal that you could form the compact without going to congress?

**Nick Dranias:** What you do point out is the fact that you have to grapple with politically. In order to invoke this preapproval authority, what you have to be compacting about, has to be criminal law, which means that there has to be the political will to criminalize interference with something like the ALEX model health care freedom act, which says that the people have the right to chose their doctor, medical care and can't be compelled into insurance programs. So you have to have that political will, you have to make it a crime in your state for anyone to violate what that defines as health care freedom, in order to invoke the authority to for compact of a criminal nature. I don't hazard to guess whether that will exist in all places, is suspect it does in many places and in other places it doesn't.

**Representative Gruchalla:** You mentioned the ALEX model, when they addressed this, did they decide to continue on working in this issue or did they put it on the shelf?

**Nick Dranias:** ALEX is just broached the topic, it has not adopted any model interstate compact language yet. So, nothing has been shelved, nothing has been proposed, the closest thing that came to it, is in the insurance committee, the committee that deals with finance. There has been long conversation in unrelated interstate compacts dealing with allowing more competition in the insurance markets, but that really something that's been

percolating for years. It doesn't require congressional approval and is not really relevant to this state sovereignty movement now that is arising to try to use the compact vehicle tool. ALEX had a full day of lectures and presentations and the last day of their DC conference, several of the panel discussions were devoted to this topic. This is just beyond the brain storming phase and now there is something solid, backed by research, in the form of the draft model legislation that Vice Chairman Kasper has introduced. There are far more ambitious ideas that are still be developed. There is an idea out there to use compacts to establish custodial accounts for federal tax revenues that might otherwise be diverted back to the states in the form of federal grants rather than wait for it to come back with strings attached. That sort of compact required congressional approval, there is no preapproval statue that could bring that into being. This is a developing tool for reestablishing of balance of power between the states and the federal government. You are going to see,, I believe ALEX next and you will be meeting a number model item of legislation like this, including this adopted, I believe if the votes are still there. I think you are going see much more ambitious projects as the years come.

**Chairman Keiser:** You are a constitutional attorney, this will end up in federal court, two states or more form a compact, the Federal government challenges it, based you're your experience, what do you see the scenario being in terms of process and time?

**Dranias:** I think this will come to a head before 2014, which is when the individual mandate comes into effect and you will note that the language of the compact gives it only a four year period where it is mandatory and the states can opt out of it after that. I think this will come to a head on the health care freedom compact. Between all of us, I mean there are some compact ideas that might move faster than others and even faster than the health care freedom compact that might be compact based on the immigration law that was passed in Arizona in which there is a lot of interest, where they would take the SB1070 law and turn it into an interstate compact, using this same authority. In order to circumvent the argument the federal government has the authority has supreme authority over immigration law, because they can argue that it is federal law. Considerable may move faster. This has a 50-50 chance of winning. You are arguing in front of federal courts to try to restrain federal power, you're not, even with the best possible argument, you are going that for sure. This is the strongest legal argument under current case law that you can make to try to rebalance state and federal power. There is nothing wrong to exert the 10<sup>th</sup> amendment, to claim exclusive control over interstate activity. There is nothing wrong with that it's just in those efforts you are going against 70 years of precedence and you are hope that you are going to overturn 70 of precedence. The difference between that tactic and this, you are actually using the logic and existing precedence out there. You are asking the courts to simply enforce it in a new way.

**Representative Amerman:** There are other areas besides the federal health care act that are being looked at, being, working in a manufacturing environment, if these compacts keep coming, if we can compacts all of this within the state, do we need the federal government? Where are we going with this?

**Nick Dranias:** Because congressional approval is still required for federal law to be superseded, there will always be a check and balance in the federal government. States have to exercise the power they have as sovereign governments, there will always going to

be a limit to what states can do. You can't have an interstate compact to declare war whenever you want as a state, states don't have that sovereign power. There are inherent check and balances that are preserved, that maintains our existing federalist structure both federal and state side. I'm not too concerned about that, you ought to be concerned of the fact that the average state is already a party to 25 compacts. When I say that to groups of legislators around the country, most are shocked by that. They don't even know that that's happened because very often a compact is packaged as part of some minor bill and it doesn't even look like a compact. Compacts are powerful and to this date they are generally used to expand governmental power and if you don't use this power to preserve freedom and state sovereignty, the other side will not sit on their hands; they are going to continue doing what they have been doing and that is using compacts to expand the power of the federal government and power of the state government relative to the people.

