

FEDERAL DISTRICT COURT RULING HEATS UP, WHILE PRESIDENT OBAMA SUPPORTS LEGISLATION TO MAKE "STATE INNOVATION WAIVERS" AVAILABLE THREE YEARS EARLIER

On the judicial front, you'll recall that U.S. District Judge Roger Vinson ruled in late January that the "individual mandate" provision of the Patient Protection and Affordable Care Act ("Affordable Care Act") was unconstitutional, and declared the rest of the Act inseverable and void. In that ruling the Judge stopped short of issuing an injunction, instead citing case law that would suggest his ruling was the functional equivalent to an injunction. Subsequently, the Obama Administration through the Justice Department ("DOJ") requested clarification on the ruling - friends of the Affordable Care Act would suggest this motion was a legitimate request for clarification on the implications of the informal injunction, while foes of the Affordable Care Act would suggest this motion was a mere stalling tactic. Fast forward to yesterday, Judge Vinson issued a twenty-page clarification, addressing the points raised by the DOJ and reaffirming his findings regarding the unconstitutionality and subsequent invalidity of the law. Interestingly, Judge Vinson went beyond the DOJ's request for clarification and issued a motion to "stay" or stop the effects of the injunction for seven days. The Judge was careful to limit the "stay" motion, requiring the DOJ to file for expedited review to either the Appellate or Supreme Court within seven calendar days, or else the ruling, and the effects of the injunction, will go back into effect. Based on this development we can expect this case to move sooner, rather than later, through the judicial process.

On the legislative front, earlier this week President Obama announced his support for a legislative proposal that would accelerate the availability of the option for states to use alternative approaches to reach coverage goals of the Affordable Care Act. As originally passed, the Affordable Care Act would require states to operate under the reform models prescribed by the law until 2017, three (3) years after key reforms such as implementation of health insurance exchanges and individual and employer insurance mandates take effect. That three (3) year window has been an area of concern for states already in the process of implementing their own health reform measures, states argue it will be a waste of time and resources to abandon local reform measures in 2014 to meet federal requirements, only to seek a waiver three (3) years later to return to their state's initial reform plans. The legislative proposal, known as the "Empowering States to Innovate Act," will allow states to apply to the Secretary of Health and Human Services ("Secretary") for waivers from the Affordable Care Act's requirements beginning in 2014, the same time that most of the law's key reforms take effect. The President has expressed support of making the waivers available in 2014:

I support it. It will give you flexibility more quickly, while still guaranteeing the American people reform. If your state can create a plan that covers as many people as affordably and comprehensibly as the Affordable Care Act does - without increasing the deficit - you can implement that plan, and we'll work with you to do it.





The President's endorsement of the legislative proposal is significant in that it is only the second time the President has supported a measure to change a provision of the Affordable Care Act. While some are touting that the legislative proposal will allow states to "opt out" of health reform earlier, it should be noted that the states may only do so after applying to the Secretary and certifying that their state's individual health reform plan will meet the basic tenants of federal health reform, including:

- Provide coverage that is at least as comprehensive as the coverage offered through the Exchanges.
- Make coverage at least as affordable as it would have been through the Exchanges.
- Provide coverage to at least as many residents as the Affordable Care Act would have provided.
- Do not increase the Federal deficit.

As district court cases challenging the constitutionality of the Affordable Care Act percolate to the appellate court level, this legislative proposal to accelerate the availability of waivers to 2014 may help ease some of the concerns expressed by state legislatures and Governors across the country. For those states that believe certain provisions of the Affordable Care Act are unconstitutional, like the insurance

mandates, states may craft their own health reform models that would exclude such a requirement while still covering as many lives.

Significantly, the Empowering States to Innovate Act hails from bipartisan origins, as it was introduced by Democrat Senators Ron Wyden (D-Mass.) and Mary Landrieu (D-La.), and freshman Republican Senator Scott Brown (R-Mass.). Despite its origins, the proposal will likely face challenges if and when it gets to the House of Representatives, where a Republican majority will likely want to see even more flexibility to the states.

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