On Thursday, June 28, 2012, the U.S. Supreme Court surprised the nation with a decision upholding the controversial individual mandate provision in the Patient Protection and Affordable Care Act (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010. In a 5-4 decision, the Supreme Court upheld the individual mandate as a lawful exercise of Congress’ taxing power, rather than a lawful exercise of its authority under the Commerce Clause. The court previously heard five hours of oral arguments in the case from March 26-28, 2012. The decision was the last case decided prior to the end of the court’s term.

Background
In 2010, Congress enacted the individual mandate, which requires virtually all Americans buy health insurance or pay a penalty, under the authority given Congress in the Commerce Clause, Article 1 of the U.S. Constitution. The plaintiffs in the case argued that the Commerce Clause has never been used to regulate a non-activity, such as a decision to forgo buying insurance, and therefore Congress exceeded its Commerce Clause powers in enacting the individual mandate. Comments from the justices during the oral arguments, especially from Justice Anthony M. Kennedy, seemed to indicate that the justices agreed with the plaintiffs’ concern about the expansion of congressional power under the Commerce Clause.

This same concern was seen in the lower courts when Judge Roger Vinson of the U.S. District Court for the Northern District of Florida famously opined on whether Congress would one day be able to require the purchase of broccoli if the law was upheld. While some thought that argument was ridiculous, the justices of the Supreme Court brought up the broccoli argument during the oral arguments and even expanded it to include a scenario where Congress was to mandate that every person purchase a cell phone to dial 911.

Nonetheless, opponents and proponents of the law agreed that if Congress had utilized its authority under the Taxing Clause of the Constitution rather than the Commerce Clause to establish the mandate, the lawsuit would not have made its way to the Supreme Court.

Supreme Court’s Decision
The Supreme Court, in a 5-4 ruling, with Chief Justice John Roberts joining the majority, determined that the individual mandate is constitutional. In the opinion, Roberts explained that the court’s role is limited to interpreting the law, not making policy judgments.

“Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if people disagree with them,” Roberts wrote. “It is not our job to protect the people from the consequences of their political choices.” (Page 6, Opinion of Roberts, C.J.)

Five justices agreed that the federal government cannot require people to buy something, cannot regulate inactivity and cannot impose economic mandates as a means of regulating interstate commerce. Although a majority of the court agreed that the enactment of the individual mandate exceeded Congress’ power under the Commerce Clause, the court
determined that the individual mandate is a form of tax and therefore falls under Congress’ taxing power. Chief Justice Roberts explained that it was well-established precedent that if a statute has two possible meanings and one of them violates the Constitution, the court should adopt the meaning that does not do so. So, the court was required to determine whether the government’s alternative argument – that the payment was a tax – was a reasonable one. In the end, the individual mandate was upheld as constitutional under Congress’ express power of taxation.

Because the mandate survives, the court did not need to decide severability, except as it relates to a provision requiring states to comply with new eligibility requirements for Medicaid or risk losing their Medicaid funding. On that question, the court held that the provision is constitutional as long as states would only lose those funds tied to Medicaid expansion if they did not comply with the new requirements.

The Four Questions Before the Supreme Court

The Supreme Court outlined that it would seek to answer four questions surrounding the constitutionality of the law. In doing so, it would consider appeals to the rulings in two cases: National Federation of Independent Business v. Sebelius, 132 S. Ct. 603, 181 L. Ed. 2d 420 (2011) and Florida v. Dep’t of Health & Human Services, 132 S. Ct. 604 (2011). The four questions, and the Supreme Court’s holding on each question, are:

1. Anti-Injunction Act question: Does the Anti-Injunction Act bar a challenge to the constitutionality of the individual mandate?

In this first question, the justices were tasked with deciding the applicability of the Anti-Injunction Act, which prohibits lawsuits challenging a tax until the tax goes into effect and has been assessed. This would determine whether the case should be delayed, until at least 2014, until the plaintiffs had either purchased health insurance or paid the penalty for not purchasing the mandated coverage.

