Individual Mandate Ruled Unconstitutional

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On Wednesday, December 18, the Fifth Circuit of the U.S. Court of Appeals issued a ruling in *Texas v. United States*, which determined that the individual health insurance mandate implemented by the Affordable Care Act (ACA) is unconstitutional. This ruling potentially has massive implications for multiple industries.

As background, in 2012, the U.S. Supreme Court issued *National Federation of Independent Businesses v. Sebelius*, which determined that the individual mandate was constitutional as an exercise of the federal government's taxing power. *Sebelius* also stated that the individual mandate would not be a constitutional use of the government's power under the generally broader power to regulate interstate commerce. Subsequently, in 2017, Congress set the penalty for failure to comply with the individual mandate to zero, removing the "revenue raising" component of the mandate that the *Sebelius* decision depended upon. A number of historically Republican states immediately sued.

The trial court decision in *Texas v. United States* ruled that, not only was the individual mandate unconstitutional, but that that provision was not "severable" from the law as a whole. If that ruling stands, it means every aspect of the ACA, including numerous items seemingly unrelated to the mandate, would be stricken. These include diverse issues such as:

- mandatory breakrooms for breastfeeding mothers;
- elimination of preexisting condition exclusions for individual health insurance plans;
- required dependent coverage through age 26 for group health plans;
- prohibition on co-pays for preventative care treatments;
- numerous reforms to Medicare; and
- government-funded insurance subsidies for low-income individuals.

The Fifth Circuit did not rule on the severability portion of the trial court decision. Instead, it requested that the trial court reconsider that portion of its ruling, employing a "finer toothed comb" to determine whether any provisions could be saved. Given the Department of Justice's position in the lower court that the entire law should be stricken, this issue promises to be hotly contested (and will likely make a return visit to the U.S. Supreme Court next year).

The timing of the decision preserves the status quo as annual renewals or open enrollments have concluded. However, because of the potential breadth of impact of the upcoming severability decision disruptions in the marketplace are likely. Impacted industries will need to adjust their business to account for the potential for a return to the pre-ACA state of the law, while still complying with portions of the law still in effect.

It is very likely that Congress will attempt an act to save some of the more popular provisions of the ACA. However, given the contentious nature of this law (and the proximity of a national election), it is unclear how successful such attempts will be. Additionally, appeals of this decision and the potential decision on severability will create additional uncertainty.

If you have questions or would like further information, please contact L. Stephen Bowers (bowerss@whiteandwilliams.com; 215.864.6247) or another member of the Healthcare Group.