

**The Supreme Court Decision on
Health Care Reform
What If It Stays? What If It Goes?
The Impact on Employer
Group Health Plans**

June 27, 2012


Presenter:


Greg Gautam

©2012 Snell & Wilmer L.L.P.

Health Care Reform

- On March 23, 2010, President Obama signed the Patient Protection and Affordable Care Act (the “PPACA”).
- The Health Care and Education Reconciliation Act of 2010 was signed into law on March 30, 2010.
- 2,700 pages in length.
- Some significant changes take effect in 2012 and 2013.
- Another large group of changes take effect in 2014.

	<h2 data-bbox="467 289 980 340">Supreme Court Review</h2>
	<ul data-bbox="451 399 1234 892" style="list-style-type: none"><li data-bbox="451 399 1120 472">• The United States Supreme Court heard oral arguments March 26 - March 28.<li data-bbox="451 472 1234 892">• Court heard 5.5 hours of oral argument on four key issues –<ul data-bbox="500 546 1234 892" style="list-style-type: none"><li data-bbox="500 546 1234 661">➢ Whether the Anti-Injunction Act (“AIA”) prevents the Supreme Court from considering the merits of the case.<li data-bbox="500 661 1234 703">➢ Whether the individual mandate is constitutional.<li data-bbox="500 703 1234 777">➢ If the mandate is unconstitutional, whether it is severable from the remainder of the legislation.<li data-bbox="500 777 1234 892">➢ Whether the requirement that states must expand Medicaid eligibility to receive federal Medicaid funding is constitutional.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 3

	<h2 data-bbox="467 1157 980 1207">Supreme Court Review</h2>
	<ul data-bbox="451 1266 1234 1759" style="list-style-type: none"><li data-bbox="451 1266 1234 1417">• The AIA prevents taxpayers from contesting a tax in court before it is paid. The purpose of the AIA is to ensure that the collection of taxes is not easily disrupted by lawsuits.<li data-bbox="451 1417 1234 1491">• Neither side asserted that the AIA bars the Supreme Court from hearing the case.<li data-bbox="451 1491 1234 1564">• The Court appointed an attorney to provide arguments the case is premature.<li data-bbox="451 1564 1234 1638">• Key issue is whether the individual mandate penalty is a “tax” or a “stand-alone” penalty.<li data-bbox="451 1638 1234 1759">• If the Court determines the AIA applies, the Court may not consider the merits of PPACA until April 15, 2015.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 4

S&W	<h2>Supreme Court Review</h2>
	<ul style="list-style-type: none">• Next issue is whether the individual mandate is constitutional.• Under the Constitution, Congress has the “power to lay and collect taxes.”<ul style="list-style-type: none">➢ Key issue is whether the individual mandate generates a tax.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 5

S&W	<h2>Supreme Court Review</h2>
	<ul style="list-style-type: none">• The Court is also considering whether the individual mandate is a valid exercise of power under the Commerce Clause.• The Constitution provides that “Congress shall have Power...to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.”• The existing Commerce Clause cases provide that Congress may regulate any economic activity that Congress rationally concludes is in the stream of, or substantially affects, interstate commerce.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 6

S&W	<h2 style="text-align: center;">Supreme Court Review</h2>
	<ul style="list-style-type: none"> • Solicitor General Don Verrilli argued on behalf of the federal government in favor of the mandate. • Key arguments – <ul style="list-style-type: none"> ➢ Insurance is the “predominant means” of paying for health care in the United States and, through the mandate, the government is “regulat[ing] the method of financing health, the purchase of health care.” ➢ The mandate is the government’s chosen means of regulating an economic activity (i.e., health care) which substantially affects interstate commerce. ➢ The mandate reflects Congress’s power to tax.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 7

S&W	<h2 style="text-align: center;">Supreme Court Review</h2>
	<ul style="list-style-type: none"> • Former Solicitor General Paul Clement and Michael Carvin argued on behalf of those opposed to the mandate. • Key arguments – <ul style="list-style-type: none"> ➢ “The mandate represents an unprecedented effort by Congress to compel individuals to enter commerce in order to better regulate commerce.” <ul style="list-style-type: none"> ▪ Existing cases indicate that Congress has the authority to regulate commerce at “the point of sale” but it cannot force people to enter commerce. ➢ If Congress has the power to force you to buy health insurance, what can’t it force you to buy? <ul style="list-style-type: none"> ▪ Lack of a limiting principle. ▪ Justice Scalia – Can Congress force people to buy broccoli?
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 8

