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Department of Justice to Appeals Court: Strike Down Entire ACA

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Late last year, a district court in Texas ruled that the ACA individual mandate is unconstitutional — and that, as a result, the entire ACA is invalid. The Department of Justice recently took the position that the district court's judgment should be affirmed on appeal, which would result in the invalidation of the ACA as a whole. While it remains to be seen how the Fifth Circuit will rule on the appeal, plan sponsors should stay the course in their ACA compliance efforts.

Background

On June 28, 2012, in a 5-4 vote, the Supreme Court in *National Federation of Independent Businesses v. Sebelius* rejected a challenge to the ACA individual mandate. The Court held that Congress had acted within its authority under its taxing power to impose a penalty for the failure to purchase health insurance. (See our June 28, 2012 *For Your Information*.) Writing for the majority, Chief Justice John Roberts concluded that while Congress could not require individuals to purchase health insurance, it could tax individuals who failed to purchase it.

On December 20, 2017, Congress passed the Tax Cuts and Reform Act of 2017. (See our December 20, 2017 *Legislate*.) One of the provisions of this law nullified the individual mandate by making the penalty for failing to purchase health insurance $0.

Two months later, on February 26, 2018, 20 Republican state attorneys general and governors filed suit (*Texas v. United States*) arguing that the zeroing out of the ACA individual penalty rendered the individual

Federal Court Nixes Key Portions of Association Health Plan Rule.

In other litigation news, the District Court for the District of Columbia recently **found** that the Department of Labor unreasonably expanded ERISA's definition of "employer" in its final rule on association health plans (AHPs).This rule broadened the types of arrangements through which groups of employers can band together and be treated as a single employer under ERISA. (See our **September 5, 2018** *For Your Information*.) While it has been the subject of media attention, the expanded AHP definition has not directly affected most large group health plans.

Individual Mandate Timeline

- March 2010 – ACA individual mandate enacted
- June 2012 – Supreme Court upholds mandate as a tax
- January 2014 – Mandate and ACA exchanges effective
- December 2017 – Tax reform nullifies mandate penalty
- February 2018 – States file suit that mandate is unconstitutional
- December 2018 – Judge rules mandate unconstitutional
- January 2019 – Elimination of mandate penalty effective
- 2019 – Court of Appeals decision expected
- 2020 – Possible Supreme Court decision

mandate unconstitutional. Since the individual mandate no longer had a penalty, they reasoned, it was no longer enforceable as a tax. And since the mandate is central to the ACA, the entire ACA should be struck down.

In May 2018, the court allowed 17 Democratic state attorneys general and governors to intervene in the case to defend the ACA. The Department of Justice (DOJ) then took the unusual position of deciding not to defend the constitutionality of a federal law — in this case the ACA's individual mandate. DOJ further argued that the ACA provisions protecting individuals with preexisting conditions (guaranteed issue, community rating, discrimination based on health status and the ban on preexisting conditions) are not severable from the individual mandate and that they should be struck down as well. However, DOJ maintained that other parts of the ACA — including the ACA's Medicaid expansion provisions — are severable from the individual mandate and should be upheld.

In December 2018, Judge Reed O'Connor of the Northern District of Texas ruled that the individual mandate was unconstitutional; the individual mandate was central to and inseverable from the rest of the ACA; and that the entire ACA was invalid. This ruling has now been appealed to the Fifth Circuit Court of Appeals, and the court has also allowed the U.S. House of Representatives to intervene in the case to defend the ACA.

Revised DOJ position

Last week, in a two-sentence letter to the Fifth Circuit Court of Appeals, the DOJ switched course and stated that it had "determined that the district court's judgment should be affirmed," which would result in the entire ACA being struck down — including the Medicaid expansion provisions. This was an unexpected move, given DOJ's prior position on top of DOJ's historic commitment to defend the constitutionality of federal laws "if reasonable arguments can be made in their defense."

What's Next?

The Fifth Circuit Court of Appeals will now consider the case. It is tasked with determining whether the district court properly found that the individual mandate is unconstitutional given the nullification of the tax penalty — and whether that provision is severable from all or some of the other ACA provisions.

Regardless of the outcome, it seems very likely that the Fifth Circuit's decision will be appealed to the Supreme Court. If the Supreme Court agrees to accept the case, it would almost certainly not be considered until the next term of the Supreme Court, which starts in October 2019, with a decision not likely until the spring of 2020.

What are the implications of the ACA being invalidated?

In the scenario where the individual mandate along with the provisions protecting individuals with preexisting conditions are struck down, the impact on the individual health insurance marketplace will be significant. As some states have already done, more states may take actions to shore up their individual health insurance marketplaces. Some state marketplaces may collapse. While the direct impact on large employer plans may be limited, employers may see an increase in health costs resulting from cost shifting from healthcare providers for uncompensated care if fewer individuals have health insurance.

If the entire ACA is struck down, the impact on health coverage in the U.S. generally — including that provided through large employer health plans — would be enormous. This outcome would appear to put an end to:

- Health marketplace reforms such as:
  - prohibition of pre-existing condition limitations
  - prohibition of lifetime and annual dollar limits
  - coverage of children to age 26
  - 100% coverage of preventive services
- Employer shared responsibility mandate and ACA reporting
- ACA taxes on medical devices, prescription drugs, and health insurance plans
- Medicaid expansion
- Filling in of the Medicare Part D "donut hole"
- FDA approval pathway for biosimilars

Just as it took several years to implement the ACA — from its enactment in 2010 to the opening of the ACA marketplaces in 2014 — it would seem likely that any unwinding dictated by a court decision would also occur over the course of several years.

In closing

While the Fifth Circuit's decision will be highly anticipated, plan sponsors should stay the course with ACA compliance. There are no actions that plan sponsors need to take in response to this ongoing litigation.

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