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Briefly
 April 2012 Volume 12, Issue 04

HEALTH REFORM: SUPREME COURT RECAP

UNCLEAR WHETHER FUTURE OF THE EMPLOYER MANDATE, OTHER PROVISIONS, TIED TO FATE OF THE INDIVIDUAL MANDATE



Catherine Shuck

“The second, and most highly-publicized challenge, is the Constitutional challenge to the individual mandate itself.”

On March 26, 27 and 28, the U.S. Supreme Court heard nearly six and a half hours of oral argument on the Constitutional and other challenges to the Patient Protection and Affordable Care Act (PPACA). As has been widely reported, the only thing that was clear at the end of the three days of argument is that Justice Anthony Kennedy is likely to be the swing vote on most if not all of the rulings. The Court is expected to issue its rulings at or near the end of the current term in June, 2012.

Although there have been numerous challenges to PPACA in the federal courts, the four challenges to PPACA the Court is considering all originated in the Florida lawsuit brought by 26 states and the National Federation of Independent Business (NFIB). The first challenge is whether a provision in the tax code called the Anti-Injunction Act bars the Court from even considering challenges to the individual mandate until after the IRS begins collecting penalties for noncompliance in 2015. The second, and most highly-publicized challenge, is the Constitutional challenge to the individual mandate itself. In other words, did Congress exceed its authority in passing a provision requiring individuals to purchase private insurance?

The third challenge asks the Court to consider what will happen to the remaining 2,000-plus pages of PPACA if the Court strikes down the individual mandate, including what will happen to the employer mandate and other provisions affecting employers. The final challenge is to PPACA’s broad expansion of the federal-state Medicaid program, which the 26 state plaintiffs challenge as an impermissibly coercive act by Congress.

As to the first challenge, the Anti-Injunction Act (AIA) provides that a tax payer may challenge a tax only *after* paying the tax, which preserves the government’s essential interest in maintaining its revenues. The argument before the Court is that because the penalty imposed by PPACA for noncompliance with the individual mandate is to be assessed and collected in the “same manner” as a tax, and because the penalty arguably fits within the definition of a tax, *it is in fact a tax*. If the penalty is a tax, then it cannot be challenged until some taxpayer actually pays it, which would not occur until 2015, the year after the mandate takes effect. During the ninety minutes of oral argument on the issue, the Court peppered the attorneys with questions about various theories under which the AIA might or might not apply, but seemed determined to find a way to hold that the AIA does not bar consideration of the other challenges to PPACA. By the end of the argument session, it seemed unlikely that the Court would decline to reach the merits of the challenge to the individual mandate.

The second day of argument was devoted to the second challenge, to the individual mandate itself. A majority of the nine-member Court seemed skeptical of the federal government’s argument that Congress may regulate the health care market by requiring individuals to purchase health insurance. The Constitution’s Commerce Clause gives Congress the authority to regulate interstate commerce. The argument here is not whether Congress can regulate the health care or health insurance markets at all, which are unquestionably interstate in nature, but whether Congress can enact regulation that requires individuals to participate in the market by purchasing health insurance.

The more conservative members of the Court, Justices Roberts, Scalia, and Alito, along with Justice Kennedy, posed numerous questions to the federal government attorney probing why the individual mandate is a “regulation” of commerce as opposed to the “creation” of commerce. As Justice Kennedy put it, a federal law requiring individuals affirmatively to engage in commerce

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.



Jerome D. Pinn...

"This law prohibits private companies from using polygraph examinations, except in very limited circumstances."

CAN A POLYGRAPH STILL BE USED TO DETERMINE WHO IS TELLING THE TRUTH ?

At least since the passage of the Employee Polygraph Protection Act of 1988, private employers have been severely limited regarding when they can use a polygraph in seeking to determine the truth in an employee investigation. This law prohibits private companies from using polygraph examinations, except in very limited circumstances. The law does allow private employers to polygraph existing employees during an "on-going investigation" involving "economic loss or injury," but the employer must jump through many hoops before administering a polygraph examination under the law. First, the target employee must have had "access" to the property involved. Secondly, the employer must have "reasonable suspicion" that the employee was involved in the alleged incident. Before any testing can occur, an employee must receive a written statement which identifies the loss being investigated, the employer's grounds for suspecting the employee, and the employee's statutory rights under the law. An employee must also be told of his right to consult with an attorney before and during the examination. Even if all of these requirements are met, an employer may not, without additional supporting evidence, carry out an adverse employment action against an employee solely on the basis of the results of the polygraph test, or the refusal to take the polygraph test.

