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The ACA Undergoes a New Legal Challenge

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Several states have lodged a legal challenge to the entire Affordable Care Act (“ACA”) on the basis that the lack of an Individual Mandate tax makes the remaining provisions unconstitutional. While the Administration is not intervening, several other states are, defending the ACA’s sustainability without the Individual Mandate tax. No resolution to the legal questions is expected imminently, although the uncertainty that it causes could result in higher premiums now.

Background

One of the ACA’s major provisions is that Americans must have health insurance or pay a penalty. That provision was challenged and, on June 28, 2012, the Supreme Court ruled that the Individual Mandate is not a valid exercise of Congress’ power under the Commerce Clause (i.e. the federal government cannot force individuals to buy insurance), but nevertheless upheld it due to Congress’ power under the Taxing Clause (i.e., the federal government has broad authority to monetarily penalize individuals).

Numerous efforts to repeal the ACA have all failed. However, in December 2017, Congress, through the Tax Cuts and Jobs Act, changed the Individual Mandate Penalty to \$0, beginning January 1, 2019.

New Challenge

In a renewed effort to strike down the ACA, on February 26, 2018, Texas Attorney General Ken Paxton and 19 other Republican state attorneys general filed a lawsuit which charged that Congress' changes to the law in last year's tax bill rendered the entire ACA unconstitutional.

The reasoning is as follows:

- **Step One:** If the Individual Mandate, per the Supreme Court, is only constitutional because it constitutes a tax, and if that tax has effectively been eliminated, then the mandate sans tax that remains on the books is therefore unconstitutional.
- **Step Two:** Invalidating the mandate should invalidate the whole ACA because the law cannot function the way Congress intended without the mandate in place.

Administration's Inaction

On June 7, 2018, in a departure from the Justice Department's custom of fighting to uphold all reasonable laws, U.S. Attorney General Jeff Sessions indicated in a brief that it will not participate in the defense of this law suit. While the Administration does call on the court to invalidate the Individual Mandate, guarantee issue requirement, and community rating requirement, it indicates that the remaining provisions should stand.

Defense

In May 2018, the court allowed the attorneys generals from Democratic-leaning states to "intervene" in the case and defend the law. California Attorney General Xavier Becerra is leading the challenge with 15 other states and the District of Columbia and filed a preliminary injunction on June 7, 2018. They refute the Republican attorneys'

general claim, noting that the ACA and its Individual Mandate have already survived two reviews by the Supreme Court and over 70 unsuccessful repeal attempts in Congress.

What to Expect

While the complaint requests that the ACA be dismantled as of January 1, 2019, it is likely that litigation will extend well beyond that time and perhaps return before the Supreme Court. Whether the Republican-led repeal efforts will be successful is uncertain. In *King v. Burwell* (the most recent case before the Supreme Court challenging the validity of the ACA), Chief Justice Roberts alluded that the Court's current majority favored keeping the law intact:

"Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."

In the meantime, increased uncertainty may cause insurers to pull out of the Marketplace or increase premiums. If the ACA is invalidated, obviously, this would significantly impact employers who, among other things, would no longer have to evaluate affordability, define full-time employees as those working at least 30 hours per week, limit their waiting periods to 90 days, or file Forms 1095-C.

We will continue to keep you apprised of further developments.