ACA Decision Should Not Delay Employer Prep For 2014

Since oral arguments ended at the U.S. Supreme Court, the media has been held captive by the predictions of attorneys and pundits as to the outcome. What most of these predictions have failed to capture, however, is that from an employer perspective, the Supreme Court’s decision is unlikely to have any significant impact on the applicability of the Patient Protection and Affordable Care Act (“ACA”). As a result, the court’s decision should not affect an employer’s preparation moving forward.

Absent a ruling that deems the Individual Mandate unconstitutional and not “severable” from the remainder of the law, the employer-specific provisions of the ACA will likely remain as enacted. For example, if the court rules the Individual Mandate to be unconstitutional but severable, it is unlikely that Congress has the political will to reopen the law and make additional changes such as removing the Employer Mandate.

In essence, the court’s review and ruling is the last major hurdle to clear for the employer provisions set to take effect in 2014. As a result, the Supreme Court decision itself should provide the impetus for employers who have not yet begun planning for 2014 to start such preparations.

The “Employer Mandate” is of paramount importance in such planning and will force employers to choose between providing benefits and dropping coverage and paying the associated penalty. The following discusses some of the considerations employers should be cognizant of and potential impacts that employers should consider in determining whether to continue to provide benefits or drop coverage.

Continue to Offer Benefits

The ACA forces employers to rethink the justifications they have relied upon for decades in providing employee benefits. In addition to increasing the cost of employer-provided plans, the ACA introduces several new factors employers should be cognizant of in deciding whether to continue the provision of benefits in a post-Employer Mandate world.

Increase in Cost

The ACA not only vastly increases the number of individuals eligible for an employer’s plan but also increases the richness of the benefits that must be offered, should an employer continue to provide coverage.
The ACA increases the number of individuals eligible for employer-sponsored coverage. For example, the ACA defines a “full-time” employee, for Employer Mandate purposes, as an employee who is employed on average at least 30 hours per week. Because the Employer Mandate will impose a penalty on employers for failure to provide benefits to such employees, the number of individuals eligible for an employer’s plan is likely to grow. In addition to increasing the number of individuals eligible for employer-sponsored coverage, the ACA also dictates benefit design (i.e., preventive services) and limits an employer’s ability to shift cost increases to employees. All of which add to the bottom line cost of the plan.

Should the Individual Mandate be struck down, the costs associated with employer-provided coverage are likely to increase beyond the escalations described above. The ACA requires that insurers allow individuals to buy insurance at any time, regardless of their condition. While this requirement is tempered in an employer context through permissible checks (such as the use of open enrollment periods), the elimination of the Individual Mandate could still result in adverse selection. Essentially without an individual penalty, there is no incentive for healthy employees to enroll in coverage, including employer-sponsored coverage, until they need care. In such a situation, employer-provided plans will be left with disproportionate numbers of sick individuals dramatically increasing the cost of coverage.

**Effects on Hiring**

Should an employer continue to offer benefits post-Employer Mandate, the workforce management necessary to control costs is likely to have a profound effect on employer hiring practices. As stated above, the Employer Mandate forces employers to provide individuals, who they would normally consider part-time and thus ineligible for benefits, with coverage.

In addition, the likely trajectory of implementing regulations will only provide an employer with a short period of time to determine whether a new hire is indeed full-time and eligible for coverage. The end result will be that employers will not hire employees unless they can be certain that the individual will be full-time and employers will be hesitant to hire any part-time workers for fear that they will cross the threshold to full time.

**Increase in Discrimination Claims**

As described above, with the increases in cost associated with providing coverage, employers will assume a more active role in managing their workforces in relation to the provision of employee benefits. A likely byproduct of this more active role is an increase in claims that employers based their hiring and firing practices upon an individual’s health status.

For example, with the increase in costs already occurring employers will have an incentive to only hire individuals who are healthy and thus less expensive to insure. Of particular concern in a post-mandate world are claims gender discrimination claims brought by virtue of the fact that women are often more expensive to insure than men.

**Drop Coverage**

The decision to drop or not provide health insurance coverage and simply pay the Employer Mandate penalty may be somewhat attractive to some employers from a purely economic standpoint. However, the effect on employee relations of discontinuing benefits may be more costly than continuing to provide coverage.
**Threat of Unionization**

Employers that drop health coverage expose themselves to a greater threat of unionization. Employees that have received coverage through their employer are likely to become dissatisfied should an employer drop coverage. When an employer drops coverage, the employee will be forced to navigate a new and likely complex exchange system to obtain coverage. This discontent will likely make them more receptive to union organizing efforts. Unions will capitalize on these changes and target businesses that drop or discontinue their health insurance coverage.

**Recruitment and retention**

Employee benefits are recruitment and retention tools, and the benefit packages offered by employers are one factor employees consider when determining whether to take a job or remain at their current job. Employers in most cases view their employees as their greatest asset and retention of quality employees is critical to their functionality. Should an employer’s competitors continue to offer health benefits to employees after 2014, those companies will likely increase their ability to lure the employer’s workers and employment candidates away.

**Conclusion**

Unless the Supreme Court invalidates the law as a whole, the decision is unlikely to significantly impact the application of the law to employers. In the event the Supreme Court holds that the Individual Mandate is unconstitutional but severable or constitutional, the main impact will be an increase in costs.

Regardless of the outcome, the Supreme Court decision is likely the last hurdle the law will have to overcome and should provide employers who have not yet begun planning for 2014 with the motivation to do so. The preceding merely provides an overview of some of the employment law considerations employers should weigh as they plan for the implementation of the law in 2014.

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