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**GRIST**

## LATEST ACA CASE: APPEALS COURT RULES INDIVIDUAL MANDATE UNCONSTITUTIONAL

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The 5th US Circuit Court of Appeals has upheld a lower court ruling that strikes down the individual mandate as unconstitutional, but did not decide if any other parts of the Affordable Care Act (ACA) must fall (*Texas v. United States*, No. 19-10011 (5th Cir. Dec. 18, 2019)). The case will go back to the US District Court for Northern Texas for additional analysis, will likely be subject to additional appeals and could eventually reach the US Supreme Court. Democrats — many of whom successfully ran on protecting the ACA in the 2018 elections — are likely to make healthcare part of their platforms during the 2020 elections. Employers need to follow this case as it winds its way through the courts, but should stay the course with regard to ACA compliance.

### ACA'S FUTURE STILL AT STAKE

The case arose shortly after Congress failed to repeal and replace the ACA, but enacted 2017 tax reforms that cut the individual-mandate penalty to \$0 starting in 2019. Texas and other Republican-led states and two private citizens sued, arguing the individual mandate is unconstitutional if it no longer imposes any tax. They also argued that the individual mandate is integral to the ACA, so if that mandate is unconstitutional, then the entire law must fall. The Supreme Court had upheld the constitutionality of the ACA's individual mandate in 2012 based on Congress' power to tax (*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 US 519 (2011)).

The lower court sided with the GOP states, ruling that if the individual mandate's penalty is \$0, the mandate is unconstitutional (*Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018)). The court also agreed with the GOP states, holding that the mandate can't be severed from the rest of the ACA, so the entire ACA is invalid. The judge [stayed the ruling](#) pending appeal.

The US Department of Justice (DOJ) originally [declined](#) to defend the case, then [argued](#) in the lower court that only certain parts of the ACA should be struck (like the ban on pre-existing condition exclusions). On appeal, the DOJ argued that the entire ACA should fall but only in the states that brought the case.

## APPELLATE DECISION

The 5th Circuit upheld the lower court's ruling that the individual mandate is no longer constitutional because it is no longer a tax. However, the appellate court asked the district court for more analysis on "severability" and the DOJ's arguments raised on appeal. Severability is a legal concept that allows a court to declare a single provision within a larger piece of legislation invalid without striking related provisions.

The 5th Circuit said that the severability analysis in the district court opinion is incomplete in two ways and needs to be reviewed again by the lower court. First, the lower court gave relatively little attention to the intent of the 2017 Congress, which — unlike the 2010 Congress — had observed the ACA's actual implementation before reducing the individual mandate to \$0 without making other changes. Second, the district court did not do the necessary legwork of parsing through the 900-plus pages of the post-2017 ACA to explain how particular segments are inextricably linked to the individual mandate.

The appellate court also wants the lower court to consider the DOJ's arguments first raised on appeal. The DOJ now says that the court should either tailor any relief in this case to enjoin enforcement of only those provisions that cause injury to the plaintiffs or declare the entire ACA unconstitutional only in the plaintiff states and as the law relates to the two private citizen plaintiffs.

## WHAT'S NEXT PROCEDURALLY

A number of different things could happen procedurally as a result of this decision. The case could go back to the district court as directed by the appellate court; the parties could ask for a rehearing en banc (before the entire 5th Circuit Court of Appeals); or the Supreme Court could get involved. The attorney general in California, one of the intervening states defending the ACA in this lawsuit, has [announced](#) his intention to appeal the 5th Circuit's decision to the Supreme Court. Whatever happens, this litigation will take some time to play out.

## EMPLOYERS SHOULD STAY THE COURSE

Though the 5th Circuit found the individual mandate unconstitutional, the ruling has no immediate impact on employers or employees, since Congress has already reduced the penalty for those without health insurance coverage to \$0. The more important question continues to be whether the courts will conclude that other ACA provisions — or all of the ACA — are integral to the individual mandate and must also be invalidated. The Supreme Court will likely have the final say.

For now, employers should continue to comply with all aspects of the ACA, including the employer shared-responsibility requirements, IRS assessments and related reporting obligations. Employers should monitor further developments in the courts and in Congress.

## RELATED RESOURCES

### Non-Mercer Resources

- [Texas v. United States](#), No. 19-10011 (5th Circuit, Dec. 18, 2019)
- [Response to Justice Department's Supplemental Letter Brief in Texas v. US](#) (California Attorney General, July 5, 2019)
- [Justice Department's Letter Declining To Appeal Texas v. US](#) (5th Circuit, March 25, 2019)
- [States' Appeal Brief To Overturn Texas v. US](#) (5th Circuit, March 25, 2019)
- [Stay and Partial Final Judgment in Texas v. US](#) (N.D. Texas, Dec. 30, 2018)
- [Partial Summary Judgment in Texas v. US](#) (N.D. Texas, Dec. 14, 2018)
- [Justice Department's Brief on Severability of ACA's Individual Mandate](#) (N.D. Texas, June 7, 2018)
- [Attorney General's Initial Letter Declining To Defend ACA in Texas v. US](#) (DOJ, June 7, 2018)
- [Nat'l Fed'n of Indep. Bus. v. Sebelius](#), 567 US 519 (2011)

### Mercer Law & Policy Resources

- [2019 Compliance and Policy Outlook for Employer-Sponsored Health Benefits](#) (Feb. 6, 2019)
- [2019 Outlook for Courts To Invalidate the ACA](#) (Feb. 6, 2019)

### Other Mercer Resources

- [Employers Will Face Difficult Decisions If ACA Ruling Stands](#) (Dec. 17, 2018)
- [ACA Returns to Court](#) (Sept. 6, 2018)
- [GOP on Defense Over ACA Pre-Existing Condition Protections](#) (June 14, 2018)

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