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SCOTUS RULES ON THE ACA -- IT'S BUSINESS AS USUAL

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In a case that has been much anticipated and described by some as momentous, history in the making, and the decision of the century, the U.S. Supreme Court (SCOTUS) ruled this morning that the Affordable Care Act's (ACA) so-called individual mandate – the requirement that almost all Americans buy health insurance by 2014 or pay a penalty – is constitutional as a tax that Congress can impose using its constitutional taxing power. For those wishing to "own a piece of history" the court's slip opinion (193 pages) released this morning is attached.

Keep in mind, however, that today's decision in *National Federation of Independent Business v. Sebelius* is not really about health care reform itself but Congressional authority, and the constitutional limits on the assertion of that authority, to mandate the purchase of insurance under the ACA. We are reminded of this in the very first paragraph of Chief Justice Roberts' opinion:

> "We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions." 567 U. S. ____ (2012)

In examining the arguments for and against the constitutionality of the individual mandate, five Justices – Chief Justice Roberts and Justices Kennedy, Scalia, Thomas, and Alito – all rejected the argument that Congress can require everyone to buy health insurance using its power under the Commerce Clause of the Constitution. This is an important restraint on what has been an expanding Commerce Clause interpretation over the past several decades and sends a message to Congress that it does not enjoy unfettered authority without limits in this regard.

However, in what came as a surprise to many, it was Chief Justice Roberts that provided the court's swing vote. A different subset of five Justices – the Chief Justice, and Justices Ginsburg, Breyer, Sotomayor, and Kagan – agreed that the individual mandate was constitutional under an alternative argument made by counsel for the government during oral arguments in March: that the mandate imposes a tax on people who do not buy health insurance, and that tax is something that Congress can impose using its constitutional taxing power. Game over.

Today's decision goes down in the books as a 5 to 4 decision finding the ACA's individual mandate constitutional. In reality, we have a 59 page decision written by Chief Justice Roberts indicating that the individual mandate is constitutional under Congress' taxing power, but not under the Commerce Clause.

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There is a 61 page opinion written by Justice Ginsburg on behalf of herself and Justices Breyer, Sotomayor, and Kagan agreeing with Chief Justice Roberts as to the bottom line result, but disagreeing with his Commerce Clause conclusion and indicating they were OK with the Commerce Clause argument. Finally, there is a 65 page dissenting opinion on behalf of Justices Kennedy, Scalia, Thomas, and Alito, which argues that the ACA exceeds federal power in mandating the purchase of health insurance, that the mandate is central to the ACA's design and operation, and that all the ACA's other provisions would not have been enacted otherwise. The dissent concludes that the entire ACA statute is inoperative and should have been struck down in its entirety.

What Now? It's Business as Usual

Of all the potential scenarios and outcomes resulting from today's decision, upholding the constitutionality of the individual mandate causes the least turmoil and confusion for employers and group health plans – it's business as usual. Employers now know that the ACA will remain in place for at least the near future. While it's possible that November's elections could change control of the House, Senate, the White House or any combination thereof, there will be no changes to the direction of the ACA in the near term and the ACA compliance timeline marches on.

Here are the main ACA compliance components that employers and group health plans should be addressing presently:

- Summary of Benefit Coverages (SBC)
  - Open enrollments beginning on or after 9/23/12
  - Other enrollments (new hire, etc) for PYs on or after 9/23/12

- W-2 Reporting
  - 2012 W-2s due 1/31/13

- New Women's Preventive Care Guidelines w/o Cost Sharing
  - PYs on or after 8/1/12

- $2500 EE FSA Contribution Limit
  - PYs on or after 1/1/13

- Comparative Effectiveness Fees
  - PYs on or after 11/1/11, due annually each July 31 beginning 7/31/13

- Distribution of Minimum Loss Ratio (MLR) rebates for fully insured plans.
  - Beginning this summer under the ACA and MA law

Please contact me if you have any questions.

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