



Case to Watch: U.S. District Court Judge Rules ACA Unconstitutional

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On December 14, 2018, U.S. District Court Judge Reed O'Connor issued a 55-page opinion declaring the Patient Protection and Affordable Care Act (ACA) unconstitutional. The opinion does nothing to derail the law in the short-term. For the moment, nothing will change. The decision is expected to be appealed to the Fifth Circuit Court of Appeals, and then any decision from the Fifth Circuit will likely end up before the U.S. Supreme Court. In the meantime, employers should continue to comply with those provisions of the ACA that apply to them, i.e., the employer share contribution, pending further developments in this case.

The Complaint in *Texas v. United States of America* was filed on February 26, 2018, by the State of Texas, 18 other state attorneys general, two governors, and two individuals against the Trump Administration. The Complaint alleges that, following passage of the Tax Cuts and Jobs Act of 2017 (TCJA), the ACA became unconstitutional because the TCJA eliminated the penalty, for years subsequent to 2019, on individuals for their failure to comply with the ACA's mandate to purchase insurance. As Judge O'Connor noted in his opinion, resolution of the question rests at the intersection of the ACA, the Supreme Court's decision in *Nat'l Fed'n of Indep. Businesses v. Sebelius* ("*NFIB*"), 567 U.S. 519 (2012), and the TCJA. In June, 2018, the Trump Administration's Justice Department declined to defend the case stating that it agreed with Plaintiffs on several points, including that the individual mandate be struck on constitutional grounds. Attorneys general from 16 states and the District of Columbia were allowed to intervene to defend the case.

In 2012, the Supreme Court, in *NFIB*, ruled that the individual mandate was constitutional because the penalty for failing to purchase individual coverage could fairly be read as an exercise of Congress's tax power. Plaintiffs in the *Texas* case argued that because the TCJA eliminated the individual penalty, the basis for the Supreme Court's *NFIB*'s decision was erased and its ruling no longer valid. Plaintiffs further argued that the individual mandate is inseverable from the other provisions of the ACA and therefore the entire ACA should be struck down as unconstitutional. Defendants argued that when Congress enacted the TCJA, it did not intend to overturn the entirety of the ACA, including popular provisions such as the bar against preexisting conditions. The *Texas* court sided with Plaintiffs and found that the ACA was unconstitutional.

In his ruling, Judge O'Connor stated that, "[b]ecause rewriting the ACA without its 'essential' feature is beyond the power of an Article III court, the court thus adheres to Congress' textually expressed intent and binding Supreme Court precedent to find the individual mandate is inseverable from the ACA's remaining provisions." The court went on to state that because the mandate is so connected to the ACA, the ACA in its entirety cannot survive constitutional muster without it.

So what happens now? The decision will be appealed to the Fifth Circuit. Irrespective of how the Fifth Circuit rules, it is likely that the case will make its way to the U.S. Supreme Court. If that happens, Chief Justice John Roberts will again likely play a key role in determining the constitutionality of the ACA. In the meantime, the ACA will remain in place. Employers should continue to comply with all applicable provisions.

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