S&W	<h2>Supreme Court Review</h2>
	<ul style="list-style-type: none">• Next issue is severability.• In general, the Court favors severability over declaring an entire statute void, out of deference to the legislative branch.• The Administration has argued that if severability becomes an issue, the Court should strike only the guaranteed-issue and community-rating provisions.• The key inquiry is whether Congress would have preferred the remainder of the statute or no statute at all.• It is interesting to note that Congress removed a severability clause from an earlier version of the bill.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 9

S&W	<h2>Supreme Court Review</h2>
	<ul style="list-style-type: none">• Deputy Solicitor General Edwin Kneeder argued on behalf of the federal government.• Key argument –<ul style="list-style-type: none">➢ The legislative history of PPACA indicates that Congress did not intend for the whole act to fail if the individual mandate provision is struck down “because we have many provisions that are operating now without [it].”<ul style="list-style-type: none">▪ Justice Scalia – “Once you’ve cut the guts out of it, who knows which of them were really desired by Congress on their own and which ones weren’t.”
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 10

Supreme Court Review


- Paul Clement argued on behalf of those opposed to the mandate.
- Key argument –
 - The entire piece of legislation should fall if the mandate is found unconstitutional because the key provisions of PPACA are “textually interconnected” to the entirety of PPACA.
 - Justice Ginsburg – “There are so many things in [PPACA] that are unquestionably okay...so why should we say it’s a choice between a wrecking operation...or a salvage job.”


Supreme Court Review


- Final issue is the Medicaid expansion.
- Beginning in 2013, Medicaid will be expanded to otherwise eligible individuals under the age of 65 whose income does not exceed 133% of the poverty line.
- States that refuse to implement the expansion risk losing federal Medicaid funding.


S&W	<h2>Supreme Court Review</h2>
	<ul style="list-style-type: none">• Paul Clement argued on behalf of those opposed to the mandate.• Key arguments –<ul style="list-style-type: none">➢ The expansion is coercive and not voluntary in nature (i.e., states need federal Medicaid funding).➢ This expansion is different than previous Medicaid expansions because:<ul style="list-style-type: none">▪ The expansion is significantly larger than prior expansions.▪ The expansion is connected to a “nonvoluntary” individual mandate.▪ The federal government has “leveraged prior participation” in the Medicaid program to coerce states to comply with the expansion.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 13


S&W	<h2>Supreme Court Review</h2>
	<ul style="list-style-type: none">• Solicitor General Don Verrilli argued on behalf of the federal government.• Key argument –<ul style="list-style-type: none">➢ The Medicaid expansion provisions of PPACA are a valid exercise of Congress’s power to spend.<ul style="list-style-type: none">▪ Justice Ginsburg – “We have never had, in the history of this country or the Court, any Federal program struck down because it was so good that it becomes coercive to be in it.”
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 14

	<h2 data-bbox="467 262 1144 367">#1 – The Individual Mandate is Constitutional</h2>
	<ul data-bbox="451 399 1209 630" style="list-style-type: none">• The law remains in place.• Employer group health plans must continue to comply with all requirements.• Focus on 2012 and 2013 changes.• Start thinking about 2014 changes.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 15


	<h2 data-bbox="467 1129 1144 1245">#2 – The Individual Mandate is Not Constitutional But is Completely Severable From the Rest of PPACA</h2>
	<ul data-bbox="451 1281 1242 1375" style="list-style-type: none">• The impact on employer group health plans is the same the law being upheld (#1 above).
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 16

	#3 – The Individual Mandate is Not Constitutional But is Partially Severable From the Rest of PPACA
	<ul style="list-style-type: none">• The portions that are severable will remain in effect.• Those that are not will cease to apply.• Some or all of the portions of health care reform that apply to employer group health plans may remain in effect.• Could take months to sort out.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 17


