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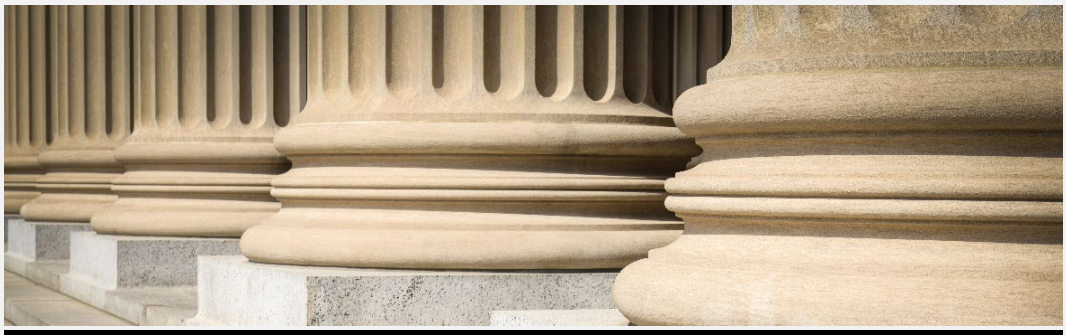

Rewards Policy Insider
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In this Issue:

Supreme Court Rejects Latest Legal Challenge to the Affordable Care Act

The Affordable Care Act ("ACA") of 2010 has survived yet another legal challenge. By a 7-2 margin, the Court held that Texas and other plaintiffs do not have legal standing to bring their claim that the ACA's individual mandate, as amended in 2017 to reduce the individual shared responsibility penalty to zero, is unconstitutional. For employers and other stakeholders, the Court's ruling means the ACA will continue in effect for the foreseeable future.

Background

This is the second challenge to the ACA's individual mandate the Supreme Court has heard, and the third time the ACA has been before the Court. In 2012, the Supreme Court rejected a claim that Congress did not have the authority to require individuals to purchase and carry health insurance coverage. A 5-4 majority held that the individual shared responsibility requirement was a proper exercise of Congress's power to tax. *NFIB v. Sebelius*, 567 U.S. 519 (2012).

Then, in 2017, Congress amended the ACA to reduce the individual shared responsibility penalty to zero. That move revived questions about the constitutionality of the individual mandate because there was no longer a penalty/tax associated with it. That prompted Texas and 12 other states to file the lawsuit that was the subject of the Supreme Court's most recent decision.

Initially, a U.S. district court ruled the individual mandate, as amended, was unconstitutional. Furthermore, it ruled the individual mandate could not be severed from the rest of the ACA, and thus the entire ACA – including all the requirements for employers and employer-sponsored group health plans – were unconstitutional as well.

On appeal, the Fifth Circuit Court of Appeal agreed with the district court that the individual mandate was unconstitutional. However, it remanded the case back to the district court for reconsideration of the severability question. But before the district court could take up that question, the Supreme Court accepted an invitation by the parties to review the Fifth Circuit's opinion.

Supreme Court Decision

The Supreme Court did not address the substantive question of the constitutionality of the ACA's individual mandate. Instead, it ruled that the plaintiffs did not have standing to bring the lawsuit to begin with. Specifically, the Court found that because there is no longer a penalty attached to the individual mandate, there was no way the IRS, Department of Health and Human Services (HHS), or any other federal agency or employee could take any action with respect to the individual mandate that would cause any injury to the plaintiffs. Without the possibility of injury, the Court concluded the plaintiffs did not have standing to challenge the individual mandate.

What Does the Supreme Court's Decision Mean for Employers?

Through legal and political challenges, the ACA has proved it has staying power over the course of its 11-year history. Still, the almost constant uncertainty about the ACA's future has created a challenging environment for employers offering group health benefits to employees and managing the related costs.

The resolution of this case, along with the Supreme Court's 2012 decision, may finally signal the end of constitutional challenges to the ACA. If so, employers and other stakeholders may – at least until the next election – be able to plan for the future without worrying about significant and abrupt shifts to the regulatory framework for group health benefits.

Treasury and Labor Departments Issue Regulatory Agendas

The Biden Administration issued its first regulatory agenda on June 11 to identify projects that each Federal agency intends to release in the next 6-12 months, with targeted dates. As usual, the agendas for the Departments of Labor and Treasury include numerous projects relating to employee benefits. Some of the more significant of these are highlighted below.

Department of Labor

- Fiduciary Rule. As expected, DOL has formally announced its intent to propose a "major" rule that is "economically significant" to modify the definition of fiduciary in the context of investment advice. The description of the project, while high level, sounds similar to the 2016 rule and could include revisions to the prohibited transaction regime. This project is targeted for release in December 2021.
- Lifetime Income Disclosure. This is an update to DOL's "interim final rule" on the new lifetime income disclosure requirement for 401(k) plans. The agenda lists this for a July 2021 release of a "final" regulation. Note that this project has not been sent to the Office of Management and Budget (OMB) for review, so this timing seems unlikely.
- Environmental, Social, and Governance (ESG)/Proxy Voting. President Biden issued an executive order directing DOL to issue new ESG and proxy voting rules by September 2021. The regulatory agenda repeats this date.
- Form 5500. Proposed regulations expected in June 2021 will make changes to the Form 5500 to implement the SECURE Act, particularly the new "group of plans" rule which allows a consolidated annual report for certain groups of similar plans. This revision may also reflect new reporting for pooled employer plans (PEPs).
- Prohibited Transaction Procedures. A new project, which is targeted for December 2021, will update the procedures for requesting prohibited transaction exemptions.
- Provider Nondiscrimination Requirements for Group Health Plans. A proposed rule to implement the provider nondiscrimination

requirements included in the Consolidated Appropriations Act, 2021 is expected by January 2022.

