



### **District Court Judge in Texas Strikes Down the ACA – But Law Remains in Effect for Now**

On Friday, December 14, a federal judge in Texas issued a partial ruling that strikes down the entire Affordable Care Act (ACA) as unconstitutional. The White House has stated that the law will remain in place, however, pending the appeal process. The case, *Texas v. U.S.*, will be appealed to the U.S. Court of Appeals for the Fifth Circuit in New Orleans, and then likely to the U.S. Supreme Court.

The plaintiffs in *Texas* (a coalition of twenty states) argue that since the Tax Cuts and Jobs Act zeroed out the individual mandate penalty, it can no longer be considered a tax. Accordingly, because the U.S. Supreme Court upheld the ACA in 2012 by saying the individual mandate was a legitimate use of Congress's taxing power, eliminating the tax penalty imposed by the mandate renders the individual mandate unconstitutional. Further, the individual mandate is not severable from the ACA in its entirety. Thus, the ACA should be found unconstitutional and struck down.

The court in *Texas* agreed, finding that the individual mandate can no longer be fairly read as an exercise of Congress's Tax Power and is still impermissible under the Interstate Commerce Clause—meaning it is unconstitutional. Also, the court found the individual mandate is essential to and inseparable from the remainder of the ACA, which would include not only the patient protections (no annual limits, coverage of pre-existing conditions) but the premium tax credits, Medicaid expansion, and of course the employer mandate and ACA reporting.

Several states such as Massachusetts, New York and California have since intervened to defend the law. They argue that, if Congress wanted to repeal the law it would have done so. The Congressional record makes it clear Congress was voting only to eliminate the individual mandate penalty in 2019; the record indicates that they did not intend to strike down the entire ACA.

It is worth noting that the Trump administration filed a brief early in 2018 encouraging the court to uphold the ACA but strike down the provisions relating to guaranteed issue and community rating.

The ACA has largely survived more than 70 repeal attempts and two visits to the U.S. Supreme Court. We anticipate it will survive this one too, in time. While the Supreme Court lineup has changed, all five justices

who upheld the ACA in 2012 are still on the bench. Moreover, the Supreme Court may be reluctant to strike down a federal law as expansive as the ACA, particularly when it has been in place for nearly nine years and affects millions of people. Notably, the Supreme Court was not required to rule on the “severability” issue in 2012. Given a strong tradition of the Supreme Court to avoid, if possible, broad rulings of unconstitutionality in established laws, it is not unlikely that the current Court, if this case makes it that far, will find a way to hold that even if the Court’s 2012 logic with respect to the individual mandate is no longer applicable, the rest of the law is severable and saved, thus avoiding once again a broad ruling on the ACA’s constitutional soundness. The bottom line: employers should continue to comply with the ACA, as its provisions (including the employer mandate and associated reporting) remain the law for the foreseeable future.

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