	#4 – The Individual Mandate is Not Constitutional and Not Severable From the Rest of PPACA
	<ul style="list-style-type: none">• The entire law is void.• Employer group health plans would no longer have to comply with any of health care reform.• Don't have to worry about upcoming change.• Need to think about which changes to keep and which changes to unwind.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 18


	#5 – The Court Cannot Hear the Case Until Individuals Are Required to Pay the Penalty in 2015
	<ul style="list-style-type: none">• If the Supreme Court hangs its hat on the AIA, the impact is the same as the law being upheld (#1 above), at least for the time being.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 19

Snell & Wilmer
<p style="text-align: center;">What If It Stays?</p>

	<h2>What If It Stays? - Health Care Reform 2012 - 2014</h2>
	<ul style="list-style-type: none">• Additional preventive services for women. (2012)• Summary of benefits and coverage (the “SBC”). (2012)• 60-day advance notice of changes impacting the SBC. (2012)• W-2 reporting of the value of employer sponsored medical coverage. (2012)• Medical loss ratio (“MLR”) rebates for insured plans. (2012)• Elimination of deduction on Medicare retiree drug subsidies. (2013)• \$2,500 health FSA limit. (2013)• Increase restricted annual limit to \$2 million for essential health benefits. (2014)• Employer Penalties. (2014)
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 21


<p>Snell & Wilmer</p>
<h1>What If It Goes?</h1>


	<h2 data-bbox="467 289 824 336">What If It Goes?</h2>
	<ul data-bbox="451 403 1237 928" style="list-style-type: none">• Do not have to comply with any of the above changes.• Need to think about which changes to keep, and which to unwind.• If you keep some, consider whether to shift cost to employees.• Employee relations issues.• Plan amendments.• When will changes take effect?• 60-day SMM rule.• Not a lot of time to make changes in advance of next plan year.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 23


	<h2 data-bbox="467 1161 824 1207">What If It Goes?</h2>
	<ul data-bbox="451 1270 1247 1711" style="list-style-type: none">• Don't have to worry about grandfathered plan status.<ul data-bbox="500 1360 1188 1444" style="list-style-type: none">➢ Remove grandfathered plan notice from plan documents and summaries.• No more small business tax credit.• \$5 billion retiree medical reinsurance program – not clear what will happen.<ul data-bbox="500 1585 1214 1711" style="list-style-type: none">➢ Employers who applied might not receive expected payments.➢ Could claw back payments already made.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 24


S&W	<h2>What If It Goes?</h2>
	<ul style="list-style-type: none">• Don't have to, but may, allow reimbursement of over-the-counter medications without a prescription under a health FSA or similar plan.• Ability to offer increased wellness incentives will go away. In a recent survey of employers this was the provision of health care reform that employers would most want reinstated.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 25


S&W	<h2>What If It Goes? - Coverage For Children To Age 26</h2>
	<ul style="list-style-type: none">• This is probably the most popular change.• Can revert to prior rules.<ul style="list-style-type: none">➢ Reduce age, require financial dependence, require children to be unmarried, require full-time student status, etc.• If continue to allow coverage to age 26, special tax rule deeming children to be dependents will no longer apply because it was part of health care reform.<ul style="list-style-type: none">➢ If these kids continue to be covered, will need to impute income if not a tax dependent for health care purposes.• Might have to impute income for coverage already provided to such kids.• If keep this coverage, might charge more for it.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 26


	<h2>What If It Goes? – Preexisting Condition Exclusion For Children</h2>
	<ul style="list-style-type: none">• May add back pre-existing condition exclusion for children (and adults if made in advance of the 2014 effective date).• Must comply with HIPAA pre-existing condition rules.• Difficult to justify adding back.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 27

	<h2>What If It Goes? – Annual and Lifetime Limits</h2>
	<ul style="list-style-type: none">• May add back some or all annual and lifetime limits on benefits.• Some employers terminated HRAs because of the annual limit rules.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 28


	<h2>What If It Goes? – Preventive Services</h2>
	<ul style="list-style-type: none">• Non-grandfathered plans had to cover a specific list of preventive services without any cost-sharing.<ul style="list-style-type: none">➢ No copayments, coinsurance or deductibles.• May decide not to cover some or all of the preventive services.• In addition, or alternatively, may subject them to cost sharing.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 29