Treasury/IRS

- Hybrid Plans. These proposed regulations, scheduled for release in December 2021, will provide guidance on the application of the nondiscrimination requirements, the backloading limitations, certain plan termination rules, the benefit limitations, and the top-heavy rules to cash balance plans, pension equity plans, and variable annuity plans.
- Nondiscrimination Relief for Closed DB Plans. The regulations, expected by December 2021, would amend the existing IRC § 401(a)(4) and IRC § 401(a)(26) regulations applicable to certain defined benefit plans and defined contribution plans that provide additional benefits to a grandfathered group of employees to reflect modifications enacted by section 205 of the SECURE Act.
- Minimum Present Value for Lump Sum Distributions. These will be final regulations reflecting changes to IRC § 417(e) made by the Pension Protection Act of 2006. The proposed regulations were issued in 2016, and the final regulations are now scheduled for release by December 2021.
- Required Minimum Distribution (RMD) Regulations. The proposed regulations will implement changes to the required minimum distribution rules made by the SECURE Act. The agenda lists the proposed regulations for release in September 2021.
- Implementing SECURE Act changes for 401(k) Plans. A project to implement various changes made by SECURE Act, including certain aspects of the rules governing safe harbor 401(k) plans and for long-term part-time employees, is targeted for December 2021.
- Government and Church Plans. The long-standing project to define what constitutes a governmental plan remains on the agenda, now listed as a proposed regulation in April 2022. A related project on church plans is listed for release in December 2021.
- Normal Retirement Age Rules for Governmental Plans. Final regulations to apply the normal retirement age regulations to governmental plans are scheduled for December 2021.
- Surprise Billing (2 Parts). The agenda includes two sets of temporary final rules implementing the new surprise billing requirements included in the Consolidated Appropriations Act, 2021. The first rules are scheduled for release in July 2021; the second are scheduled for October 2021. Note that these projects also are listed on the Department of Labor's agenda, as well as the Department of Health and Human Services' agenda.
- Applying Employer Shared Responsibility and Nondiscrimination Rules to HRAs. Expected by September 2021, these final regulations will address issues relating to applying the ACA's employer shared responsibility rules and other rules to HRAs and other account-based group health plans.

More on these and other regulatory developments will be included in future editions of the Rewards Policy Insider as details become available.

ERISA Claims Administrators May Have to Provide Audio Recordings of Telephone Conversations with Participants Upon Request

A Department of Labor (DOL) Information Letter (06-14-2021) clarifies that audio recordings of telephone conversations between an ERISA plan participant and the plan's insurer about an adverse benefit determination can be a relevant document, record, or other information that a claims administrator may have to turn over to a participant on request, pursuant to ERISA's claims procedure rules.

Especially in the group health plan context, a participant's claim for benefits – including appeals of an adverse benefit determination – may include telephone conversations between the participant and the claims administrator. These calls are often recorded for "quality assurance purposes." However, the content of conversations between a participant and claims representative might include substantial information that is relevant to a participant's claim for benefits.

An audio recording and transcript of one such conversation was at issue in the DOL's information letter. The participant's attorney asked for the audio recording and transcript pursuant to the ERISA claims procedure regulation, which states "a claimant shall be provided, upon request … copies of, all documents, records, and other information relevant to the claimant's claim for benefits." DOL Reg. § 2560.503-1(h)(2)(iii). For this purpose, the regulations define "relevant" to mean the document, record, or other information:

> (i) was relied upon in making the benefit determination; *(ii) was submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;* (iii) demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5); or (iv) constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination. (Emphasis added)

See DOL Reg. § 2560.503-1(m)(8).

Even if, as the claims administrator argued, the information in the audio recording was *not* relied on in making the adverse benefit determination, the information letter points out it still must be given to the claimant because "it was generated in the course of making the benefit determination."

Also, the information letter notes, "nothing in the regulation requires that 'relevant documents, records, or other information' consist only of paper or written materials."

Why Does this Matter?

ERISA's claims administrators should be aware of their obligations to disclose information about a participant's adverse benefit determination as part of the internal appeals process. Failing to do so could lead to unnecessary (and expensive) litigation that the ERISA claims procedure rules are designed to try to avoid.

Additionally, the information letter might prompt some ERISA plan administrators, insurers, claims administrators, etc. to revisit previous decisions to record conversations with participants. The information letter does not suggest that conversations such as these must be recorded. Instead, it addresses only a participant's right when appealing an adverse benefit determination to demand such recordings and transcripts if they exist.