A recent example of the successful use of such a test occurred in *Cummings v. Washington Mutual*, 32 IER Cases 1057 (C.A. 11 2011), in which a bank asked the branch manager to take a polygraph test during an ongoing investigation of the disappearance of money from the branch. The court found that the bank properly asked the employee to submit to a polygraph test because it had a "reasonable suspicion" under the totality of the circumstances that the plaintiff was involved in, or responsible for, a money shortage from two teller cash dispenser machines. In another case decided last year, however, an employer's motion to dismiss was denied where the employer did not comply with the procedural requirements that it must provide the employee a written statement detailing the theft charges against her, or with other requirements that she be given written notice of the date, time, and location of the polygraph exam, the right to consult an attorney, and the nature and characteristics of the polygraph instruments to be used, and notify her of her right to terminate the polygraph exam. *Miller v. Natural Resources Recovery, LLC*, 32 IER Cases 1335 (M.D. La. 2011).

Editor's Note – The bottom line is that a polygraph can only be used by an employer in very limited circumstances, and should not even be considered or suggested without the advice of counsel.



Howard Jackson ...

"In effect, the statute prohibits mandatory payment of union dues in right-to-work states, but permits voluntary payment of dues in those states."

RIGHT TO WORK MEASURES PUSHED IN INDIANA AND SOUTH CAROLINA

Indiana has become the twenty-third state to have a state "right to work law," and the first in twelve years. The Republican-controlled state legislature passed the law largely along party lines. The National Labor Relations Act currently permits the enforcement of union security provisions in collective bargaining agreements requiring covered employees to join labor organizations or maintain union memberships as a condition of employment, requirements that the U.S. Supreme Court has limited in certain respects. However, Section 14(b) of the statute permits state laws prohibiting such provisions in agreements within the state. In effect, the statute prohibits mandatory payment of union dues in right-to-work states, but permits voluntary payment of dues in those states.

Interest in the issue seems to have increased since the NLRB issued a controversial unfair labor practice complaint against Boeing related to its decision to locate a new manufacturing operation in a right-to-work state, South Carolina, rather than in the state of Washington. Although the complaint was ultimately settled, the issue provoked an outcry among those in South Carolina and in industry, contending that the Boeing complaint was an effort to limit the growth of jobs in right-to-work states. More recently, the governor of South Carolina, Nikki Haley, announced her support of additional right-to-work legislation (H4652) introduced in the South Carolina state legislature on January 24th. The law would require employers to display a poster informing workers of the state's right-to-work protections and clarify existing provisions in the South Carolina right-to-work law. These provisions require that persons may not be denied employment because of membership or non-membership in a labor organization. The measure also would require **Continued on page 4**

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EMPLOYERS WARNED NOT TO SEEK TOO MUCH MEDICAL INFORMATION EVEN WHERE SOME INFORMATION IS NECESSARY



Fred Bissinger
 "...an employer may have reasonable and legally valid reasons for requesting medical information from the employee. However..."

Employers often have to determine if an employee is able to perform the essential functions of the job, able to return from medical leave, or able to be reasonably accommodated. In these situations, an employer may have reasonable and legally valid reasons for requesting medical information from the employee. However, employers must be careful not to require too much medical information.

Basically, an employer would violate the ADA provisions related to disability-related inquiries if an employer asked for more than what it reasonably needs to support the request or other issue at hand. In the case of a request for reasonable accommodation, employers are limited to getting such information as is reasonably needed to determine whether the person requesting the accommodation has

a disability, and if the person medically needs the accommodation requested. The EEOC and courts have found violations of the ADA where employers have instead treated these matters as a fishing expedition, and asked for unnecessary medical information beyond what is needed.

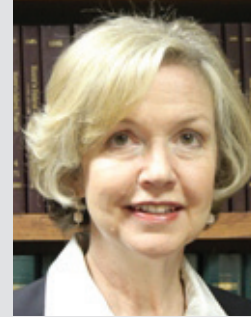
Once gaining the necessary information, the employer must then focus on whether the person is able to perform the essential functions of the job with or without an accommodation, is qualified, or poses a direct threat to safety. This determination needs to be based on the individualized information provided from the inquiry.

An even more extreme example of this principle occurred recently in a case involving something as simple as a doctor's excuse for an excused absence under an employer's attendance policy. *EEOC v. Dillard's Inc.* (W. D. Calif. 2011). The defendant's store had a policy requiring that notes for health-related absences state the nature of the absence. In practice, management did not demand specific diagnosis, but rather, some general information providing a medical explanation for the employee's absence. The EEOC sued on behalf of three employees, one of whom was fired for accumulating unexcused

absences the last of which was not excused because her doctor's notes did not give a medical reason for her absence. The court stated that the policy violated the ADA because it called for prohibited disability-related inquiries. The court ruled that the employer lacked any business necessity to receive additional information from an employee's physician about an employee's absence. Although the court technically decided only that the employer was not entitled to a summary judgment ruling in its favor, the ruling effectively decides the merits of the case and even allows the EEOC to proceed with discovery to locate additional claimants. Hopefully, future decisions will be more accepting of such a common-sense requirement to provide medical support for a medical excuse for an absence, even if a medical diagnosis is not allowed. However, employers need to be careful when seeking medical information from or about employees.

