

[Podcast]: Texas Judge Declares Affordable Care Act Unconstitutional

Employee Benefits & Executive Compensation Blog on **December 19, 2018**

In this episode of the Proskauer Benefits Brief, partner [Robert Projansky](#) and associate [Katrina McCann](#) discuss the recent district court case, *Texas et al. v. The United States of America*, which declared the Affordable Care Act (ACA) unconstitutional. On December 14, 2018, a district court judge in the Northern District of Texas deemed the entirety of the Affordable Care Act invalid because he found the individual mandate to be unconstitutional. From what would happen to the employer mandate to emergency care coverage, tune in as we discuss what these changes could mean for employers and plan sponsors if the court's decision is ultimately upheld.

[Listen to the podcast](#)

Katrina McCann: Hello and welcome to the Proskauer Benefits Brief legal insights on Employee Benefits and Executive Compensation. I'm Katrina McCann, and on today's episode I'm joined by Rob Projansky, and we're here to talk about the recent District Court case that declared the Affordable Care Act invalid. So, on December 14th, a Federal Judge in Texas deemed the entirety of the Affordable Care Act invalid because he found the individual mandate to be unconstitutional. The case is *Texas et al. v. The United States of America*. So Rob, this is not the first time that the Affordable Care Act has been in the Courts? Correct?

Rob Projansky: No, Katrina, actually it's not. In the most significant case on this topic the Supreme Court upheld the individual mandate in *National Federation of Independent Businesses v. Sibelius* some years ago. There were really two arguments in that case about whether Congress actually had the ability to impose an individual mandate. The first related to the Commerce Clause. Was the power to regulate interstate Commerce? Did that give the authority to Congress to impose an individual mandate? And the majority in that case said, "No it didn't", because forcing someone buy insurance is not regulating commerce. However, the majority ultimately upheld the individual mandate because what they said was that it fell within congressional power to tax. Said differently, the Federal Government can't force someone to buy insurance but can impose a tax if a person doesn't buy insurance.

Katrina McCann: So, why this was already decided by the Supreme Court, do we have another lower court decision on the constitutionality of the individual mandate at this point?

Rob Projansky: Yeah, so, the reason is that the Tax Cuts and Jobs Act intervened. So, the Tax Cuts and Jobs Act was a 2017 law that dropped the tax for violating individual mandate to zero. Why would they drop it to zero rather than to just get rid of individual mandate? A reasonable question. The answer is that, it had to be done thru the reconciliation process, which really just a congressional process where all you can do is change something with a tax impact. So, what happen was, they had no choice but to eliminate the tax. They couldn't simply just eliminate the mandate. What that means is the individual mandate remains in the law but there no tax for violating it.

Katrina McCann: So, why does it matter that the individual mandate is still there?

Rob Projansky: Great question. So, according to two individuals in the twenty states that sued the Federal Government in our case, it matters because it impacts whether the individual mandate can be upheld based on the power tax. If the tax was zero and the mandate to, still in the law, the argument was that it couldn't be supported by the taxing power, there is no tax. So it must be unconstitutional. The defendants, which were lead by a coalition of sixteen states that intervened in the case, said that the purpose of the Tax Cuts and Job Act was really to eliminate the individual mandate; but because of the legislative process that I mentioned, they could only do so by dropping the tax to zero. But in effect, the individual mandate didn't exist according to the defendants. So the judge actually ended up agreeing with the plaintiffs, and saying that, without a tax impact, the mandate is there but is unconstitutional because it simply can't be supported by the taxing power. Not only that, the judge stated that the individual mandate is such a critical component of the ACA that it can't be severed from it, and the whole statute is therefore invalid.

Katrina McCann: What's next after that?

Rob Projansky: The Court didn't issue a final order yet or an injunction, so the White House has stated the ACA remains in effect for now pending appeal. The judge in the case was asked to clarify that this is the case, so we are waiting to hear from the judge as to what's next. What we do know is that there will almost certainly be an appeal to the Fifth Circuit and now we wait.

Katrina McCann: And that's why we're suggesting that Employers basically stay the course for the time being.

Rob Projansky: That's right. So what we're saying to employers is that, as far as we know right now, the ACA remains the law of the land. That could change in the future. But for now we are just going to stay the course.

Katrina McCann: Rob, the media is focused on what this means to the Affordable Care Act as a whole and what this means to individuals? But let's talk about what this means to employers if the Court's decision is ultimately upheld.

Rob Projansky: And even the changes for employers would be pretty sweeping. So the first and most notable is that the employer mandate would go away. That's a tax that applies if the employer doesn't offer coverage to 95 percent of its full timers or coverage isn't affordable or minimal value and certain other things happen. That's going to go away, which means that there will be some additional denying flexibility for employers like there was before the ACA. The second thing, and pretty significant is that the substantive requirements for coverage that the ACA brought are also going to go away. So if you think back to pre-ACA rules, you can look at coverage for dependents, right now, under the ACA dependents have to be offered coverage under age 26. Before ACA, many plans covered someone up to age 19, or if the child was in school, or on a medical leave from school up to the age of 23 or something like that. Plans can now revert if they wanted to, to that type of arrangement. Out-of-pocket maximums would go away; annual life-time dollar limits, which were very common place prior to the ACA, would now be permitted again. Other things, maybe not as big an impact, for example, emergency care would no longer need to be covered at the network cost sharing level. Often in the past it was covered at that level by employer plans, but not always. Other changes include, for example, preventive care would no longer need to be covered at a zero-dollar co-pay. The claims and appeals enhancements would go away. So things like the external appeals requirements now go back to the pre ACA regime where insured plans have to do it if the state law requires it. But other than that it there wouldn't be a requirement for external review. Also, and this one is getting a lot of press, pre-existing conditions exclusions would be permitted. That's an interesting one because even those who oppose the ACA seem to be focused on finding a solution to the problem; and if you look at what politicians have said since this decision came out the other day, your, well, hearing a lot of people say, we're going to find another solution and then we'll protect people with pre-existing conditions. So it will be interesting to see if this decision is upheld, what happens next with respect to pre-existing conditions. The other thing is taxes will go away. There were some tax increases and those will change. For example, the much maligned Cadillac tax, which nobody really likes yet it stays there because it's a revenue provision, but that will go away. Other taxes like the Medicare surcharge tax for high earners, the medical device tax and health insurance tax, those will all disappear as well.

Katrina McCann: So, what I'm hearing is, stay tuned there's a lot more to come on this.

Rob Projansky: Yep, all eyes are going to be on this appeal for a while and, if the decision stands, as I said, it will be interesting to see what, if anything, Congress does to replace all of this; and if it doesn't, what the States will do?

Katrina McCann: Thanks Rob, and thank you for joining us on the Proskauer Benefits Brief. Stay tuned for more legal insights on Employee Benefits and Executive Compensation and be sure to follow us on iTunes.

[View Original](#)

[Related Professionals](#)

- **Robert M. Projansky**
Partner
- **Katrina E. McCann**
Senior Counsel