In an opinion by Chief Justice Roberts, the court relied on congressional intent and the label used in PPACA to describe the payment made by individuals who do not buy health insurance. In the opinion, Roberts states:

“It is of course true that [PPACA] describes the payment as a “penalty,” not a “tax.” But while that label is fatal to the application of the Anti-Injunction Act, supra, at 12–13, it does not determine whether the payment may be viewed as an exercise of Congress’s taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress’s choice of label on that question. That choice does not, however, control whether an exaction is within Congress’s constitutional power to tax.” (Page 33, Opinion of the Court)

As the opinion clarified, congressional intent is relevant for purposes of the Anti-Injunction Act and PPACA because they are both creations of Congress. Thus, Congress may determine how the two statutes interrelate. Because Congress called the payment a “penalty” instead of a “tax” and did not require that the penalty “be treated as a tax for purposes of the Anti-Injunction Act,” the court concluded that is all that matters. The court held that the Anti-Injunction Act does not apply to penalties, and therefore does not apply to PPACA’s individual mandate. The holding paved the way for the justices to issue a decision on the remaining three questions.

2. Minimum Coverage Provision question: Did Congress exceed its powers under Article I of the Constitution by enacting the individual mandate?

In the second question, the justices were tasked with determining whether Congress was within its scope of the Commerce Clause to mandate that individuals purchase health insurance. The government presented alternative arguments for congressional power.

The government’s primary argument was that Congress can require individuals to buy health insurance using its power under the Commerce Clause of the Constitution, because the failure to buy insurance shifts the costs of health care for the uninsured to third parties. Five justices – Chief Justice Roberts and Justices Kennedy, Scalia, Thomas and Alito – all rejected that argument. Roberts emphasized that Congress’ power to regulate commerce assumes that there is commerce to regulate. In the opinion, he stated that the mandate creates commerce, rather than regulates commerce already in existence. If the court were to interpret the Commerce Clause the way that the government does, Roberts expressed concern that Congress would be able to regulate many new things, such as forcing people to buy vegetables.
Although Roberts rejected the government’s Commerce Clause argument, he agreed with the government’s alternative argument: 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. A different set of five justices – Roberts and Justices Ginsburg, Breyer, Sotomayor and Kagan – agreed that the mandate was constitutional for this reason.

Roberts focused, in part, on the limitation of the mandate in finding that it was merely a tax. If an individual chooses not to buy health insurance, then the individual must pay the tax and that is the end of the matter; the government cannot do anything else. The tax is not so burdensome as to be punitive, is enforced through normal tax-collection means and there is no threat of criminal sanctions. Thus the mandate merely encourages rather than requires certain behavior. Additionally, Roberts looked at the characteristics of the payment: It is paid into the U.S. Treasury by taxpayers when they file their tax returns; it does not apply to people who do not pay federal income tax; the requirement to pay is found in the Internal Revenue Code (IRC) and is enforced by the Internal Revenue Service (IRS); and the process “yields the essential feature of any tax: it produces at least some revenue for the government.” (Page 33, Opinion of the Court)

Interestingly, while the court relied upon Congress label of “penalty” rather than “tax” for determining application of the Anti-Injunction Act, Roberts made it clear that the label did not “control whether an exaction is within Congress’s constitutional power to tax.” (Page 33, Opinion of the Court) This is due to the Constitution not being a creation of Congress.

Thus, the Supreme Court determined that imposing a tax on those without insurance is within Congress’ taxation power, an Article I power expressly given to Congress. Since the enactment of the individual mandate was an appropriate exercise of Congress’ taxation power, the individual mandate is constitutional.

3. Severability question: Because it is non-severable from the individual mandate, if the individual mandate is considered unconstitutional, must PPACA be invalidated in its entirety?

The Supreme Court did not address the severability issue because it determined that the individual mandate was constitutional. If the Supreme Court had determined that the individual mandate was unconstitutional, it would have had to decide if the entire law should be struck down or if only certain aspects – such as the guaranteed issue and community rating rules – would also need to fall with the individual mandate. However, the severability issue was relevant in the court’s ruling on Medicaid expansion, as explained below.

