

Federal Judge Declares the Affordable Care Act Unconstitutional

On December 14, 2018, a federal judge in Texas ruled that the entire Affordable Care Act (ACA), also known as ObamaCare, is unconstitutional because of a recent change in federal tax law.

The opinion, by U.S. District Judge Reed O'Connor, overturns all of the law nationwide. If the ruling stands, it will create widespread disruption across the U.S health-care system, potentially upending hundreds of provisions in the law that was a prized domestic achievement of President Barack Obama.

In this issue we will explain how this ruling came about, how the ruling might affect seniors, and what we can expect going forward.

Explaining the Ruling

In 2010, the ACA created an individual mandate to expand health insurance coverage, along with Medicaid expansion and subsidies for moderate and low-income households. The mandate required most Americans to maintain "minimum essential" coverage, enforced through a "shared responsibility payment" in the form of a tax. In short, those who chose not to have health insurance were required to pay a tax penalty.

In 2012, the Supreme Court's Chief Justice John Roberts Jr. wrote that the penalty the law created for Americans who do not carry health insurance is constitutional because Congress "does have the power to impose a tax on those without health insurance." (In that same ruling, the Court struck down the ACA's provision that was set to expand Medicaid nationwide, instead of letting each state decide on its own whether to participate in Medicaid expansion.)

In December 2017, Congress enacted the *Tax Cuts and Jobs Act* which reduced the tax penalty to \$0, effectively eliminating the individual mandate. In June 2018, the Texas Attorney General, joined by 18 additional Republican state attorneys general and two governors, filed a lawsuit in the U.S. District Court for the Northern District of Texas. Their lawsuit argued that with the enforcement of the insurance requirement gone, there is no longer a tax, so the law is no longer constitutional. "Once the heart of the ACA—the individual mandate—is declared unconstitutional, the remainder of the ACA must also fail," their lawsuit states.

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Judge O'Connor agreed. He wrote that the individual mandate is unconstitutional, saying that it "can no longer be fairly read as an exercise of Congress' tax power." He concluded that this insurance requirement "is essential to and inseparable from the remainder of the ACA," and declared the entire ACA unconstitutional.

Texas Attorney General Paxton praised the ruling, saying that it "halts an unconstitutional exertion of federal power over the American health care system" so that Congress can have "the opportunity to replace the failed social experiment with a plan that ensures Texans and all Americans will again have a greater choice about what health coverage they need and who will be their doctor."

The decision was announced in the closing hours of open enrollment, which led to some confusion for last-minute enrollees. The White House issued a statement to alleviate concerns, saying, "We expect this ruling will be appealed to the Supreme Court. Pending the appeal process, the law remains in place."

The Department of Health and Human Services (HHS) also issued a statement that the court's ruling was "not an injunction that halts the enforcement of the law and not a final judgment" and said the agency would "continue administering and enforcing all aspects of the ACA."

What Happens Next?

The ACA has already made its way twice to the U.S. Supreme Court, once in 2012 and again in 2015, and it does appear to be headed there again.

California Attorney General Xavier Becerra, a Democrat and former U.S. Congressman, is leading a group of states defending the ACA and is challenging the ruling in the U.S. Court of Appeals for the 5th Circuit. Colorado, Iowa, Michigan, and Nevada recently joined California and 16 other Democrat state attorneys general in the appeal. The U.S. House of Representatives has also moved to intervene as a defendant. The Democrats contend that while the Republican tax law eliminates the federal penalty for being uninsured, it does not negate the entire ACA's constitutionality. They also argue that Congress intended to keep the ACA in place when it set the individual mandate penalty to zero while leaving the rest of the law intact.

Judge O'Connor's ruling goes beyond the Trump administration's legal position in the case. In a June 2018 court brief, Justice Department officials contended that once the insurance mandate's penalty is gone, the ACA's consumer protections, such as its ban on charging more or refusing to cover people with pre-existing medical conditions, would be invalidated. However, they stated that many other parts of the law could be considered legally distinct and therefore continue.

Typically, the executive branch argues for upholding existing statutes in court cases, but in this case, the administration took the unusual step of telling the court that it will not defend the ACA against this latest challenge. The Trump administration has been taking steps on its own to foster alternative insurance that would be less expensive because it does not have certain ACA requirements. After the ruling, President Trump encouraged Congress to pass a "strong law that provides great healthcare and protects pre-existing conditions."

In its statement, the HHS added that the administration "stands ready to work with Congress on policy solutions that will deliver more insurance choices, better health care, and lower costs while continuing to protect individuals with pre-existing conditions."

