

# Issue Brief

## **The Impact of the Supreme Court's ACA Ruling on Employer Sponsored Health Plans**

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On Thursday June 28<sup>th</sup> The Supreme Court issued its much anticipated decision on the constitutionality of the Affordable Care Act (ACA). In a split 5-4 decision, the court ruled the so called "individual mandate" contained in the ACA constitutional. This provision of the ACA requires individuals to maintain health insurance or pay a "shared responsibility payment" if they fail to do so.

The manner in which the court came to its ruling surprised many observers. Prior to the court's decision it was commonly believed that Justice Anthony Kennedy would cast the "winning vote" which would determine the outcome. Instead, Chief Justice John Roberts joined with four other justices in ruling the individual mandate constitutional. Justice Kennedy wrote the dissent, arguing that the entire ACA should have been ruled unconstitutional.

The argument on which Justice Roberts based his decision also surprised many. Four justices ruled that Congress has the power to impose the individual mandate under the commerce clause of the Constitution. Justice Roberts disagreed and ruled that congress exceeded its powers under the commerce clause. However, Justice Roberts ruled that the shared responsibility payment was a tax, and it was within Congress's power to impose the tax on individuals who failed to maintain qualifying health insurance. Justice Roberts's opinion, combined with the four justices who supported the commerce clause argument, created the five justice majority that decided this portion of the case.

In a different decision regarding a separate challenge to another portion of the law, the court ruled that the federal government cannot deny existing Medicaid funds to states that choose not to participate in the Medicaid expansion contained in the ACA.

The result of the decision to uphold the individual mandate is that the court has affirmed the constitutionality of the entire ACA, other than the provision related to Medicaid expansion.

### **Effect on Employer Sponsored Plans**

So what does the court's decision mean to employer sponsored health plans? Employee benefit managers must now move forward to comply with upcoming ACA rules. They must also analyze, and plan for, significant requirements scheduled to go into effect in 2014.

#### 2012 and 2013 ACA Elements

The first, and most obvious result, is that employers must implement the ACA provisions scheduled to go into effect in 2012 and 2013. With the court's ruling, there is no longer any question that the following elements of the ACA will take effect:

- Summaries of Benefits and Coverage (SBCs)
- W-2 Health Plan Reporting
- Comparative Clinical Effectiveness Research Fee
- Health FSA limits
- Medical Loss Ratio (MLR) Rebates

Employers who may have been waiting for the outcome of the Supreme Court case need to move forward quickly to comply with rules related to these ACA requirements.

#### Additional Regulatory Guidance Likely

The regulatory agencies responsible for various ACA rules are now likely to accelerate the release of additional guidance and regulations. Of particular interest to employers is the pending release of IRS

guidance on the definition of a full-time employee. Likely to be issued later in 2012, these IRS rules may provide employers with additional flexibility in defining employees who qualify as full-time. This flexibility could significantly impact how some employers define plan eligibility and possibly reduce the risk of employer penalties related to coverage requirements.

### Medicaid Expansion

The ACA expands Medicaid eligibility to most individuals with a household income of less than 133% of the Federal Poverty Level (FPL). Since the Medicaid eligibility formula ignores the first 5% of an individual's income, the result is that individuals with household incomes of less than 138% of FPL would generally be eligible for Medicaid. The federal government will initially pay 100% of the costs of newly Medicaid eligible individuals through 2016. Beginning in 2017, the federal government payments will decrease slightly until 2020 when the federal government will pay 90% of the cost and states will be responsible for 10%. The ACA requires states to accept the expanded Medicaid eligibility or risk losing all current federal Medicaid funding.

The court's ruling that the federal government cannot deny existing Medicaid funds to states that choose not to participate in the Medicaid expansion creates an opportunity for individual states to opt-out of the expansion without losing existing federal Medicaid funding.

This portion of the ruling creates a number of questions for employer sponsored health plans.

