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*Practice Group:*  
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## Several Scenarios: The Patient Protection and Affordable Care Act, the Supreme Court, and the 2012 Elections

### What Does This Mean For Employers?

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#### Introduction and Summary

The Patient Protection and Affordable Care Act (PPACA) made significant changes to the nation's health care system. Since its enactment, PPACA has been the subject of heated political opposition and numerous lawsuits. Many Republicans (including all major Republican presidential candidates) have vowed to work towards the repeal of PPACA. At the same time, PPACA has been the subject of dozens of lawsuits, most of which have centered around the law's "individual mandate," which requires individuals to maintain health insurance coverage or pay a penalty. The Supreme Court has scheduled oral arguments on PPACA for March 26-28, with a ruling expected in the summer of 2012. The Supreme Court's ruling on this issue and the 2012 presidential election may have a significant impact on how PPACA applies to large employers.

#### Background

PPACA, which President Obama signed into law on March 23, 2010, made significant changes to the private and public health insurance markets. Among the major provisions, PPACA requires most Americans to obtain health insurance or pay a penalty, establishes American Health Benefits Exchanges for individuals and small businesses to purchase coverage, expands Medicaid eligibility, and reforms the private insurance market.

##### *The Individual Mandate*

PPACA requires most individuals to maintain "minimum essential coverage" beginning in 2014 or pay a penalty. Minimum essential coverage includes eligible employer coverage, individual coverage, grandfathered plans, and federal programs such as Medicare and Medicaid, among others. Individuals who do not maintain minimum essential coverage, and who are not exempt from the mandate, will be required to pay a penalty for noncompliance. The requirement that individuals purchase insurance or pay a penalty (the "individual mandate") has been the source of various legal challenges.

##### *The Employer Mandate*

PPACA requires large employers to provide minimum essential coverage to employees or pay a penalty. Under PPACA, an employer with 50 employees or more must offer minimum essential

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coverage to all full-time employees (individuals working 30 hours or more per week) or pay a penalty for any individual who receives premium tax credits in a health insurance exchange.

