

Health Law and Policy Update:

November 30, 2012

This week's updates

- [U.S. Supreme Court allows challenge to health law to proceed](#)
- [Self-insuring may lead to higher premiums in small group insurance market](#)
- [Study shows increase in Medicaid costs even to states that do not expand](#)

What's New

U.S. Supreme Court allows challenge to health law to proceed

On November 26, the U.S. Supreme Court vacated its earlier denial of review for the case of *Liberty University v. Geithner* and remanded to the Fourth Circuit Court of Appeals for further deliberations. *Liberty*, which challenges the constitutionality of the Patient Protection and Affordable Care Act (ACA), was first filed in 2011. Law Professor Timothy Jost recently wrote in a Health Affairs [Blog Post](#) that this challenge will likely amount to nothing. According to Jost, it is common for the Supreme Court to remand cases to a lower court to allow consideration of an earlier ruling in light of a major change in the law or Supreme Court Ruling. In this case, the Fourth Circuit will have the opportunity to reevaluate its earlier dismissal of the *Liberty University* case in light of this past summer's Supreme Court decision upholding most of the ACA.

Liberty challenges both the individual and employer mandates under the ACA on the grounds that they violate rights to religious freedom and legal equality and that the employer mandate represents an unconstitutional exercise of Congress's Commerce Clause and Necessary and Proper Clause powers. The Supreme Court held in June that the individual mandate is constitutional under Congress's power to tax. However, the Court declined to rule on the constitutionality of the employer mandate. According to Timothy Jost, it is very unlikely that the Fourth Circuit would overturn the employer mandate. "The Fourth Circuit would have to reject decades of law to hold that Congress cannot regulate employee benefits under the Commerce Clause," Jost said. "Employers are clearly engaged in commerce, and their commerce is subject to regulation." While this challenge will likely be the subject of much discourse in the press, it will not likely result in any significant change to the law.

Self-insuring may lead to higher premiums in small group insurance market

A new [issue brief](#) from the Commonwealth Fund demonstrates the need for increased regulation of self-insurance among small-group employers once the ACA is fully implemented in 2014. The report concludes that employee premiums in the fully insured small group market could rise by 25 percent for individuals and 19 percent for families if no regulatory action is taken.

Self-insured plans refer to employer-sponsored health coverage where the employer bears the risk

of covering its employees' medical expenses. Many employers purchase stop-loss coverage which protects an employer who incurs high cost claims in a year. According to the report, less than 12% of employers with fewer than 100 employees offer a self-insured plan compared with almost 90% of employers with 500 workers or more.

According to the report, small businesses with healthier workforces may be more likely to self-insure beginning in 2014 than participate in the small business exchange (SHOP). Businesses that self-insure can offer experience-rated plans, which favors healthier small groups. The fear is that over time the fully insured small group market could contain more and more sick, high risk individuals, which would result in higher premiums. There are also concerns that self-insured small groups will be able to use self-insurance during healthier periods and move into the exchange when employees or their family members become sicker. The report suggests setting regulatory safeguards to ensure that self-insured employers can cover the cost of unexpected claims should their employees become sick.

Study shows increase in Medicaid costs even to states that do not expand

As we have [previously reported](#) in this update, the Affordable Care Act (ACA) requires states to expand Medicaid to 138 percent of the Federal Poverty Level (FPL). That's \$15,415 annual income for an individual. However, the United States Supreme Court ruled this summer that states may not be penalized for failing to extend Medicaid coverage. States are waiting for federal guidance about what the Supreme Court's decision means for them. While states wait for federal guidance, many governmental and nongovernmental entities across the country are beginning to discuss the benefits and economic impact of expanding.

On November 26, the Kaiser Family Foundation released its findings from a [study](#) that projects national and state-by-state cost estimates of expanding Medicaid. A recent Denver Post [editorial](#) addressed this study, concluding that more financial review is needed, especially from the Colorado Department of Health Care Policy and Financing. The Department is conducting its own economic analysis, which will likely be available in the near future. We will continue to monitor and report on these developments in future updates.