**Chairman Keiser:** Any other questions. Anyone here to testify in support, opposition or neutral of HB 1291? Seeing none, I will close the hearing on HB 1291.

**Vice Chairman Kasper:** There are some amendments that I want to draft. I

**Representative Sukut:** Is the other bill, Representative Kriedt's bill, are those going to be contradictory or will both be treated separately?

**Chairman Keiser:** They can be treated separately.

**Representative Sukut:** We could pass both?

**Chairman Keiser:** We could pass both.

**Representative N Johnson:** Representative Kriedt's, his doesn't make it a criminal act, it just says that nobody can force?

**Chairman Keiser:** That's correct.

**Representative N Johnson:** So amending those will be another step in it?

**Vice Chairman Kasper:** I have a bill almost identical that I turned in a couple of days ago and what those bills are, they are statute not compacts. They are totally different with no intention of entering in a compact with anyone else.

**Representative N Johnson:** I thought what I just heard was that the state has to first criminalized to be an infringement on the freedoms because has to be a criminal action to fit under that compact.

**Vice Chairman Kasper:** That's right, for the compact to work; it has to have the criminal thing because as Nick said, we have the opening where we already have preapproval for a compact if it's has to deal with criminal offenses. If the compact as it is, which it does have the language in it for criminal offenses, it then would and we don't have to go to congress to get approval. That's the beauty of it, it's already preapproved and there is precedent that the congress has already upheld these compacts with the criminalization. The

criminalization is it's a crime to interfere with a person's right in North Dakota to own their own health insurance, from a provider of their choice, or to take away their right to choose where they have their medical services done. That's what the criminal offense is. The compacting then puts in to overwriting law.

# 2011 HOUSE STANDING COMMITTEE MINUTES

## House Industry, Business and Labor Committee Peace Garden Room, State Capitol

HB 1291  
February 2, 2011  
13898

☐ Conference Committee

Committee Clerk Signature

*Ellen Letang*

### Explanation or reason for introduction of bill/resolution:

Authorize the governor to enter the state in the interstate health care freedom compact.

### Committee Work Session Minutes:

**Chairman Keiser:** Opens the work session on HB 1291.

**Vice Chairman Kasper:** HB 1291 is about allowing North Dakota enter into a health insurance freedom compact. This is a hog house of the current bill before us because this bill will mirror the Arizona and Montana statues that I believe are going to be passed by those two states. Under article 1, sections 10, in the US Constitution, states are authorized to enter into compacts with each other and there are two ways to get approval for an interstate compact. One is where two or more states enter into the compact and they go to the congress for approval. The second area is using a compact that has congressional preapproval and you use criminal penalties for violation of the compacts. What this compact would do is authorize our governor and other governors to sign a compact agreement that simply says that they agree to enforce each other's laws, rules and regulation. We have about 100 compacts out there already between states in which Congress has said that if you have a compact with criminal laws of your state, we preapproved it and you do not need approval of the Congress. The key with this area is if we pass this bill, North Dakota Senate passes it, the governor signs it, and if one or more states do the same, we will have a compact that will protect the North Dakota citizen to purchase or not purchase health insurance and use the medical provider of their choice. It says no federal or state agency can interfere with that person's right to those choices. It would have the effect to overrule and override any previous legislation or future legislation that may be passed. On the bottom line, it gives our state standing to challenge if we so desire any rules, laws and regulations that has passed or may pass in the future regarding those protected right in the bill. Our Attorney General was one of the 26 or 27 states, as part of Florida lawsuit, that sued the federal government in saying Obama care or PPACA was unconstitutional and 2 days ago a judge rules that it was unconstitutional. Ultimately, if we pass this legislation, our Attorney General and Governor would determine if we would take action at all. Give us standing to do our own action if so desired our beliefs of our rights. I would ask your support in adopting this amendment 11.0385.01001.

