

Escaping the media storm surrounding the federal healthcare reform law would be difficult even for those who rarely open a newspaper, surf the Web, or turn on the radio. Intense partisan battles that were waged on the Hill for more than a year prior to the law's passage have since trickled out to statehouses and courthouses across the country. At least 30 lawsuits have been filed challenging all or some aspect of the federal healthcare reform law.

Constitutionality of the Individual Mandate is a Central Issue

At the heart of many challenges to the healthcare reform law, commonly referred to as the Accountable Care Act (ACA), is section 1501 of the law, which contains the individual responsibility requirement. Starting in 2014, the law stipulates that the majority of U.S. citizens and legal aliens will be required to maintain minimal essential health insurance coverage. Those who choose to forgo coverage will face a financial penalty that is phased in over three years starting in 2014. After 2016, the penalty is increased annually according to a cost-of-living adjustment. There are several exemptions from the individual mandate and penalty, including those for financial hardship and religious objections, among others.

Arguments in Support of the Individual Mandate

As legislative and legal challenges wind their way through courts and statehouses across the country, vocal supporters and opponents of the law have lined up on different sides of the aisle. Supporters assert that the purchase of health insurance is an interstate economic transaction and thus subject to regulation by Congress under the Commerce Clause of the Constitution. Put another way, proponents argue that choosing not to purchase health insurance has effects on the national health insurance market and as such it affects economic activity and therefore Congress has the authority to regulate it.

Need to Spread the Risk Across the Sick and the Healthy

Specifically, those in favor of the individual mandate argue that effective health insurance markets rest upon spreading risk widely across both the sick and the healthy. The individual mandate is a necessary mechanism to ensure the widest pool of both sick and healthy people are in the health insurance market and it helps achieve (close) to universal coverage.

In the absence of the individual mandate, supporters argue that healthy people have a disincentive to purchase insurance until they expect to need it, which leaves a sicker pool of insured

individuals in the market and drives up the cost of health insurance for everyone. President Obama has likened the individual mandate in healthcare to car insurance by noting that most states require drivers to carry car insurance and arguing that if people had the choice many would wait until they had an accident and then call and try to get car insurance.

A Large Uninsured Population Creates Cost Shifting in the Healthcare Market

Furthermore, supporters argue that individuals who don't purchase insurance drive up not just the cost of health insurance but also the cost of care for everyone. This is because hospitals cannot fully absorb the uncompensated costs associated with treating uninsured patients and therefore are forced to pass these costs on to private insurers in the form of higher charges for services. These then get passed on to the insured in the form of higher premiums. In essence, when the uninsured become sick and require healthcare services, the majority of the cost of that care is shifted onto hospitals and private payers.¹

Arguments in Opposition to the Individual Mandate

The central argument that opponents make is that the individual mandate violates the Commerce Clause of the Constitution.

Not Within Congress' Power to Regulate Inactivity

Opponents argue that choosing not to purchase health insurance is "inactivity" and the Commerce Clause of the Constitution does not grant Congress the power to regulate inactivity. Whereas it has been well established that Congress has the authority to regulate individuals' economic activities, such as purchasing goods and services or shipping goods across state lines, critics argue that in passing the individual mandate provision and regulating inactivity Congress overstepped its authority.

Moreover, many critics take aim at Obama's car insurance analogy saying that unlike health insurance – which people will be required to purchase with few exceptions – the purchase of car insurance is only required if people choose to buy a car. Furthermore, opponents argue that Congress is requiring individuals to purchase and maintain a product that is expensive over the entire course of their lives, from birth to death.



Unprecedented Federal Action

Those opposed to the individual mandate provision note that if Congress is allowed to regulate the purchase of health insurance there is no limit to what Congress and the federal government will be able to regulate the purchase of. Frequently cited by critics of the individual mandate is a 1994 memorandum by the Congressional Budget Office which found that requiring individuals to purchase health insurance would be an “unprecedented form of federal action.”²

Status of Legal Challenges

Roughly 30 lawsuits challenging various provisions of the Affordable Care Act have been filed by state governments, private citizens, lawmakers, and organizations.³ From the beginning, experts have said that the Supreme Court will likely have the final say on the individual mandate’s constitutionality. To date, federal appellate courts (the highest courts so far to rule on provisions of the ACA), have reached conflicting decisions, increasing the likelihood that the Supreme Court will review the law. The Supreme Court could decide to hear the case as early as the 2011-2012 term, with a decision possible as early as 2012.