	<h2>What If It Goes? - Choice of Health Care Professional</h2>
	<ul style="list-style-type: none">• Health care reform required non-grandfathered plans to:<ul style="list-style-type: none">➢ Allow participants to choose any willing participating provider as their primary care provider;➢ Allow children to designate a pediatrician as their primary care provider; and➢ Allow women to access in-network OB/GYN without a referral or prior authorization.• May undo some or all of these changes.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 30


	<h2>What If It Goes? – Emergency Services</h2>
	<ul style="list-style-type: none">• Health care reform required non-grandfathered plans to:<ul style="list-style-type: none">➢ Cover out-of-network emergency services without prior authorization and at same copayment and coinsurance rates as in-network providers; and➢ Equalize rates paid to out-of-network and in-network providers.• May undo some of all of these changes.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 31

	<h2>What If It Goes? – Ban on Rescission of Coverage</h2>
	<ul style="list-style-type: none">• Health care reform prohibits retroactive termination of coverage except due to fraud or intentional misrepresentative of a material fact.• Required 30 days advance notice of such retroactive termination.• Most employers will probably revert to pre-health care reform rule to make plans easier to administer.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 32


	<h2 data-bbox="467 262 1258 357">What If It Goes? – Nondiscrimination Rules For Insured Plans</h2>
	<ul data-bbox="451 399 1242 714" style="list-style-type: none"><li data-bbox="451 399 1242 525">• The new nondiscrimination rules for non-grandfathered insured plans are not currently being enforced by the agencies.<li data-bbox="451 525 1242 714">• Before the agencies indicated they would not enforce these rules until regulations were issued, some employers terminated discriminatory executive health benefits.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 33

	<h2 data-bbox="467 1129 1209 1228">What If It Goes? – Expanded Claim and Appeal Rules</h2>
	<ul data-bbox="451 1260 1209 1774" style="list-style-type: none"><li data-bbox="451 1260 1209 1375">• Health care reform required non-grandfathered plans to comply with additional claim and appeal rules.<li data-bbox="451 1375 1209 1459">• The most significant one was the addition of an external review procedure.<li data-bbox="451 1459 1209 1575">• Most employers will probably revert to pre-health care reform rules to make plans easier to administer.<li data-bbox="451 1575 1209 1774">• Department of Labor previously indicated that it intended to change the claims procedures regulations to incorporate some of the changes health care reform made to internal appeal procedures.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 34

	<h2>What If It Goes? - \$2,500 Cap on Health FSAs</h2>
	<ul style="list-style-type: none">• Although not yet effective, some employers have amended their plans in anticipation of it taking effect.• Consider whether to go back to higher limit.• Amendment must be effective prospectively.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 35

	<h2>What If It Goes? - Tax on Medicare Retiree Drug Subsidies</h2>
	<ul style="list-style-type: none">• Health care reform eliminated the deduction for Medicare Part D drug subsidies.• Although not effective until 2013, some employers took a charge against earnings related to the anticipated elimination of the deduction.• Employers will need to determine whether and when to change their financial statements to reflect that deduction again exists.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 36

	<h2>What If It Goes? – Some Insurance Companies Not Changing</h2>
	<ul style="list-style-type: none">• On June 11, 2012, three major health insurers announced that they will continue abiding with many of the health care reform rules, regardless of how the Supreme Court rules.• UnitedHealthcare and Humana said they will continue to offer:<ul style="list-style-type: none">➢ preventive health care without copayments;➢ dependent coverage to age 26;➢ elimination of lifetime coverage limits;➢ no rescissions of coverage except for fraud or intentional misrepresentation of material fact; and➢ review of appeals by independent review organizations.• If an insurer keeps certain provisions, an employer may not be able to unwind them.
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 37

	<h2>Circular 230 Disclaimer</h2>
	<p>To ensure compliance with Treasury Regulations governing written tax advice, please be advised that any tax advice included in this communication, including any attachments, is not intended, and cannot be used, for the purpose of: (i) avoiding any federal tax penalty; or (ii) promoting, marketing, or recommending any transaction or matter to another person.</p>
Snell & Wilmer	©2012 Snell & Wilmer L.L.P. 38