**Vice Chairman Kasper:** Moves the adoption of 11.0385.01001.

**Representative Ruby:** Second

**Chairman Keiser:** Further discussion?

**Representative N Johnson:** Going from the proposed bill to the amendments, the bill say the governor say he may, the amendment says the governor shall. Have you talked to the governor's office about this?

**Vice Chairman Kasper:** No I have not but I talked the Lieutenant Governor and ask if I would be able to come down and visit to the governor. I don't want to change the language because we have to be identical with Montana and Arizona.

**Representative N Johnson:** Have you visited with the Attorney General's or his office to see if we need to do this to have standing, if we have standing elsewhere.

**Vice Chairman Kasper:** No I haven't but it would gives us standing.

**Chairman Keiser:** I've been thinking about the shall, what the language does say that the governor still have the authority to enter into or not, if the governor does, it shall have the following format?

**Vice Chairman Kasper:** At the top it says for an act to authorize the governor. You're assumption is correct.

**Chairman Keiser:** I think you have to be identical with the other states.

**Voice vote to adopt amendment, yeas have it.**

**Chairman Keiser:** We have HB 1291 before us, what are the wishes of the committee?

**Vice Chairman Kasper:** Moves a Do Pass as Amended.

**Representative Nathe:** Second.

**Representative M Nelson:** On page 4 down near the bottom, the compact shall be liberally construed so as to effectuate its purposes, what does that mean?

**Vice Chairman Kasper:** Liberally construed means that you will make an effort to find a way to do it.

**Chairman Keiser:** It gives you a lot of flexibility.

**Roll call was taken for a Do Pass as Amended on HB 1291 with 10 yeas, 4 nays, 0 absent and Representative Sukut is the carrier.**



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PROPOSED AMENDMENTS TO HOUSE BILL NO. 1291

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to authorize the governor to enter the state in the interstate health care freedom compact."

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1.**

**Interstate health care freedom compact.**

The governor shall enter the interstate health care freedom compact on behalf of the state in a form substantially as follows:

Interstate Health Care Freedom Compact

The party states agree to the following articles of the interstate health care freedom compact.

Article I. Findings and Declaration of Policy

1. 4 U.S.C. 112 gives congressional consent "to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts".
2. Pursuant to their police powers to protect public health, safety, welfare, and morals, the party states have enacted or anticipate enacting laws or constitutional provisions to protect and guarantee their residents' rights and freedom to pay, or not to pay, directly for health care services and to participate, or not to participate, in health plans and health systems.
3. The party states have enacted or anticipate enacting laws that make it a crime in their states for anyone to interfere with their residents' enjoyment of the rights and freedoms guaranteed by their respective health care freedom laws.
4. The party states find it necessary and deem it desirable for making effective their respective current or anticipated health care freedom criminal laws, as well as this agreement and compact, to do the following:
  - a. Prohibit any governmental agent from depriving any resident of any party state of the rights and freedoms guaranteed under their respective current or anticipated health care freedom laws.

- b. Prohibit any governmental agent from penalizing any resident of any party state for exercising the rights and freedoms guaranteed under their respective current or anticipated health care freedom laws.
- c. Cooperate with each other and to give each other mutual assistance in the prevention of crimes under the health care freedom criminal laws of any party state.
- d. Cooperate with each other and to give each other mutual assistance in the criminal prosecution of anyone who violates the health care freedom criminal laws of any party state.