- In states that choose to take advantage of the expanded Medicaid eligibility, employers with a number of lower income employees will find that more active employees will also qualify for Medicaid. This could have varying impacts on employers depending on how each particular state chooses to implement the expanded Medicaid eligibility. For example, under an existing Medicaid program called the Health Insurance Premium Payment Program (HIPP), states can choose to enroll a Medicaid eligible employee in an employer's plan (if they are eligible) and pay the employee contribution.
- Under current ACA rules, employers are not subject to some ACA employer penalties for employees who qualify for Medicaid. Employers with employees in states that opt-out of the expanded Medicaid eligibility may face an increased employer penalty risk.

### **Planning for 2014**

Most employers are aware that many of the major requirements of the ACA go into effect in 2014, now only 18 months away. Employers who have already begun to look into the effect that the 2014 rules will have on their plans are often surprised by what they find. Many find that the coverage and eligibility requirements contained in the ACA will have little impact on current employee benefit strategies. On the other hand, some employers, especially those with a large number of lower income employees, and/or eligibility rules that differ for different categories of employees, are finding that they may need to make significant changes. In either case, employers must work quickly to figure out how the rules affect their particular plans.

### Impact of the 2012 Elections

Obviously, the elections in the fall of 2012 have the potential to alter the course of health reform. In general, there are three election scenarios, each posing different possible effects on employer sponsored plans.

- Scenario 1: President Obama is reelected - Under this scenario ACA rules related to employer sponsored health plans are likely to remain much as they are today.
- Scenario 2: A Republican president is elected and Democrats control either the Senate or the House of Representatives - With new Republican appointed heads of the various regulatory agencies there could be significant changes in regulatory process related to the ACA. However, with a divided congress there would likely be few significant legislative changes.
- Scenario 3: A Republican president is elected, and the Republican Party controls both the Senate and House of Representatives - Obviously this would create the greatest possibility of significant

legislative and regulatory changes to the ACA. However, most political observers think it is very unlikely that Republicans will control 60 seats in the Senate. Under this scenario, Democrats may be able to block, or at least significantly slow, legislative changes to the ACA through the use of the filibuster.

### Various State Approaches

As of July 2012, 14 states and the District of Columbia have created state based exchanges, and 18 others are at various stages of the planning process. 18 states have decided not to implement a state based exchange, or have made little or no progress in planning for one. If a state does not create their own exchange, the federal government will operate an exchange in that state.

This creates some uncertainty for smaller employers. Initially under ACA rules, only small employers (those with less than 50 or 100 employees depending on the state) can purchase group coverage through an exchange. Small employers will need to follow the development of state and federal exchanges in their states to understand what options they will have for purchasing group coverage beginning in 2014. Larger fully insured employers, and self-funded employers, will continue to contract directly with an insurer or administrator for their employer sponsored plans.

### Employee Qualification for ACA Subsidies

Another pending question related to state exchange development could have an impact on employees. The ACA contains a tax credit for individuals making up to 400% of the federal poverty level (FPL) for the purchase of individual health insurance coverage through an exchange. In 2012, 400% of FPL equals \$92,200 for a family of four.

Employees eligible for affordable employer sponsored coverage are not eligible for the tax credit. However, employees ineligible for an employer plan, or employees for whom the employer plan is determined to be unaffordable, could qualify for the premium tax credit. If an employee qualifies for the tax credit, and purchases subsidized individual coverage through an exchange, their employer will pay a penalty.

Due to a technical question related to the specific wording of the statute, it is unclear if the premium tax credit will be available to individuals in states which choose not to set up a state based exchange. Until this question is resolved, employers will not be able to determine definitively how many employees could qualify for the tax credit and potentially leave the employer's plan.

### **Summary**

The Supreme Court's ruling has resolved the constitutional questions related to the ACA and it is now clear that employers have a number of ACA related issues to deal with in the remaining months of 2012 and early 2013. Unfortunately, many questions remain related to employer sponsored plans. Considering the uncertainty of the future political landscape, and the significant elements of the ACA scheduled to go into effect in less than 18 months, prudent employers will carefully analyze the impact of the 2014 ACA requirements on their plans, and begin to plan for changes that may be necessary.

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