

Health Care Reform is (almost 100%) Constitutional; What Next?

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On June 28, in a 5-4 decision, the Supreme Court decided the first consolidated cases on Health Care Reform. Those cases challenged the constitutionality of two provisions of the Patient Protection and Affordable Care Act ("PPACA"): namely, the individual mandate and the elimination of all Medicaid funding to states that failed/refused to join the new Medicaid expansion program.

With regard to the individual mandate, many experts believed that it would be held unconstitutional as beyond the scope of the Commerce Clause. The Court held that Congress did not have the Constitutional power under the Commerce Clause to force individuals to purchase health insurance. The Court ruled that "[p]eople, for reasons of their own, often fail to do things that would be good for them or for society", but that does not "authorize[] Congress to use its commerce power to compel citizens to act as the Government would have them act."

However, Congress does have the power to tax people in order to encourage them to purchase health insurance, just as it provides incentives for conduct elsewhere in the tax code (such as the deduction of home mortgage interest to promote home ownership). It does not matter that Health Care Reform used the label "penalty" vs. "tax" in the individual mandate; it functions like a tax and is collected by the IRS, so as long as the penalty is not so high as to leave people with no reasonable choice other than to purchase health insurance, it is constitutional under the power to tax. The Court found that, for most people, penalty would be about 15% to 50% of the cost of purchasing coverage, and cannot be higher than the cost of purchasing coverage, and estimated that approximately 4 million people each year would pay the penalty rather than purchase insurance. Since people have the choice to forego insurance, so long as they are willing to pay the tax, the Court found the mandate constitutional.

The Court did strike down as unconstitutional the provision of PPACA that would permit the government to withhold all Medicaid funding to States that refuse to accept the new Medicaid expansion proposed under the Health Care Reform act. Since 1982, all 50 states have adopted the Medicaid program, and Medicaid funding provides 10% or more of the budgets of those states. The Court ruled that the expansion fundamentally changes Medicaid so that it "is no longer a program for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage." States that do not

agree with that transformative new Medicaid strategy cannot be penalized by taking away their existing Medicaid funding. Even though that provision was unconstitutional, the Court held that the provision was severable, and the rest of the act stands.

So what is the significance of the Supreme Court decision, and what is next for Health Care Reform?

- The Supreme Court only ruled on the two parts of the law that were specifically challenged: the individual mandate and the Medicaid expansion. These were the provisions that were most likely violative of the Constitution, so the rest of the act most likely would withstand constitutional scrutiny. Therefore, it is not likely that there will be further constitutional challenges to the act itself.
- The struggle over repealing Health Care Reform will be extremely heated, both in Congress and on the campaign trail, now that the Supreme Court has upheld the ruling. Indeed, the Supreme Court has indicated that the passage/repeal of Health Care Form is a truly political issue, in which the Court has no role. ("It is not our job to protect the people from the consequences of their political choices.") The results of the Congressional and Presidential elections will play a key role in the future of Health Care Reform.
- It should be noted that approximately 20 states – including Rhode Island – have adopted some or all of the key provisions of Health Care Reform in their own state's laws to provide a safety net in the event the law is repealed. Therefore, it is important to check both federal and state law provisions before devising a program in response to Health Care Reform.
- In addition, other controversial Health Care Reform provisions have been implemented by regulation, such as the mandated coverage without copayment for contraception. Since these issues were not addressed at all in the decision, were implemented by regulations (and therefore have both Constitutional and statutory limitations), and were not addressed at all by the decision, it is likely that those provisions still may be challenged in the future.
- Despite the lingering uncertainty, employers still will need to focus on compliance with the provisions of Health Care Reform that come into effect in 2013 and 2014, including the individual mandate and exchanges. Many employers – particularly smaller employers – will need to make a cost-benefit analysis comparing continuation of employer-provided coverage to paying the applicable penalty. Once the individual mandate

and health insurance exchanges come online, it may be less problematic from an HR perspective not to offer health insurance.

While the debate regarding Health Care Reform is not over, the Supreme Court decision brings us a major step closer to full implementation of Health Care Reform in 2014. Employers who put off their decision-making to wait and see if the law would be upheld now need to review their compliance programs and begin to make the hard decisions on how to handle the mandate, the exchanges and other key Health Care Reform provisions.