#### Article II. Definitions

As used in this compact, unless the context clearly indicates otherwise:

1. "Compel" includes legal mandates, penalties, or fines.
2. "Health care freedom criminal laws" means any state law that makes it a crime for anyone to interfere with a resident's enjoyment of the freedoms protected and guaranteed by the state's respective health care freedom laws.
3. "Health care freedom laws" means any state law or constitutional provision that protects and guarantees a resident's freedom to pay or not to pay directly for lawful health care services and to participate or not to participate in health care plans and health care systems.
4. "Health care plan" means any legally binding arrangement under which at least one person or entity promises and undertakes, in exchange for consideration of a set or assessed amount of money, to make a payment to another party or a third party if a specified event occurs involving the provision of health care services.
5. "Health care system" means any public or private entity whose function or purpose is the management of, processing of, enrollment of individuals in health care plans or payment for, in full or in part, health care services or health care data or health care information for its participants.
6. "Lawful health care services" means any health-related service or treatment to the extent that the service or treatment is permitted or not prohibited by law or regulation and that may be provided by persons or businesses otherwise permitted to offer such services.
7. "Pay directly" means payment for lawful health care services without a public or private third party, not including an employer, paying for any portion of the service.
8. "Penalty" means any civil penalty, criminal fine, tax, salary or wage withholding or surcharge or any named fee with a similar effect established by law or rule by a government established, created or controlled agency that is used to punish or discourage the exercise of rights protected under this state's health care freedom law.
9. "State" means a state of the United States.

Article III. Terms

Notwithstanding any state or federal law to the contrary:

1. Each party state shall give full faith and credit to the health care freedom criminal laws and health care freedom laws of every party state.
2. A governmental agent shall not deprive residents of party states of the rights and freedoms protected under their respective states' health care freedom criminal laws and guaranteed by their respective states' health care freedom laws.
3. Governmental agents shall not penalize residents of party states for exercising the rights and freedoms protected under their respective states' health care freedom criminal laws and guaranteed by their respective states' health care freedom laws.
4. The party states shall cooperate with each other and give each other mutual assistance in the prevention of crimes under the health care freedom criminal laws of any party state.
5. The party states shall cooperate with each other and give each other mutual assistance in the criminal prosecution of any person who violates the health care freedom criminal laws of any party state.

Article IV. Enforcement

Notwithstanding any state or federal law to the contrary:

1. The chief law enforcement officer of each party state shall enforce this agreement and compact.
2. A taxpaying resident of any party state has standing in the courts of any party state to require the chief law enforcement officer of any party state to enforce this agreement and compact.

Article V. Compact Administrator and Interchange of Information

1. The governor of each party state, or the governor's designee, is the compact administrator. The compact administrator shall:
  - a. Maintain an accurate list of all party states.
  - b. Consistent with subsections 3 and 4, transmit in a timely fashion to other party states citations of all current health care freedom laws and current health care freedom criminal laws of the compact administrator's respective state.
  - c. Receive and maintain a complete list of the health care freedom laws and health care freedom criminal laws of each party state.
  - d. Formulate all necessary and proper procedures to effectuate this compact.
  - e. Delegate needed tasks to other state agencies.

2. The compact administrator of each party state shall furnish to the compact administrator of each party state any information or documents that are reasonably necessary to facilitate the administration of this compact.
3. Within ten days after executing this agreement and compact, and thereafter on the close of each of their respective succeeding legislative sessions, the party states shall notify each other in writing and by appropriate citation of each of their current health care freedom laws, which shall be deemed within the subject matter of this agreement and compact, unless the compact administrator of one or more party states gives specific notice in writing to all other party states within sixty days of such notice that it objects to the inclusion of such law or laws in this agreement and compact.
4. Within ten days after executing this agreement and compact, and thereafter on the close of each of their respective succeeding legislative sessions, the party states shall notify each other in writing and by appropriate citation of each of their current health care freedom criminal laws, which shall be deemed within the subject matter of this agreement and compact, unless the compact administrator of one or more party states gives specific notice in writing to all other party states within sixty days of such notice that it objects to the inclusion of such law or laws in this agreement and compact.