How Would Ending the ACA Affect Seniors?

Many experts are skeptical that this decision will ultimately be upheld by the Supreme Court. However, if the Court does determine that the ACA is unconstitutional after eight years of implementation, almost every aspect of health care as we know it today would be affected.

For example, the ACA provided:

- Coverage for more than 19 million people who were previously uninsured;
- Protections for people with pre-existing conditions;
- Insurance marketplaces and premium subsidies for low- and modest-income people;
- Expansion of Medicaid eligibility for low-income adults;
- Coverage of preventive services with no cost-sharing for those enrolled in private insurance, Medicare and Medicaid expansion;
- Phase-out of the “doughnut hole” gap in Medicare drug coverage and reductions in the growth of Medicare costs (see below); and
- New national initiatives to promote public health and quality of care, including programs to fight obesity, curb tobacco use, prevent the onset of chronic conditions such as diabetes and heart disease, promote immunization, and detect and respond to infectious diseases and other public health threats.

Without a replacement for the ACA, it is estimated that over 4.5 million older adults age 55-64 who have coverage through the marketplaces and Medicaid expansion would lose access to health care. For millions more, health care would become either unaffordable or unattainable because health insurance companies would again be permitted to charge seniors based on age, and increase premiums or deny coverage to the 8 out of 10 older adults with a pre-existing condition.

There would also likely be changes to Medicare that would affect millions of seniors, including:

- *Increase in Part A deductibles and copayments, as well as Part B premiums and deductibles paid by beneficiaries.* The ACA included provisions that adjusted the rate of growth in payments to hospitals and other healthcare providers. Should the ruling be upheld, provider costs could be expected to resume growing at faster rates, causing out-of-pocket costs to climb more rapidly for beneficiaries.
- *Medicare premiums would take a greater share of Social Security benefits.* Part B premiums grow several times faster than annual cost-of-living adjustments (COLAs), which in some years can mean less Social Security income to meet other household budget needs.
- *Increase in cost-sharing for Part B preventive benefits.* The ACA included a number of provisions that provide free coverage for some preventive benefits, such as screening for breast and colorectal cancer, cardiovascular disease, and diabetes. These free screenings could end, and beneficiaries would be expected to have higher costs in screening for these diseases.
- *Increase in spending by Part D enrollees who hit the doughnut hole coverage gap.* Before the ACA, beneficiaries who had drug spending high enough to reach the Part D doughnut hole paid 100% of the full retail cost of brand name and generic drugs until they spent the annual out-of-pocket threshold to qualify for catastrophic coverage. The ACA provided new discounts on brand name drugs in the coverage gap and slowed the growth in the out-of-pocket threshold required for catastrophic coverage. If the ACA ruling is upheld, beneficiaries would likely again be charged 100% of the undiscounted full retail price of their prescription drugs until they qualify for catastrophic coverage.

- *End to new sources of funding for Medicare Trust Funds.* The ACA established a 0.9% increase in the Medicare payroll tax on high-earnings workers, a 3.8% tax on net investment income for higher income taxpayers, and a fee on manufacturers and importers of brand name drugs. These generated additional revenue for the Part B Trust Fund (\$3 billion in 2015). Before passage of the ACA, Medicare trustees predicted that the Medicare Hospital Insurance Trust Fund would not have sufficient revenues to pay all Part A benefits by 2017. The current insolvency date is projected to be 2026, but if the ACA were overturned, this stream of revenue would cease.

Opposition to the ACA is Not New

The ACA has not been without its critics from the beginning. While some of the provisions have proven to be popular with consumers, there were complaints that it was too expensive and intruded on the freedom of choice. Some think the marketplaces are collapsing and, in some areas, only one plan is offered. Many complained early on that they could not keep the plan and doctors they had and liked. Some were “forced” onto Medicaid through the marketplaces when they did not want to be on Medicaid. Also, many have seen their health care premiums and out-of-pocket costs skyrocket, as they are required to pay for services for others that they do not use. However, many Americans lauded the ACA as a big step in the right direction to providing affordable quality healthcare for all.

What to Watch

The appeal process will take time, possibly years before it reaches the Supreme Court. In the meantime, the ACA will stay in effect. However, there may be some renewed interest in creating a replacement for the ACA that offers consumers more choices while keeping costs down and protecting those with pre-existing conditions.

Conclusion

We care deeply about issues that affect the elderly, the disabled, and our Veterans. We will continue to watch future developments in health care and how they affect our most vulnerable, and we will keep you informed.

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