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Impact of Virginia Federal Court Decision Finding Mandatory Coverage Provision of PPACA To Be Unconstitutional on Other PPACA Coverage Requirements

Healthcare Law Alert

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On December 13, 2010, the U.S. Federal Court for the Eastern District of Virginia issued a decision holding that section 1501 of the Patient Protection and Affordable Care Act (PPACA) is unconstitutional. Section 1501 contains the mandatory coverage requirements and related penalty provisions effective in 2014 requiring that individuals (with very limited exceptions) must obtain and maintain health care coverage. Pub.L. No. 11-148, §1501, adding Internal Revenue Code §5000A.

In the decision in *Commonwealth of Virginia v. Sebelius*, 3:10CV188-HEH (E.D.Va. 2010), the district court stated that in striking down the mandatory coverage provision, it was not invalidating PPACA wholesale. Slip opinion at 38. Where there is no severability clause, the U.S. Supreme Court has articulated the test for the severability of statutory provisions found to be unconstitutional in a series of decisions. *See, e.g.*, *Free Enterprise Fund v. Public Company Accounting Oversight Board,* __U.S. __, 130 S. Ct. 3138, 3161 (2010)(provisions of Sarbanes-Oxley relating to removal of Public Company Accounting Oversight Board members were unconstitutional, but severable from other Sarbanes-Oxley provisions); *Alaska Airlines v. Brock*, 480 U.S. 678, 686 (1987)(legislative veto provision of the employee protection program created by the 1978 Airline Deregulation Act was unconstitutional but severable from other provisions of the employee protection program). The test of severability as articulated by the U.S. Supreme Court involves determinations whether the Legislature would have enacted the balance of the statute without the invalidated provisions and whether the balance of the statute would function in a manner consistent with the Legislature's intent without the invalidated provisions. In *Sebelius*, the district court stated that on the existing record it would be impossible to make these determinations and decided that it would "sever with circumspection." Slip opinion at 40.

The finding of unconstitutionality is limited to section 1501 and "directly-dependent" provisions which make specific reference to Section 1501." Id. The scope of the finding of unconstitutionality is somewhat unclear. Section 1501 is not specifically referenced in any other provision of PPACA. However, section 1501(a) references the provisions of PPACA that amend Public Health Services Act (PHSA) sections 2704 and 2705. Pub.L. No. 11-148, §1201. Section 2704 prohibits pre-existing condition clauses and section 2705 bans pricing based on health status.

As section 2704 also inserts amendments to PHSA sections 2701, 2702 and 2703, those provisions are also potentially within the ambit of the severability analysis in *Sebelius*. Section 2701 adopts modified community rating, under which the underwriting factors that carriers may use are limited to age, tobacco usage, geographic region and whether dependents are covered and the permitted variation in rates for these factors is strictly capped. Section 2702 mandates that insurers issue coverage to any applicant and section 2703 contains the mandatory renewal provision.

With one notable exception, none of the provisions cross-referenced in section 1501 take effect until 2014. The exception is the ban on pre-existing condition clauses with respect to children younger than age 19, which took effect on September 23, 2010. Pub.L. No. 11-148, §10103.

The other provisions of PPACA that take effect prior to 2014 are almost certainly outside the ambit of the *Sebelius* decision. These provisions include various prohibitions on coverage limitations effective September 23, 2010, the medical loss ratio provisions effective January 1, 2011 and filing requirements with respect to “unreasonable” rate increases. See Pub.L 11-148, §1001, Pub.L. 111-148, § 10101(f), adding PHSA § 2718(b); Pub.L. 111-148, §1003 adding PHSA § 2794(a).

Some provisions of the sections cross-referenced in section 1501 may not be “directly-dependent” on that section. Although section 2705 contains the ban on medical underwriting and health-status-related pricing, it also authorizes expanded discounts for employee wellness programs. Prior to the enactment of PPACA, discounts of up to 20 percent were authorized under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations. "Nondiscrimination and Wellness Programs in Health Coverage in the Group Market, Final Rule." Federal Register 71:239 (December 13, 2006) p 75014, 75044. Section 2705 codifies the substance of the HIPAA regulation and increases the maximum discount to 30 percent.

Sorting out which provisions of PPACA are subject to the severability holding in *Sebelius* will involve some fine line drawing. Fortunately, with the exception of the ban on pre-existing condition clauses for children younger than 19, the potential “directly-dependent” PPACA provisions do not take effect until 2014. In the interim, the unconstitutionality decision undoubtedly will be appealed. There is plenty of time for clarifying appellate decisions or clarifying congressional action.

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