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Justice Department Says ACA Should Be Struck Down

By Beth Mirza
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The Justice Department is supporting a federal judge's ruling that the Affordable Care Act (ACA) is unconstitutional in a case that could eventually be heard by the U.S. Supreme Court. In the meantime, all ACA coverage and reporting obligations for employers remain in place.

"The Department of Justice has determined that the district court's comprehensive opinion came to the correct conclusion and will support it on appeal," said Kerri Kupec, spokesperson for the Justice Department, as reported by CNN (<https://www.cnn.com/2019/03/25/politics/trump-administration-aca/index.html>).

On Dec. 14, in *Texas v. United States* (<https://affordablecareactlitigation.files.wordpress.com/2018/12/Texas-v-US-partial-summary-judgment-decision.pdf>), district court judge Reed O'Connor ruled that because Congress eliminated the penalty (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/aca-obligations-remain-in-place-despite-court-ruling.aspx) on individuals without ACA-compliant health coverage effective Jan. 1, 2019, the ACA's individual mandate requiring people to have health insurance "can no longer be sustained as an exercise of Congress's tax power." O'Connor, who sits in the Northern District of Texas, then struck down the ACA in full, concluding the individual mandate is so connected to the law that Congress would not have passed the ACA without it.

The suit against the ACA was filed last year by a group of Republican state attorneys general and others opposed to the statute. The appeal is lead by Democratic state attorneys general.

O'Connor allowed the law to stand while his judgment is under appeal to the 5th U.S. Circuit Court of Appeals (https://ag.ky.gov/pdf_news/20190325_Appellant-Brief_Texas-vs-USA.pdf) in New Orleans. "No matter how the appeals court rules, the matter is certain to move on to the Supreme Court," said Edward Fensholt, senior vice president and director of compliance services at Lockton, a benefits brokerage and consultancy based in Kansas City, Mo., in previous *SHRM Online* coverage.

However, Andrew Douglass, an attorney with Reed Smith in Chicago, predicted that if the 5th Circuit reverses the district court decision, the Supreme Court is unlikely to review the case. But he predicted that the 5th Circuit, which he characterized as conservative, would affirm, in which case Supreme Court review would be likely.

Some think the Supreme Court is likely to uphold the constitutionality of the law, which Congress arguably reaffirmed when it amended the statute in 2017 by lowering the individual mandate tax to zero, said Brian Johnston, an attorney with Jackson Lewis in Kansas City, Mo. He said the Justice Department's new position makes more sense than its assertion before the district court ruling that pre-existing conditions were constitutional but the rest of the law wasn't.

The Supreme Court in 2012 decided that Congress had the power to enact the ACA because of the individual mandate, which the court interpreted to be a tax, Johnston noted. Without the tax, arguably there is no basis to uphold the law, he added.

If the Supreme Court strikes down the entire ACA as unconstitutional it would be "monumental," as the number of uninsured individuals would be likely to swell, he predicted.

Democrats in the House of Representatives are likely to file a brief in support of the constitutionality of the law, Douglass noted.

Staying Compliant

For now, employers should remember that the ACA is still the law and the Justice Department's stance does not change their present compliance obligations, said Stephanie Smithey, an attorney with Ogletree Deakins in Indianapolis. Employers still have to offer health care coverage to at least 95 percent of full-time employees and properly report offers of coverage, so they are not penalized.

"Employers don't have any option other than staying the course. The ACA is still the law," said Ann Caresani, an attorney with Tucker Ellis in Cleveland.

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