

Preparing for the Supreme Court Decision on the Affordable Care Act



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The Supreme Court is expected to issue its decisions on questions related to The Affordable Care Act (ACA) by the end of June. It would not be an exaggeration to say that millions of words have already been written regarding the Supreme Court's review of the ACA. However, what has been missing from most of the hours of cable TV coverage and thousands of newspaper, magazine and internet articles, is a discussion of how various court decisions will affect employer-sponsored group health plans.

This review will not attempt to predict an outcome or provide a detailed review of the various legal arguments and principles involved. Rather, we will try to present a summary of the impact that different court decisions will have on employers as they begin to prepare for significant elements of the ACA scheduled to go into effect in 2014.

Brief review of what the Supreme Court is considering

In March, the Supreme Court heard arguments on four specific issues. While there have been various court challenges to the ACA related to other issues, following are the only questions the Supreme Court has agreed to consider this term:

Questions related to the so called "individual mandate"

- Can the Court even rule on the individual mandate, or should the decision be put off until 2015?
- There is a technical argument that the case cannot be decided until 2015, after a taxpayer is actually required to pay a penalty for not having health insurance. If the court were to adopt this approach, it will not even rule on the next two questions at this time.
- Is the individual mandate constitutional?
- If the court decides it can rule on the individual mandate at this time, the next question it will address is if that requirement is constitutional.
- If the individual mandate is struck down, is the entire law unconstitutional?

- Finally, if the court decides that the individual mandate portion of the ACA is unconstitutional, the court will then decide if only that portion of the law must change, or if the entire law would fall. This answer depends on the court's decision as to whether the individual mandate requirement is "severable" from the rest of the law.

Medicaid Expansion

- Can the Federal Government require states to pay costs related to the expansion of Medicaid?
- Beginning in 2014, the ACA expands the eligibility for Medicaid to any individuals with household incomes up to 133% of federal poverty level (FPL). Individuals with a household income up to 138% of FPL will be eligible for Medicaid since the eligibility formula ignores the first 5% of household income.
- Initially the Federal Government will pay 100% of the costs of the newly eligible individual, but beginning in 2020, states are required to pay for 10% of the total costs incurred by these individuals. A number of states have filed suit to block this requirement, arguing that the Federal Government cannot require them to pay a portion of the expanded coverage.


Impact of Various Outcomes on Employer-Sponsored Plans

The Supreme Court's decision will have significant political implications and will likely have a dramatic effect on the individual health insurance market. However, most of what is being considered by the court will have a relatively small impact on employer-sponsored plans. This section will discuss the effect that various court decisions may have on employer-sponsored group health plans.

Individual Mandate Decisions

Scenario One - Decision delayed until 2015

There is no need to say much about this one. Obviously, if the court decides to delay any decision regarding the individual mandate, then all other



employer plan related provisions scheduled to go into effect in 2014 would be unaffected.

Scenario Two - Individual mandate ruled unconstitutional but remainder of law allowed to stand

In the event the individual mandate is ruled unconstitutional but the rest of the law is allowed to stand, the impact on individual health plans, and the insurance companies that offer them, could be dramatic. However, the effect this would have on employer-sponsored group plans would be relatively insignificant for most employers.

Three different reports have been released which have analyzed the effect of a ruling that the individual mandate is unconstitutional. Interestingly, the three studies - one by the Congressional Budget Office (CBO), one done by Gruber on behalf of a conservative think tank opposed to the ACA, and one published in the Journal of Health Affairs by the Lewin Group, a consulting subsidiary of United Health Group - all came to very similar conclusions, albeit to different degrees.

All three studies predicted the following if the individual mandate is ruled unconstitutional:

- Individual health insurance rates would increase (from 12% to 25% depending on the study) due to fewer healthy individuals obtaining individual health insurance.
- The number of individuals currently uninsured, who would become covered after the ACA is fully implemented, would decrease.
- Two of the studies also predict that by 2019 the Federal Government would save \$40 to \$50 billion per year, because fewer individuals eligible for the ACA's premium tax credit would seek to obtain individual coverage without the mandate.

All three studies also predicted a change in the number of Americans who receive health insurance through their employers if the individual mandate is removed. Two of the three studies (CBO and Lewin Group) predicted a small change in the number of people receiving health insurance through their employer, while Gruber predicted a somewhat larger impact. The principal reason for this change is that all three studies assume that, with the individual mandate intact, some employers who currently do

not offer coverage to employees will be pressured by those employees to offer coverage to help them avoid the penalties under the individual mandate rules.

A ruling that the individual mandate is unconstitutional would not change other aspects of the law that apply to employer-sponsored plans. Elements such as the shared responsibility rules, employer penalties, coverage requirements (like the dependents to age 26 rule), limits on annual and lifetime maximums, discrimination rules for fully insured plans, and other rules and requirements would continue.

Another possible result of this scenario would be that employers planning to stop offering group coverage, under the assumption that their employees would be able to obtain competitive individual health insurance coverage beginning in 2014, may need to reconsider their plans. The loss of the individual mandate is sure to shake up the individual health insurance market.

Scenario Three - Individual mandate ruled unconstitutional and entire law invalidated

Obviously, the decision that would create the most change would be for the court to rule that the entire law must fall if the individual mandate is unconstitutional. In the short run this decision would also create the most uncertainty for employer-sponsored plans. Which changes that employers have already made to their plans would have to be undone? What could employers keep in place? How would insurance companies react? Would congress pass new laws reinstating some of the requirements, such as the popular age 26 rule?

Employers and insurers have already made numerous changes to their plans to comply with portions of the ACA already in force. Most employers have amended plan documents and implemented coverage changes related to child coverage to age 26, restrictions on annual and lifetime plan limits, and removal of any pre-existing condition limitations on children under 19, to name just a few. Since ERISA requires plans to be administered according to their plan documents, a change in the law may not immediately change coverage offered by plans.

It is also not clear how a total repeal would affect claims currently in the appeals process. The ACA significantly changed participants' appeals rights in non-grandfathered plans. If the law is repealed,



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claims currently being appealed could be caught up in a kind of legal limbo.

Finally, it is not clear how Congress and the regulatory agencies would address a ruling that invalidates the entire law.