Opponents of the federal healthcare reform law won a closely watched victory in August after the United States Court of Appeals for the 11th Circuit, in Atlanta, ruled 2-1 that the individual mandate provision of the federal healthcare reform law was unconstitutional. This was the first federal appellate court to rule against provisions of the federal healthcare reform law. The lawsuit was filed by the attorneys general for 26 states (including Ohio), two private individuals and the National Federation of Independent Business.⁴

In this ruling, the appellate court found that Congress exceeded its powers under the Commerce Clause of the Constitution, yet held that the rest of the law could stand. This is important in that the appellate court ruled that the individual mandate could be severed from the rest of the law. A lower court ruled that the individual mandate could not be severed from the rest of the law and had declared the entire law invalid.⁵

Supporters of the federal healthcare reform law won a victory earlier this summer when the United States Court of Appeals for the 6th Circuit, in Cincinnati, affirmed a lower court ruling that the individual mandate was within Congress’ authority. In their 2-1 ruling, the appellate court affirmed that the minimum coverage provision was a valid exercise of Congressional power under the Commerce Clause of the Constitution.⁶

The 4th Circuit Court of Appeals, in Virginia, recently handed President Obama two victories when it threw out two cases challenging the federal healthcare reform law. In the first case, filed by Virginia’s attorney general, the court ruled that the state had no legal standing to sue. In the second case, the appellate court ruled that the Anti-Injunction Act forbids taxpayers from challenging taxes in court prior to paying the tax. Given that the financial penalty attached to the individual mandate doesn’t take effect until 2014, this ruling could impact when the Supreme Court hears the case. Several other lawsuits challenging the federal healthcare reform law are pending before various U.S. Courts of Appeals.

Status of Legislative and Other Challenges

Widespread activity continues in state legislatures across the country with members of at least 45 state legislatures having introduced bills to limit, alter, or oppose federal or state reform initiatives. Many of the bills address the individual mandate and related financial penalty of the ACA. In the past two years, 17 states have succeeded in passing binding legislation opposing elements of health reform.⁷ Given that federal law trumps state law, the movement in the states is largely symbolic.

In November, Ohio voters will have the opportunity to decide whether a proposed state constitutional amendment should be enacted to nullify the individual mandate and related financial penalty in the federal healthcare reform law. The proposed legislation, based on a citizen-led petition, is listed as Issue 3 on the November ballot and is titled the Health Care Freedom Amendment.

Conclusion

For those who thought the partisan battles waged prior to the federal healthcare reform law’s passage were intense, the legal and legislative challenges since its enactment have grown no less heated. Keeping track of the status of all the lawsuits and bills is dizzying and how the Supreme Court will eventually rule is unknown. The fact that the Justice Department recently asked the Supreme Court to hear its appeal of the 11th Circuit Court of Appeals’ decision that struck down the individual mandate as unconstitutional raises the probability that the Court will soon review the law and potentially issue a decision before the 2012 election.



With so much uncertainty surrounding the fate of the individual mandate and the entire law, healthcare providers and others are caught in the tricky position of working to implement provisions of a law that may soon be changed or dismantled entirely. Stay tuned for November’s policy snapshot, which explores whether the individual mandate provision can realistically be severed from the rest of the law as well as alternatives to the individual mandate.

Endnotes

1. *U.S. Court of Appeals, Eleventh Circuit*. State of Florida, et. al. versus U.S. Department of Health and Human Services, et. al. August 12, 2011. <http://www.uscourts.gov/uscourts/courts/ca11/201111021.pdf>
2. *Congressional Budget Office*. “The Budgetary Treatment of an Individual Mandate to Buy Health Insurance.” August 1994. <http://www.cbo.gov/ftpdocs/48xx/doc4816/doc38.pdf>
3. Goldman, T.R. “Health Policy Brief: Legal Challenges to the Affordable Care Act.” *Health Affairs*, July 8, 2011. http://www.healthaffairs.org/healthpolicybriefs/brief.php?brief_id=49
4. *U.S. Court of Appeals, Eleventh Circuit*.
5. *Ibid.*
6. *U.S. Court of Appeals, Sixth Circuit*. Thomas More Law Center, et. al. versus Barrack Hussein Obama, et. al. <http://www.ca6.uscourts.gov/opinions.pdf/11a0168p-06.pdf>
7. *National Conference of State Legislatures*. “State Legislation and Actions Challenging Certain Health Reforms, 2011.” <http://www.ncsl.org/?tabid=18906#court-2011>