

# HR Leaders Scrambling After Supreme Court's Health Care Reform Ruling

From the individual mandate provision to 'pay or play' rule, companies find it's time to deal with the bottom line.

While supporters of the Patient Protection and Affordable Care Act cheered the Supreme Court's decision to uphold the law's constitutionality, the announcement was sobering news for employers and observers who have taken a "wait and see" approach toward health care reform.

"I was surprised," said attorney Steve Friedman, chair of the employee benefits practice at Littler Mendelson in New York. "There's been so much press about how tough the court's questions were with respect to the individual mandate when this case was first argued that many of us believed there was a fair chance that the mandate would be overturned."

The individual mandate, which requires virtually all Americans to purchase health insurance coverage or pay a penalty, is the central provision of President Barack Obama's legislation. Opponents argued that the mandate was a violation of the commerce clause, which gives Congress the power to regulate interstate commerce, and was therefore unconstitutional. But in the 5-4 decision, justices ruled June 28 that the mandate is a tax and that it falls within Congress' power under the Constitution to levy taxes.

Although many of the law's provisions, like extending health care coverage to adult children up to age 26 and covering preventive-care services at 100 percent, have already been enacted, some HR leaders hoped that the law would be struck down.

"I was hoping, really hoping, but I was not confident that it would be overturned," said Diane Harrington, human resources director for Otto Environmental Systems North America Inc., a manufacturer of plastic waste containers based in Charlotte, North Carolina. "There are just too many liberals on the court."

Harrington said she is worried about the impact the law will have on her 325-employee self-insured company's bottom line. "With future cost increases, Medicaid expenditures and all the additional employees we will have to cover, there's this fear of the unknown."

In the hours after the ruling was announced, the offices of the Management Association of Illinois were eerily quiet, according to president and CEO Mary Lynn Fayoumi. She attributed the silence to the "shock factor."

"Our phones aren't exactly ringing off the hook," said Fayoumi, whose organization provides human resources training and services to its members. "People are saying 'Wow, did you hear? But not 'What the heck should we do?' "

Under the health care law, which was passed in March 2010, employers with more than 50 employees must provide health insurance or pay a fine of \$2,000 per worker each year if any worker receives federal subsidies to purchase health insurance on a state exchange. This provision, known as "pay or play" is one of the most controversial features of the legislation.

Employers largely were able to sidestep the issue while the law was pending, according to Littler's Friedman, but they can no longer afford to avoid the issue. He urges employers to "get off the fence," start implementation plans and confront the larger question of whether to continue offering health insurance coverage to their employees.

According to recent surveys, the overwhelming majority of employers say they will continue to offer health care plan coverage in 2014, but given the Supreme Court's decision, some will likely reconsider their position.

"Employers were able to put the 'pay or play' decision on the back burner, but now they will have to look at it more seriously," he said. "Like other corporate decisions which may not be palatable to employees, the first reaction employers might have is that they have no intention of abandoning insurance and will continue to offer it. But as time goes on this is going to be a greater business concern."

For employers, deciding whether to continue providing health care benefits depends on their industry and the size and nature of their workforce, according to Dan Levin, an actuary with Buck Consultants in Chicago.

"The smaller employers will be more likely to say, 'OK, maybe we want to get out of business because it's very expensive to insure people in a smaller market and it just makes more sense to get out," Levin said. "So we'll pay the penalty and give our employees some money to purchase insurance on the exchanges. But the larger the employer is, the more inertia there is. If you had [health care insurance] all these years for all these employees, it's not so easy to eliminate your plans."

The high court's decision took many by surprise in part because conservative Chief Justice John Roberts cast the deciding vote, joining the court's four liberal justices.

"The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause," Roberts wrote. "That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax."