

Current Status on the Constitutionality of the ACA Individual Mandate

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In December 2019, the Fifth Circuit Court of Appeals upheld, in a 2-1 decision, a lower court ruling that the individual mandate of the Affordable Care Act (ACA) became unconstitutional when Congress set the penalty amount to zero as part of the Tax Cuts and Jobs Act, because the mandate was no longer a valid exercise of Congress' taxing powers. However, the Appeals Court stopped short of throwing out the entire law and sent it back to the District Court of Texas to take another look at whether the individual mandate could be severed from other portions of the law. If you recall, this federal judge in Texas (Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas) already struck down the entire law back in 2018. In discussing the severability issue, the Appeals Court was critical of the lower court's failure to consider the intent of Congress in eliminating the individual mandate penalty, but did not give any further guidance as to how to conduct this analysis.

In a further development, on January 3, 2020, a coalition of 20 Democratic states, the District of Columbia, and the U.S. House of Representatives asked the United States Supreme Court to review the December 18, 2019, Fifth Circuit Court of Appeals (Appeals Court) [decision](#) on an expedited basis.

What does this decision mean for employers?

For now, business as usual—but with heightened attention to whether or not the Supreme Court takes this case. It only takes four out of the nine justices to grant review of a lower court decision. However, it is unclear whether the Supreme Court will agree to take the case.

While certain of the ACA market reforms have been positively embraced by employers—such as the elimination of pre-existing condition exclusions, the availability of public markets, and the extension of coverage to adult dependent children—other aspects of the law have been more widely criticized, such as the Employer Shared Responsibility Requirement and the additional tax reporting. Until the status of the ACA is settled, employers will need to stay on top of this ever-shifting legal landscape.

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