

## Obamacare Unconstitutional? – Carry On and Comply

In an unexpected and controversial decision, a federal district court judge in Texas ruled that the Patient Protection and Affordable Care Act (the “ACA”) is unconstitutional. However, it remains unclear exactly what this means for individuals who are required under the ACA to obtain health insurance (known as the “individual mandate”), as well as certain employers that are required to offer qualifying health insurance to their full-time employees (known as the “employer mandate”). Until the judge provides further clarification or the decision is upheld on appeal, individuals and employers should continue complying with the ACA’s requirements.

Looking at the particular decision in *Texas, et al. v. United States*, District Judge Reed O’Connor based his decision on the elimination of the tax penalty for failing to comply with the individual mandate, beginning in 2019 pursuant to the Tax Cuts and Jobs Act of 2017 (the “TCJA”). In 2012, a divided United States Supreme Court upheld the constitutionality of the individual mandate under the ACA on the basis that the penalty was in fact a tax and constituted a valid exercise of Congress’ taxing power. Because that Supreme Court decision also found that the individual mandate was not a valid use of Congress’ power to regulate commerce, Judge O’Connor held that the individual mandate without the tax penalty was unconstitutional. Because Judge O’Connor further determined that the individual mandate “is essential to” the ACA as a whole, he held that the entire law was unconstitutional.

With the open enrollment period for individual and employer health insurance coverage for the upcoming year either closed or closing soon, what impact will this decision have? Probably very little until it is further clarified by Judge O’Connor himself or through the appeal process. Judge O’Connor did not issue an injunction against enforcement of the ACA, and it remains to be seen if he will offer any further clarification of his opinion. In a statement following the decision, the Department of Health and Human Services (“HHS”) asserted that the “decision does not require that HHS make any changes to any of the ACA programs it administers or its enforcement of any portion of the ACA at this time.” Consequently, employers will be expected to continue complying with the ACA coverage mandates and all reporting and disclosure requirements.

The decision will certainly be appealed, but it is unclear when an appeal could occur procedurally. In any event, it could take quite some time before any appeal is decided, and might include another trip for the ACA to the Supreme Court.

Consequently, the ACA remains in place and enforceable. We also note that, while the TCJA removed the tax penalty for failure to comply with the individual mandate, there was no similar repeal or elimination of penalties related to an employer’s failure to comply with the employer mandate, or other requirements of the ACA on employer-provided health insurance coverage. We will continue following this decision and its impact.

If you would like additional information, we would be happy to help. Please contact any of the attorneys within Cohen & Grigsby’s [Employee Benefits & Executive Compensation Practice Group](#).

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