4. Medicaid question: Did Congress exceed its enumerated powers when it imposed onerous requirements on states as a prerequisite for receiving additional federal funding for Medicaid?

The fourth question focused on the constitutionality of Medicaid’s expansion. The 26 states that brought the lawsuit under Florida v. United States Department of Health and Human Services argued that the federal government was unconstitutionally coercing states to expand Medicaid eligibility as a condition for qualifying for federal funds meant to help pay for Medicaid.

In the ruling, the Supreme Court took a narrow view of the Constitution’s Spending Clause, which says that Congress can impose any requirements it sees fit on the recipient of federal funds. In doing so, a majority of the justices agreed in part with the states’ argument that receiving federal funds with strings attached could be construed as a type of coercion. The court, however, found that this provision is constitutional as long as states would lose only funds tied to the Medicaid expansion under PPACA if they did not comply with the new requirement, rather than lose all of their Medicaid funding.

Interestingly, in the dissent, four justices (Scalia, Kennedy, Thomas and Alito) agreed that the entire law was invalid:

“The Act before us exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Acts other provisions would not have been enacted without them. In our view, it must follow that the entire statute is inoperative.” (Page 3, Scalia, Kennedy, Thomas and Alito, JJ., dissenting)

Implications for Employers

For employers that have been delaying preparation for PPACA’s implementation, the Supreme Court ruling signals the end of any judicial delay in the implementation of PPACA. Barring repeal or other change by Congress, those employers should assume that PPACA’s mandates will be implemented as expected and within the timeframes outlined.
As an immediate first step, employers must continue to implement the remaining 2012 mandates as required under the law. These include provisions such as:

- Increasing the annual limits on essential health benefits;
- Including preventive care and screening guidelines for women with no cost-sharing if the plan is grandfathered;
- Distributing a summary of benefits and coverage;
- Reporting the cost of health care coverage under Form W-2;
- Paying a comparative clinical effectiveness research fee if self-insured;
- Distributing rebates received under the medical loss ratio provisions if the plan is insured; and
- Adjusting participant health flexible spending account salary reductions to reflect the new statutory limit.

Looking ahead into 2013 and beyond, the next year and a half will most likely consist of employers making important decisions, such as determining future contribution strategies for employee benefits in light of the employer mandate. When making these decisions, NFP advisors and Benefits Partners-affiliated advisors are available with tools and resources to help employers understand the implications of PPACA.

**Political Implications**

The Supreme Court’s historic decision will undoubtedly impact the November 2012 elections. Republicans and Democrats will both use the decision to energize their base. If the Democrats maintain control of the White House and Congress, it is generally assumed that implementation will continue at a faster pace. The decision paves the way for the IRS, the HHS and the DOL to finalize regulations where such regulations may have only previously existed in proposed or interim final form. Thus, it would seem likely that guidance related to some of the more controversial issues, such as the nondiscrimination rules under IRC Section 105(h) for non-grandfathered fully insured plans, will be forthcoming.

Conversely, if Republicans sweep the White House and Congress, it is generally assumed that they will attempt to overturn the law. While Republicans currently control the House, the possibility of gaining enough support in the Senate to overturn pieces of the law will be difficult, but the ruling makes that possibility more in reach. This is because the Supreme Court construed the mandate as a tax, which makes it possible to amend the provision through the budget reconciliation process. Under this process, the mandate may be overturned by 51 votes in the Senate, without the possibility of a 60-vote filibuster. This is one of many strategies likely being reviewed by Republicans.

If there is a mixed government after the election, there will likely be efforts toward bipartisan revisions. Both parties have recognized the need for certain technical and substantive revisions to improve the overall health care reform legislation.

*Opinion in the case: [www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf](http://www.supremecourt.gov/opinions/11pdf/11-393c3a2.pdf)*