### *The Supreme Court*

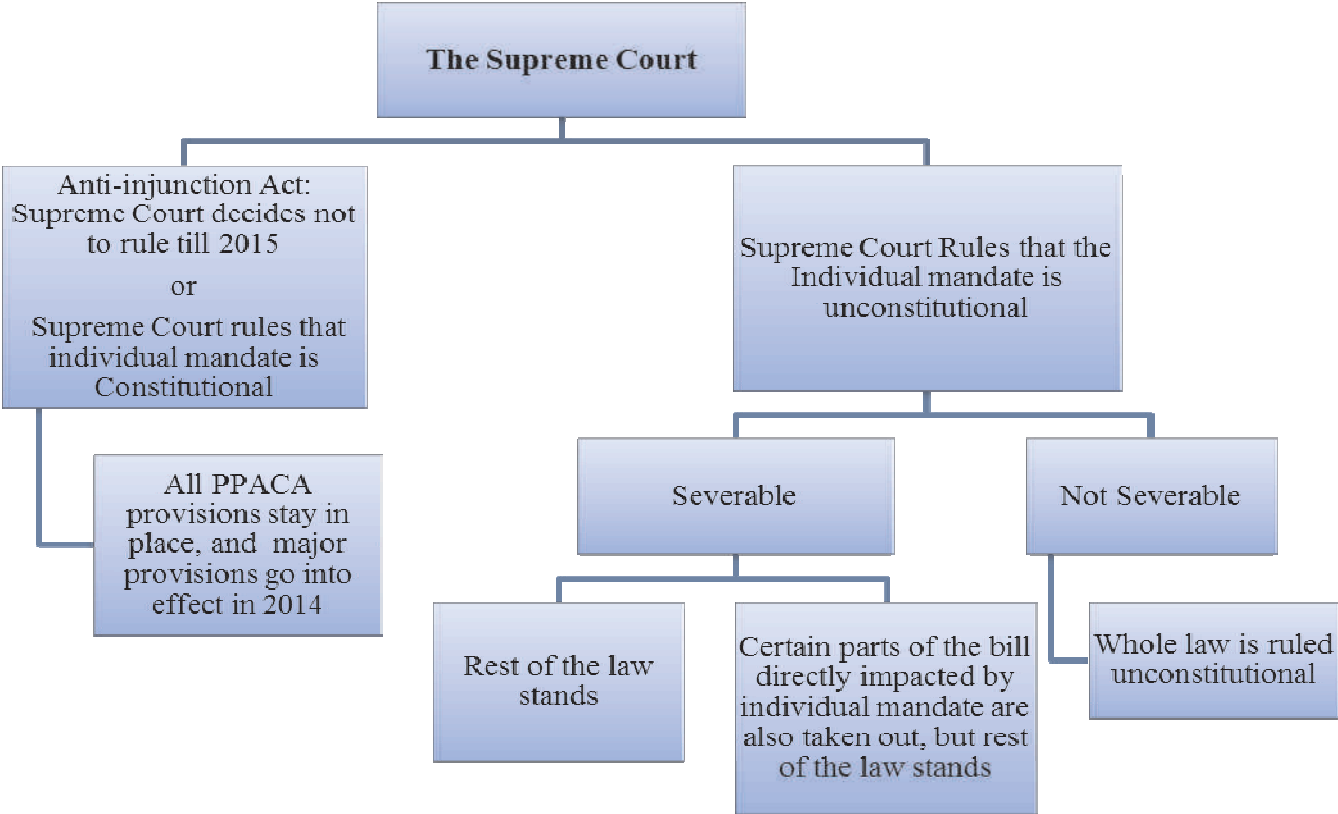
On November 14, 2011, the Supreme Court agreed to hear oral arguments in one lawsuit challenging the constitutionality of PPACA. This lawsuit was brought by 26 states, the National Federation of Independent Businesses, and two individuals. The Court will hear arguments on four issues: (1) whether the individual mandate is constitutional; (2) whether the individual mandate is severable from the rest of PPACA (i.e., whether some or all of PPACA must fall if the individual mandate is found unconstitutional); (3) whether PPACA's expansion of the Medicaid program is constitutional; and (4) whether the Anti-Injunction Act bars some or all of the legal challenges to the insurance mandate until the mandate takes effect. The Supreme Court has scheduled oral arguments for March 26-28, with a ruling expected in the summer of 2012. The timing of the Court's consideration of the lawsuit makes it likely that a ruling will have significant political implications during the 2012 elections. The flowchart below gives a broad overview of the various ways in which the Court may decide the case. Table 1 details the impact of these scenarios on employers.

### *Key Issues*

- 1. Threshold Question.* The government asked the Court to consider whether legal challenges to the individual mandate are barred, until 2014, by the Anti-Injunction Act, which forbids pre-enforcement challenges to tax statutes (that is, challenges prior to the actual payment of the tax).
- 2. The Individual Mandate.* The individual mandate has been challenged as exceeding congressional power.
- 3. Severability.* The fact that one provision of a PPACA is unconstitutional does not necessarily render the entire law unconstitutional; instead, the unconstitutional provision potentially can be "severed," with the unconstitutional provision and other provisions directly implicated by it stricken but the rest of the law remaining.

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## Supreme Court Scenarios



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**Table 1: The Supreme Court**

