

June 28, 2012

## U.S. Supreme Court's Ruling on the Affordable Care Act: What Does It Mean?

### RESOURCE LINKS

#### Supreme Court's Decision in *National Federation of Independent Business v. Sebelius*

<http://www.ebglaw.com/webfiles/National-Federation-of-Independent-Business-v-Sebelius.pdf>

#### Decision 2012: What's In, What's Out, and What's Next?

[https://ecomms.ebglaw.com/reaction/RSGenPage.asp?RSID=GjU6L0gZvlsURQ2Tk3\\_p872LraxDMKk2fziUCrupAE6GYIXOQ\\_dwwCQSxjiVc08RLJCS-v03sdykVaoAd2xFuQ](https://ecomms.ebglaw.com/reaction/RSGenPage.asp?RSID=GjU6L0gZvlsURQ2Tk3_p872LraxDMKk2fziUCrupAE6GYIXOQ_dwwCQSxjiVc08RLJCS-v03sdykVaoAd2xFuQ)

By now, every American who pays any attention to the news is aware that the Supreme Court of the United States has upheld essentially all of the Obama administration's Affordable Care Act ("ACA"). We have posted a copy of the lengthy opinion, concurrence, and dissent [on our website](#). For now, we should be focusing on what the case of *National Federation of Independent Business v. Sebelius* actually will cause to occur.

For those who haven't yet dissected the opinions, the Court's controlling decision does two things. First, by a 5-4 majority led by the Chief Justice, the Court upheld the individual mandate, the single most controversial and essential provision of the ACA, not under the Commerce Clause, as its proponents primarily urged, but under the tax power—not as a requirement to buy health insurance, but as a tax if individuals don't. The four "liberal" Justices, concurring, would have upheld the mandate under the Commerce Clause. The net of this is that the Chief Justice surprised many people by creating a majority to uphold the law, but he also stood as a bulwark against

the expansion of the Commerce Clause to cover inactivity. In other words, you can't be forced to eat broccoli, but you might be subject to a tax or fine if the consumption of broccoli is found by Congress to be an important national interest and you refuse to eat it.

Second, what the Court did was to uphold, but limit, the controversial Medicaid expansion provision of the ACA. In short, the expansion survives, but if a state declines to participate in the expansion, it can't be constitutionally deprived of the federal Medicaid funding that it previously had received.

Okay, that's the opinion, but what is going to happen besides celebration among the administration's supporters? It is an election year, and the Republican House Majority Leader has already promised a vote this month on repealing the ACA in its entirety. That, however, includes not only the individual mandate but guaranteed issue irrespective of pre-existing conditions, dependent child coverage to age 26, and community rating provisions, all of which are popular. In any event, expect a lively legislative and presidential campaign issue.

From our viewpoint, the most important outcome will be in the marketplace. Hospital consolidation and expansion clearly will proceed apace. Health insurers will be able to move ahead, as some pledged to do irrespective of the decision, with what they had argued was the linchpin of the law—the individual mandate that was argued to prevent adverse selection—having been upheld. The accountable care organization (“ACO”) movement also should expand. And, overarching all of this, with significant uncertainty having been removed, much of the health care investment and expansion capital that has remained on the sideline will now be in play. At the same time, expect additional regulatory pressure with respect to insurance rates and reimbursement amounts, enhanced anti-fraud enforcement, and, notwithstanding the consolidation encouraged by the ACO regulations, significant new antitrust scrutiny.

Affirmance of the ACA’s Medicaid expansion will put additional pressure on already cashed-strapped states. It is unlikely that, in an election year, the administration will be unduly harsh in dealing with them. Indeed, its waiver stance so far has been flexible. We believe that, in any event, there will be substantial opportunities in Medicaid managed care as the states look for ways to cap and control their outlays.

With the ACA being upheld in its entirety, employers also must gear up for 2014, when the law requires that most employers must provide health insurance for all full-time employees and their dependents or pay a penalty. Seniors also are winners: the so-called “donut hole” in Medicare drug benefit will remain closed.

That’s the news from the front. We will be providing continuing guidance and analysis in the days to come. For example, we will have a webinar at 11 a.m. on Monday, July 2, 2012, that you may register for by [clicking here](#).

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For more information about this issue of *IMPLEMENTING HEALTH AND INSURANCE REFORM* or to discuss any of the constitutional ramifications of the *Sebelius* case, please contact the author below or the member of the firm who normally handles your legal matters.

**Stuart M. Gerson**  
MEMBER OF THE FIRM  
Washington, DC  
202-861-4180  
[sgerson@ebglaw.com](mailto:sgerson@ebglaw.com)

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Kristi Swanson  
Practice Development Manager  
National Health Care & Life Sciences Practice  
Epstein Becker & Green, P.C.  
1227 25th St., NW, Suite 700  
Washington, D.C. 20037  
phone 202/861-4186 – fax 202/861-3086  
kswanson@ebglaw.com

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