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HEALTH CARE REFORM UPDATE

SUPREME COURT TO CONSIDER LEGALITY OF HEALTH CARE REFORM LAW

At the request of the Obama administration and the 26 states challenging its legality, the United States (U.S.) Supreme Court agreed Monday to rule whether the 2010 Patient Protection and Affordable Care Act (PPACA) is constitutional. The oral arguments will occur in March 2012 and the Court's decision is due by July of 2012, which should have dramatic implications on both employers offering employee health benefits plans and national politics in a Presidential election year.

In this issue of *Health Care Reform Update*, we outline the issues the Supreme Court is considering, the differing opinions of the lower courts on these issues, and the possible outcomes and implications of the Court's decision.

Legal Issues

The Supreme Court has decided to address four critical issues that have been challenged in more than 20 suits related to the PPACA:

1. Individual Coverage Mandate: The legal question is whether the law's requirement that legal U.S. residents must purchase health insurance or pay a penalty is within Congress' powers under the Commerce Clause in Article 1 of the Constitution.
2. Severability: If the Individual Mandate is found to be unconstitutional, the Court will decide if the rest of the PPACA can be implemented, or if the Individual Mandate is so deeply linked to the purpose and results of the overall law, that the PPACA is unconstitutional in its entirety.
3. Penalty: The Court will interpret whether the Individual Mandate penalty really acts as a tax; if so, then Congress has much broader authority to implement the Mandate.
4. Medicaid Expansion: The legal challenge is whether the need for states to comply with the federal funding conditions defined in the PPACA are so compelling that states are being "coerced" by Congress, which goes beyond its authority.

Most of the recent court activity and legal focus has been on the first two issues. The Commerce Clause of the Constitution gives Congress power to regulate three categories of business transactions, one of them being activities that substantially affect interstate commerce; in this case, the activity is the payment of health care expenses. The Individual Mandate issue focuses on whether the way an individual decides to pay for health care expenses, (i.e., third-party payments through insurance coverage, individual out-of-pocket payment, or uncompensated care funded through cost-shifting to third-party payers) substantially affects the overall performance of the health care marketplace.

If the Court determines that the Individual Coverage Mandate is unconstitutional, the issue of severability will come into play. Because Congress did not write a severability clause in the PPACA legislation, the Court must decide if the "failure" of one provision of the law substantially affects the performance and validity of other provisions. Supreme Court precedent from a 2010 majority opinion written by Chief Justice John Roberts Jr. states, "...when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any 'problematic portions while leaving the remainder intact.'" However, even the Obama administration has suggested that the Individual Mandate provision is intertwined with the other key provisions of the PPACA, so the likely Court decision is unclear.

The third and fourth issues are more subtle legal arguments. As an argument to have suits disqualified, the Obama administration has stated the Individual Mandate penalty is actually a tax which Congress has broad powers to enact; therefore Congress has authority to implement the Individual Mandate. It is worth noting that the Anti-Injunction Act bars any suits against a tax until it becomes effective, so if the Supreme

Court rules the Individual Mandate is a tax, legal challenges would have to wait until 2014. The Medicaid Expansion issue is a more speculative argument: It's based on whether or not states are forced to accept the funding conditions for broader Medicaid access. The question is whether, by rejecting them, states risk their federal funding altogether---giving them no other option but to accept, which exceeds Congress' authority to set state funding practices.

Appellate Court Decisions

Four circuits of the U.S. Court of Appeals, which is the judicial level right below the Supreme Court, have ruled differently on the 20 suits against the PPACA involving the first three issues, prompting the Supreme Court to hear this case. The lower courts have been consistent on the fourth issue, deciding the PPACA expansion of Medicaid is constitutional; yet, the Supreme Court still agreed to provide an opinion on that issue as well.

The Second, Fourth and Sixth Circuit Courts of Appeals all have upheld the constitutionality of the Individual Mandate, although based on somewhat different interpretations. The most important of these rulings was the Sixth Circuit decision to uphold the lower court's interpretation: That Congress has authority, within the Commerce Clause, to establish an Individual Mandate based on the fact that individuals who don't buy health insurance impact the entire health care market. To the contrary, the Eleventh Circuit upheld a Florida district court decision that the Individual Mandate was unconstitutional because Congress can't regulate how someone buys health insurance. It also decided the Individual Mandate was severable from the other PPACA provisions and overturned the lower court decision on this issue.

Implications of Supreme Court Decision

There are four possible outcomes on the constitutionality of the Individual Mandate:

- The entire law can remain if the Individual Mandate is considered legal, causing a number of major PPACA provisions to gain immediate momentum (most significantly the design and implementation of health exchanges by the states);
- The entire law can be invalidated if the Individual Mandate is found both unconstitutional and not severable from the other provisions of the law, in which case continued compliance of current PPACA provisions is in question (especially the significant 2010-2011 market reforms, by employers and insurance companies);
- The Individual Mandate can be invalidated but considered separate from most or all other PPACA provisions, which will require employers to comply with all applicable provisions—but make cost savings from PPACA much more difficult to achieve; or
- The decision on constitutionality could be delayed until at least 2014, if the Individual Mandate penalty is considered a tax and the Anti-Injunction Act disqualifies all related suits until the Mandate becomes effective January 1, 2014.

We will keep you updated on further developments and their implications as they relate to the Supreme Court decisions expected in June or July 2012; and we will provide a detailed assessment of the ruling(s) when published.

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