

Report on Medicare Compliance Volume 27, Number 45. December 24, 2018 Compliance Ground Will Shift if Court Decision Invalidating ACA Is Upheld

By Nina Youngstrom

The grounds of compliance and enforcement could shift because of the Dec. 14 court decision invalidating the entire Affordable Care Act (ACA) by Judge Reed O'Connor from the U.S. District Court for the Northern District of Texas. Along with creating the health insurance exchanges and expanding Medicaid, the ACA has a multitude of compliance, enforcement and related provisions that will be DOA if the court decision is affirmed on appeal. They include the 60-day Medicare overpayment return requirement, the Physician Payments Sunshine Act, the hospital pricing transparency requirement, 501(r) regulations for nonprofit hospitals and new authorities for Medicare watchdogs.

Now what? Attorneys say nothing changes while the court decision, *Texas vs. United States*, is appealed, presumably to the U.S. Court of Appeals for the Fifth Circuit and then the U.S. Supreme Court, which may or may not hear the case. O'Connor denied the plaintiffs' request for an injunction that would have stopped the entire ACA in its tracks (for now), and HHS announced it would implement and enforce the ACA pending the outcome of an appeal.

"The obvious takeaway is that until we get a final decision affirming O'Connor's ruling, the 60-day rule and every other provision of the ACA and every implementing regulation that stems from it remain the law of the land," says attorney Christopher Kenny, with King & Spalding in Washington, D.C. "No one should think they [don't] have to meet their obligations under the ACA because even under the terms of O'Connor's ruling, the law still remains operative on appeal."

To recap, briefly: 20 Republican state attorneys general (AGs) on Feb. 20 asked the judge to throw out the entire ACA, arguing it can't stand without the tax penalty on people who don't buy health insurance, which was zeroed out in the 2017 Tax Cut and Jobs Act. The judge agreed, and went so far as to declare that the rest of the law must fall because it can't be severed from the individual mandate, Kenny says. On Dec. 18, in response to a request by 17 Democratic attorneys general (AGs), O'Connor issued an order confirming the ACA remains in effect nationally while his decision is appealed, according to the American Hospital Association. O'Connor ordered an expedited briefing on the appeal, AHA said, giving the Republican AGs until Dec. 21 to respond and the Democratic attorneys general until Dec. 26 to reply.

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