



OBAMA ADMINISTRATION POSTPONES EMPLOYER PENALTIES AND CERTAIN OTHER REQUIREMENTS UNTIL AFTER 2014 ELECTIONS



Mary Moffatt Helms

"The Obama administration announced that it will postpone the effective date of several requirements imposed on employers under the Affordable Care Act."

On July 2, 2013, in a Treasury Department blog post, the Obama administration announced that it will postpone the effective date of several requirements imposed on employers under the Affordable Care Act ("ACA"). On July 9, 2013, the IRS issued Notice 2013-45, which provides some guidance on the transition relief for 2014 regarding §§ 6055, 6056 (information reporting) and §4980H (employer shared responsibility) of the ACA, and indicates proposed rules are expected to be published later this summer.

The blog post indicates that large employers (those with 50 or more employees) will not be subject to the employer shared responsibility payments until 2015. In other words, for 2014 only, large employers who do not offer health coverage to at least 95% of their employees will not have to pay a penalty of as much as \$2,000 per employee per year for all employees (less 30) if just one employee obtains tax subsidized coverage in a State Exchange. Also, for 2014 only, employers who offer health coverage that is not affordable or that does not provide minimum value will not have to pay a penalty of as much as \$3,000 per year for each employee who obtains tax subsidized coverage in a State Exchange.

The blog post also mentions that, for 2014 only, employers will not have to comply with certain information reporting requirements. All employers will not be required to file information returns that include details about the employees who have employer-provided health coverage, the type of coverage, and the premiums paid. Large employers will not have to submit information returns that disclose information about their health coverage and their full-time employees and that are necessary for determining the employer and individual penalties.

..... This transitional relief does not yet extend to employees. Employees may have access to tax subsidized coverage in the State Exchanges and may be subject to the individual penalties if they do not have minimum essential coverage. On July 9, White House Press Secretary Jay Carney said that the individual mandate would take effect as planned, although Republican leaders are calling for the same one-year delay for individuals as has been granted for employers.

What does this transitional relief mean for large employers? Large employers who offer health care coverage to their employees still must prepare for implementation of all other ACA requirements that become effective in 2014, such as reducing the waiting period for coverage to no more than 90 days. Otherwise, such employers will be subject to other penalties imposed by federal law and to lawsuits by employees based on violations of their rights under the ACA and other federal laws. Large employers who do not offer health care coverage to their employees may have another year to decide whether to offer coverage.

There have been many comments as to the reasons for the delay. The Administration stated that the decision is one of accommodating business, but many questions remain as to whether the government is ready to implement the new law. Regulations have not been issued in many areas, including regulations covering information that was to be provided to each employee starting October 1, 2013, as to options of participating in the State Exchanges, and regulations necessary for reporting data to the government. Further, reports indicate that the new computer systems necessary to implement the law have not yet been installed. Indeed, the Government Accountability Office has reported that various steps are still necessary for building the State Exchanges.

Employers need to follow carefully subsequent developments and hopefully additional guidance on these matters will be issued in the near future.

ACCESS BY UNION REPRESENTATIVES TO SAFETY INSPECTIONS OF BOTH UNION AND NON-UNION FACILITIES



Gerard Jabaley.....

"The OSHA inspector has the right to 'exercise discretion over who participates in workplace inspections.'"

During April of 2013, the Occupational Safety and Health Administration (OSHA) issued a controversial letter dealing with OSHA Standard 29 C.F.R. Section 1903.8(c). This standard allows workers at establishments without collective bargaining agreements to designate who will act on their behalf during OSHA safety inspections. The standard says that "representative(s) authorized by employees shall be an employee(s) of the employer" but goes on to say that if in the inspector's judgment "good cause has been shown why accompaniment by a third party who is not an employee" is necessary to conduct an inspection, a third-party representative may be present. In the letter released April 5, the OSHA inspector has the right to "exercise discretion over who participates in workplace inspections," such as by declining to allow representatives to accompany the inspector if the representatives' presence would harm the inspection. Employers fear that the letter opens the door to representation by union business agents and others who may use OSHA inspections as an organizing tool, and also forces OSHA inspectors to take sides where employee factions select different representatives. Unions have broader rights of access to facilities where employees are represented by a union. For example, unions may have the right under the National Labor Relations Act to have access to a facility to conduct a health and safety inspection after a significant industrial accident. See, e.g., Caterpillar, Inc., 195 LRRM 1400 (2013).



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HOW SUPREME COURT GAY MARRIAGE RULING AFFECTS EMPLOYERS



Jeff Jones.....

“The DOMA decision allows some same-sex married couples to enjoy many federal tax-related benefits, including taxpayer-friendly employee benefits, previously available only to opposite-sex married couples.”

In a ruling issued by the U.S. Supreme Court on June 26, 2013, the Court declared unconstitutional Section 3 of the federal Defense of Marriage Act (DOMA), which defines marriage as a legal union between a man and a woman for purposes of more than 1,000 federal laws. The majority indicated that by denying federal recognition to a marriage recognized as legitimate under state law, the federal law violated the Constitution’s guarantees of equal protection and due process. *U.S. v. Windsor*, _____ U.S. _____ (June 26, 2013). A companion case, *Hollingsworth v. Perry*, raised the issue whether the 14th Amendment’s equal protection clause prohibited the State of California from defining marriage as the union of a man and a woman. The Court did not reach the merits of this particular issue, but instead denied review on technical grounds and left standing a lower court ruling that struck down California’s Proposition 8, which banned gay marriage.

