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APA now the main control over new PPACA rules

Uncertainty remains regarding implementation of health law, including regulatory procedures

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There is a host of regulations either recently issued or on the way that, absent challenge, will effectively become part of the Patient Protection and Affordable Care Act (PPACA). Indeed, more than 40 provisions either require or permit federal agencies to issue regulations.

The regulations, given their broad application and sheer volume, will have enormous impacts on whether PPACA is ultimately a success or failure. In fact, ensuring PPACA is a success requires that the regulations be vigorously scrutinized and challenged when appropriate.

CHECKS ON AUTHORITY

Some have already been challenged in court, and agencies will likely face additional litigation based both on the substance of their regulations and on the procedures used to promulgate them. The legal framework for these challenges is the Administrative Procedure Act (APA), which checks agency authority in connection with promulgating regulations.

Most PPACA regulations are, or will be, subject to section 553 of the APA, which prescribes the fundamental requirement of “notice and comment” for most “rule-making.” Among other requirements, agencies must publish notice of proposed rules and solicit comments before issuing any final rule.

Final rules must generally be published at least 30 days before the rule becomes effective. Regulations violating these procedures

are subject to challenge under APA Section 706.

Moreover, any regulation that is arbitrary, capricious, an abuse of discretion, unlawful, contrary to constitutional right, or in excess of statutory jurisdiction or authority is subject to challenge in court. Indeed, ensuring that regulations satisfy these core requirements is an important check against agency actions in excess of their authority and will help ensure that PPACA is implemented properly and in accordance with the law.

Recently, the Eternal World Television Network (EWTN) and Legatus filed complaints against the Department of Health and Human Services (HHS), the Department of Labor and the Department of the Treasury. These plaintiffs contend that the agencies violated Section 553 of the APA in promulgating regulations to implement PPACA.

The complaints specifically challenge an interim final rule promulgated by HHS, Labor and Treasury, which required all group health plans and insurers offering group or individual plans to provide certain contraceptives, forcing individuals to violate deeply held religious beliefs. In addition to challenging these regulations on constitutional grounds, the plaintiffs’ allege the regulations were illegal for violating the APA by failing to provide sufficient prior notice and time for public comment.

Other similar challenges are likely to follow. Given the outcome of the Supreme Court challenge, the APA now becomes the critical means by which the nature and reach of regulatory actions can be controlled.

Thus, the regulations being promulgated to implement PPACA are a fertile battleground for disputes on how the United States’ healthcare system should actually function on a day-to-day basis.

The cases discussed above are the beginning of what is very likely to be an extended struggle. **MHE**

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