



Legal Alert: Eleventh Circuit Finds Individual Mandate Provision of Health Care Reform Law Unconstitutional

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Executive Summary: The Eleventh Circuit Court of Appeals has stricken the individual mandate provision of the 2010 Patient Protection and Affordable Care Act as unconstitutional; however, the court held that this provision is severable from the remainder of the Act. Thus, unlike the federal trial court decision from which this appeal was taken, the Eleventh Circuit did not find the entire Act invalid. See *Florida v. United States Department of Health and Human Services* (11th Cir. Aug. 12, 2011).

Background

The Patient Protection and Affordable Care Act (PPACA) was enacted in 2010 and contained numerous provisions including a requirement that, beginning in 2014, everyone (with certain limited exceptions) must purchase federally-approved health insurance or pay a monetary penalty. Earlier this year, a federal trial court in Florida held that Congress exceeded the power granted to it under the Commerce Clause when it enacted the individual mandate provision. That court also held that the individual mandate could not be severed from the other provisions of the Act, and, accordingly, found the entire law to be unconstitutional. See *Florida v. United States Department of Health and Human Services* (N.D. Fla. Jan. 31, 2011). The government appealed this decision to the Eleventh Circuit.

Eleventh Circuit Decision

On August 12, 2011, in a 2-1 decision, a three-member panel of the Eleventh Circuit affirmed the trial court's determination that Congress exceeded its Commerce Clause power in enacting the individual mandate provision. The Eleventh Circuit also held that Congress's tax power does not provide an alternative basis for upholding the individual mandate because the mandate is a penalty, not a tax. Unlike the lower court, however, the Eleventh Circuit held that the individual mandate is severable from the remainder of the Act.

Congress Exceeded its Commerce Clause Authority

The Commerce Clause gives Congress the power "[t]o regulate commerce . . . among the several states." The Supreme Court has interpreted the Commerce Clause, in conjunction with the Necessary and Proper Clause, to permit Congress to regulate purely local, intrastate economic activities that substantially affect interstate commerce.

In examining Supreme Court's Commerce Clause precedent, the Eleventh Circuit noted that these cases run the gamut of possible regulation; however, they all involve attempts by Congress to regulate preexisting, freely chosen classes of activities. Despite this, the court acknowledged that the Supreme Court has never expressly held that activity is a precondition for Congress's ability to regulate commerce – "perhaps, in part, because it has never been faced with the type of regulation at issue here."

The court then addressed whether the federal government can issue a mandate that Americans purchase and maintain health insurance from a private company for the entirety of their lives and held that the Supreme Court has never allowed Congress "to dictate the financial decisions of Americans through an economic mandate."

Severability

Unlike the lower court, the Eleventh Circuit held that the individual mandate is severable from the remainder of the Act. The court relied on the severability test set forth by the U.S. Supreme Court in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684–97(1987): "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." The court held that excising the individual mandate would not prevent the remaining provisions of the Act from being "fully operative as a law." The court noted that the "lion's share" of the Act has nothing to do with private insurance or the mandate that individuals purchase insurance. The court also held that two provisions that do relate to private insurance industry reforms – the prohibition on preexisting condition exclusions and guaranteed issue – would stand alone as law without the individual mandate. Accordingly, the court held that the individual mandate is severable and that the lower court erred in its "wholesale invalidation" of the Act.

Employers' Bottom Line:

The court's decision finding the individual mandate provision unconstitutional creates a split of authority among the federal appeals courts on this issue, in light of the Sixth Circuit's June 2011 decision upholding the law. This split likely will be resolved by the U.S. Supreme Court.

It is not clear how the striking of the individual mandate will impact the PPACA from a practical standpoint. However, employers and businesses affected by the Act should continue to take steps to ensure compliance with the Act's many requirements until further guidance is received.

If you have any questions regarding this decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.