KNOW YOUR ATTORNEY REBECCA BRAKE MURRAY

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been a litigation attorney since 1985, practicing civil litigation with an emphasis in employment law and nursing home defense litigation in state and federal courts. Becky is also a TN Sup. Ct. Rule 31 Approved Mediator. Becky received her undergraduate degree

from the University of Michigan with a certificate in physical therapy. She attended Case Western Reserve University where she obtained a Masters Degree in Health Sciences Education. Becky worked as a physical therapist in Detroit and Harrisburg, Pennsylvania before moving to Cleveland, Ohio where she taught in the Physical Therapist Assisting program at Cuyahoga Community College. She attended Cleveland-Marshall College of Law in Cleveland, Ohio, where she was an editor of the Cleveland State Law Review. Becky received her law degree from the University of Tennessee. She is a past president of the Tennessee Defense Lawyers Association and served on the Board of Governors for the Knoxville Bar Association for three years.

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“changes the relationship of the federal government to the individual in [a] very fundamental way.” The Justices seemed troubled by the government attorney’s difficulty in articulating a limiting principle, either as to the scope of the Commerce power or the scope of the regulated market. This difficulty in finding a principle that would expand Commerce Clause jurisprudence to approve the individual mandate without greatly expanding Congress’ power in general may be the greatest sticking point with the Justices.

The federal government also defended the individual mandate under the argument, which it has argued unsuccessfully in numerous federal courts, that the mandate is in fact a tax and is proper under Congress’ taxing power. The Justices seemed underwhelmed by this argument, and it appeared to be in tension with the government’s argument, advanced as to the AIA argument, that the penalty should not be treated as a tax.

On the final day of arguments, the Court took up the third challenge, the question of whether the individual mandate is “severable” from the rest of PPACA. In other words, if the Court were to strike down the individual mandate, would any of the rest of the law survive? And if so, how would the surviving parts be determined, and by whom? This was the only argument in which the employer mandate—which is unquestionably within Congress’ power—factored in at all. The attorney for the plaintiffs argued that the purpose of the law was to effectuate the mandate, and that therefore the entire law should stand or fall as one. The plaintiffs’ attorney further argued that even if certain provisions of the law, such as the breast feeding provisions, were not inextricably linked to the individual mandate, the employer mandate is linked to the individual mandate and must fall with it. The attorney for the government, on the other hand, argued that the employer mandate, as well as virtually all the other provisions, could survive independently.

Whether or not the Justices agreed with which portions are central to the law, or even as to which theory of severability should prevail, the Justices seemed hesitant to accept the argument, advanced by an attorney specially appointed to argue the point, that only the individual mandate should be struck if it is found to be unconstitutional. The Justices seemed to think that it would be better to either strike the entire law and return a “blank slate” to Congress, or to try to draw some line around the individual mandate. The line would certainly include the community rating and guaranteed issue provisions, but could well also encompass the employer mandate which, as the plaintiff’s attorney pointed out, is fairly closely linked to the individual mandate by way of the Exchanges.

Finally, the last argument that the Court considered was the state plaintiffs’ challenge to the Medicaid expansion as impermissibly coercive. This argument was given short-shrift in many lower courts, but the Justices seemed keenly interested in whether PPACA’s Medicaid provision, which requires states to either dramatically expand their Medicaid rolls or forfeit federal Medicaid funding altogether, is a violation of federalism principles.

So come the end of June, what is the likely outcome? There is one cardinal rule about predicting Supreme Court outcomes, which is that the prediction should never be based upon the Justice’s questions during oral argument, because those questions may or may not indicate which way the Justice will ultimately vote. Justices Alito and Thomas will almost certainly vote to strike the mandate and Justices Ginsburg and Breyer will almost certainly vote to uphold it. The rest of the Justices, in this attorney’s view, are a toss-up. Given the dearth of reliable information, then, I turned to my old favorite source: the Magic 8 Ball. When I asked whether the Supreme Court would invalidate the individual mandate, the 8 Ball said (honestly), “Better Not Tell You Now.” Even the 8-Ball is hedging. But when I asked if the Court would throw out the entire law, the 8-Ball replied, “Don’t Count on It.”

You heard it here first.

unions to provide the state with organizational and financial information, increase the amount of penalties that can be levied on labor groups violating the right-to-work provisions, and allow workers to revoke the authorization for union deductions (check-offs) at any time. The legislation also would bar the use of project labor agreements on public construction projects. Discussing the legislation, Haley said “[W]e don’t have unions because we don’t need unions.” The state of South Carolina has already passed legislation attempting to protect workers’ rights to a secret ballot. Also in January, Haley issued an executive order (No. 2012-02) aimed at insuring that striking union members are not given unemployment benefits by the state. To the extent any of these measures contradict the NLRA, the federal law would control. Nevertheless, is it interesting to note the current impulse toward ensuring even greater employee freedom in the right-to-work setting.