#### Article VI. Entry Into Effect and Withdrawal

1. This compact is deemed accepted when at least two states deliver a notice of confirmation, which is duly executed by their respective authorized representative and which acknowledges complete agreement to the terms of this compact, to each other's governor, the office of the clerk of the United States house of representatives, the office of the secretary of the United States senate, the president of the United States senate, and the speaker of the United States house of representatives. Thereafter, the compact is deemed accepted by any state when a respective notice of confirmation, which is duly executed by the state's respective authorized representative and which acknowledges complete agreement to the terms of this compact, is delivered to each party state's compact administrator, the office of the clerk of the United States house of representatives, the office of the secretary of the United States senate, the president of the United States senate, and the speaker of the United States house of representatives.
2. Four years after this compact first becomes effective, any party state may withdraw from this compact by enacting a joint resolution declaring such withdrawal and delivering notice of the withdrawal to each other party state. A withdrawal does not affect the validity or applicability of the compact to states remaining party to the compact.

#### Article VII. Construction and Severability

1. This compact shall be liberally construed so as to effectuate its purposes.
2. This compact is not intended to:

- a. Affect which health care services a health care provider or hospital is required to perform or provide under state or federal law.
  - b. Affect which health care services are permitted by state or federal law.
3. This compact is intended to operate as the law of the nation with respect to the party states under 4 U.S.C. 112, to supersede any inconsistent state and federal law, and to establish vested rights in favor of residents of the party states in the enjoyment of the rights and freedoms protected by the respective health care freedom criminal laws and guaranteed by the respective health care freedom laws.
4. If any phrase, clause, sentence, or provision of this compact is declared in a final judgment by a court of competent jurisdiction to be contrary to the Constitution of the United States or is otherwise held invalid, the validity of the remainder of this compact shall not be affected.
5. If the applicability of any phrase, clause, sentence, or provision of this compact to any government, agency, person, or circumstance is declared in a final judgment by a court of competent jurisdiction to be contrary to the Constitution of the United States or is otherwise held invalid, the validity of the remainder of this compact and the applicability of the remainder of this compact to any government, agency, person, or circumstance shall not be affected.
6. If this compact is held to be contrary to the constitution of any party state, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the affected party state as to all severable matters."

Renumber accordingly

Date: Feb 2, 2011

Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 1291

House House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number 11.0385.01001

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

Motion Made By Rep Kasper Seconded By Rep Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser			Representative Amerman		
Vice Chairman Kasper			Representative Boe		
Representative Clark			Representative Gruchalla		
Representative Frantsvog			Representative M Nelson		
Representative N Johnson					
Representative Kreun					
Representative Nathe					
Representative Ruby					
Representative Sukut					
Representative Vigesaa					

voice vote, motion carried

Total Yes \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

Date: Feb 2, 2011

Roll Call Vote # 2

**2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES**

BILL/RESOLUTION NO. 1291

House House Industry, Business and Labor Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment

Motion Made By Rep Kasper Seconded By Rep Nathe

Representatives	Yes	No	Representatives	Yes	No
Chairman Keiser	✓		Representative Amerman		✓
Vice Chairman Kasper	✓		Representative Boe		✓
Representative Clark	✓		Representative Gruchalla		✓
Representative Frantsvog	✓		Representative M Nelson		✓
Representative N Johnson	✓				
Representative Kreun	✓				
Representative Nathe	✓				
Representative Ruby	✓				
Representative Sukut	✓				
Representative Vigesaa	✓				

Total Yes 10 No 4

Absent 0

Floor Assignment Rep Sukut

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1291: Industry, Business and Labor Committee (Rep. Keiser, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 4 NAYS, 0 ABSENT AND NOT VOTING). HB 1291 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to authorize the governor to enter the state in the interstate health care freedom compact.

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5. If the applicability of any phrase, clause, sentence, or provision of this compact to any government, agency, person, or circumstance is declared in a final judgment by a court of competent jurisdiction to be contrary to the Constitution of the United States or is otherwise held invalid, the validity of the remainder of this compact and the applicability of the remainder of this compact to any government, agency, person, or circumstance shall not be affected.
6. If this compact is held to be contrary to the constitution of any party state, the compact shall remain in full force and effect as to the remaining party

states and in full force and effect as to the affected party state as to all  
severable matters."

Renumber accordingly