Technically, the Supreme Court rulings do not address whether there is a federal constitutional right for same-sex marriage under the laws of the various states, thus suggesting there will be further litigation addressing that particular issue. The ruling does not address a separate DOMA provision that states need not recognize same-sex marriages permitted by other states. Justice Scalia, however, writing for the dissent, indicated that the majority has provided a “blueprint” for extending gay marriage nationwide.

In the meantime, the rulings of the Court will play out in the states in two ways. First, numerous legal challenges will be made in those states prohibiting same-sex marriages, and at the same time efforts will be made in the states to overturn legislatively the banning of same-sex marriages. Currently, at least eight states recognize full or limited civil unions or domestic partnerships, plus the District of Columbia. Some 37 states have laws or constitutional amendments prohibiting same-sex marriages.

..... The DOMA decision allows some same-sex married couples to enjoy many federal tax-related benefits, including taxpayer-friendly employee benefits, previously available only to opposite-sex married couples.

The DOMA decision does not have any immediate effect on State laws, including the laws of those 37 states that do not recognize same sex marriages. Thus, employers in States that do not recognize same-sex marriages can pretty much continue with business as usual.

The DOMA decision, however, does affect employers in those jurisdictions that recognize same-sex marriage: Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia. In those jurisdictions, the term “spouse” now may include a same-sex spouse, at least for purposes of federal law. Accordingly, employers in those jurisdictions must begin evaluating how the DOMA decision affects their cafeteria plans, health flexible spending accounts, health savings accounts, retirement plans and other benefit plans. In addition, employers in those jurisdictions will have additional COBRA/FMLA obligations.

The issue drawing everyone’s immediate attention is what to do about gay spouses who are married in states allowing such marriages, but who currently live in states that do not recognize same-sex marriages. Under past practices, many federal benefits such as Social Security turn on the validity of a marriage under the law of the state where the couple resides. The IRS will have to address these issues. Employers will have to address similar issues.



KNOW YOUR ATTORNEY ANNE T. McKNIGHT

ANNE T. McKNIGHT is a Senior Associate in the Nashville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in October 2009. Anne’s practice includes an emphasis in employment law, workers’ compensation, insurance defense and general civil defense litigation. Anne received her Bachelor of Science degree in Communication from the University of Kentucky in 2003, and a Doctor of Jurisprudence Degree from the University of Kentucky, College of Law in 2007. Prior to joining the Firm, she spent over two years with general civil defense firms in Nashville, Tennessee. Anne is a member of the Green Hills Rotary Club, the Honorable Order of the Blue Goose, International, the National Society of Professional Insurance Investigators, and the Mid-South Workers’ Compensation Association.

SUPREME COURT GREEN-LIGHTS MANDATORY ARBITRATION CLAUSES, FORESTALLING CLASS ACTIONS: COULD BE GOOD NEWS FOR EMPLOYERS



Jerome D. Pinn....

"All three Supreme Court decisions make it more difficult for litigants to bring class action claims in the future."

Will a mandatory agreement to submit disputes to one-on-one arbitration, bypassing class actions, hold up in court? The Supreme Court just said "yes" in a case involving credit cards – and this could be very significant news for employers who want to ensure that disputes with employees are handled confidentially, one at a time, rather than through protracted (and expensive) class actions in court.

In *American Express v. Italian Colors Restaurant*, a restaurant wanted to accept American Express credit cards for payment. To do that, it had to enter into an agreement with the company that contained two important conditions. First, any dispute would have to be settled in one-on-one arbitration: no class actions allowed. Second, if it wanted to take American Express credit cards, it also had to agree to take the company's debit cards. Retailers must pay high fees for both privileges, and the fees for debit card purchases are particularly high.

The restaurant and a number of other merchants decided to sue American Express, claiming that the debit card requirement was an illegal "tying" arrangement that violated the antitrust laws. But since all of the merchants had signed the one-on-one arbitration agreement as a condition of accepting the cards, American Express said they couldn't file a lawsuit, let alone a class action. The trial court agreed with American Express and dismissed the case, but the Court of Appeals agreed with the merchants and reversed, in part because enforcing the one-

on-one arbitration requirement would make it prohibitively expensive to litigate the antitrust claims. American Express asked the Supreme Court for review.

The Supreme Court came down squarely in favor of enforcing the arbitration agreement between American Express and the merchants. Justice Scalia, writing for the majority, found that abiding by the agreement between the parties was more important than any other consideration (such as enforcing the antitrust laws). Italian Colors had signed an agreement with American Express that precluded class actions, and was bound by its terms.

The *American Express* decision is consistent with the Court's other recent class action decisions, *Dukes v. Wal-Mart* and *Comcast*, which focused on the necessity to look at injuries and damages on an individual level rather than engaging experts to argue collectively. Class actions are where the big money is in litigation, although less for the class members, who often receive coupons entitling them to discounts from wrongdoing retailers, than for the lawyers, who routinely collect 7-or 8-figure fees. The expense of defending a class action, and the risk of financial ruin if you lose, often all but force a company to settle, even if they believe they would win in the end.

So, what does this mean for employers? Potentially, a lot. All three of these Supreme Court decisions make it more difficult for litigants to bring class action claims in the future. What the *American Express* decision adds to the mix is that an agreement to arbitrate disputes one-on-one, rather than through a class action, will be honored. Employee-rights organizations will protest, but employers could require the same sort of agreements as a condition of employment, thereby protecting themselves from exposure to class action suits for back wages, discrimination, or other alleged violations. If you don't think that will be important, just ask any employer who's been on the receiving end of a class action.

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