<b>Decision</b>	<b>What happens to PPACA?</b>	<b>What does it mean for employers?</b>
<b>Anti-Injunction Act: Supreme Court Decides Not to Rule Until After the Individual Mandate Takes Effect</b>  <b>OR</b>  <b>Supreme Court Upholds the Individual Mandate</b>	The whole law stands, and PPACA is implemented as enacted.	Most of the PPACA requirements go into effect in 2014, at the same time as the individual mandate. Therefore, employers would have to comply with all the requirements of PPACA, including the employer mandate, at least until after the Anti-Injunction Act no longer bars legal challenges to the individual mandate. Under PPACA, a large employer (an employer with 50 employees or more) must offer minimum essential coverage to full-time employees or pay a penalty for each employee that obtains premium tax credits in a health insurance exchange. A subsequent lawsuit may strike down all or part of the law.
	The whole law stands, and PPACA is implemented as enacted.	Employers would have to comply with all the requirements of PPACA, including the employer mandate. Under PPACA, a large employer (employer with 50 employees or more) must offer minimum essential coverage to full-time employees or pay a penalty for each employee that obtains premium tax credits in a health insurance exchange.
<b>Supreme Court Strikes Down the Individual Mandate</b>	Severable: If the Supreme Court rules that the individual mandate is severable from the rest of the law, the individual mandate is removed, but the rest of the law stands.	Employers will have to comply with the rest of the requirements under PPACA, including the employer mandate. Insurers would have to comply with all the requirements of PPACA, including offering dependent coverage for adult children up to 26, prohibiting rescissions of coverage, prohibiting annual and lifetime limits, and providing preventive services without cost-sharing.
	Severable and removes certain provisions impacted by the individual mandate: The Court may decide to remove certain provisions directly impacted by the individual mandate, including the prohibition of pre-existing condition exclusions, the prohibition of rescissions and annual limits, and others.	Employers have to comply with provisions of PPACA not directly impacted by the individual mandate, including employer responsibilities. In addition, PPACA provisions such as the health insurance exchanges, the essential health benefits requirement, medical loss ratio requirements, the limitation on waiting periods, nondiscrimination requirements, coverage of preventive health services requirements, the Independent Payment Advisory Board (IPAB), Accountable Care Organizations (ACO), and others stay in place.

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Decision	What happens to PPACA?	What does it mean for employers?
	Not severable: PPACA is ruled unconstitutional, and the whole law is struck down.	Employers do not have to comply with any requirements. Regardless, employers and health insurers will face pressure to maintain some of the more popular benefits of the law, including the requirement that children up to age 26 be allowed to remain on their parents' insurance policies, as well as the prohibition against rescissions, annual or lifetime limits, and pre-existing condition exclusions.

### *The 2012 Elections*

If the Supreme Court rules that the individual mandate is unconstitutional and is not severable from the rest of PPACA, the Court will strike down the entire law. However, if the Court rules that the individual mandate is constitutional or that the individual mandate is unconstitutional but severable from the rest of the law, the outcome of the 2012 elections will impact the fate of PPACA. There are many options available to the President/Administration and congressional Republicans depending on the outcome of the 2012 elections.

#### *Presidential/Administrative Actions*

- **Presidential Veto:** If Republicans maintain control of the House and gain 60 seats in the Senate, Congress will likely repeal PPACA. However, if President Obama wins re-election, he would almost certainly veto such a repeal. To override the President's veto, Republicans would need a two-thirds majority vote in the House and Senate.
- **Executive Order:** If Republicans win the White House, but do not win 60 votes in the Senate, a Republican president may use executive orders to impact the implementation of PPACA. However, executive orders have limited power and do not give the President the authority to eliminate a law passed by Congress. While a Republican president may be able to alter certain regulations, a president cannot issue an executive order to halt an agency from promulgating rules statutorily required by PPACA.
- **Regulations:** In addition to issuing an executive order, a Republican Administration may influence the implementation of PPACA through regulations. The Administration may delay promulgating regulations, give states broader authority, grant waivers, among others. However, individuals and consumer groups may bring legal challenges against regulations that do not adhere to PPACA requirements.

#### *Congressional Actions*

- **Repeal:** If Republicans win 60 votes in the Senate, they can repeal PPACA. A Republican president presumably would then sign the repeal bill.
- **Reconciliation:** Senate Republicans have vowed to use reconciliation to repeal various provisions of PPACA if they do not win 60 seats in the Senate. Reconciliation allows the Senate to pass legislation with 51 votes, instead of the required 60 votes. However, the impact of reconciliation is limited, and Republicans can only use reconciliation to repeal budget-related elements of

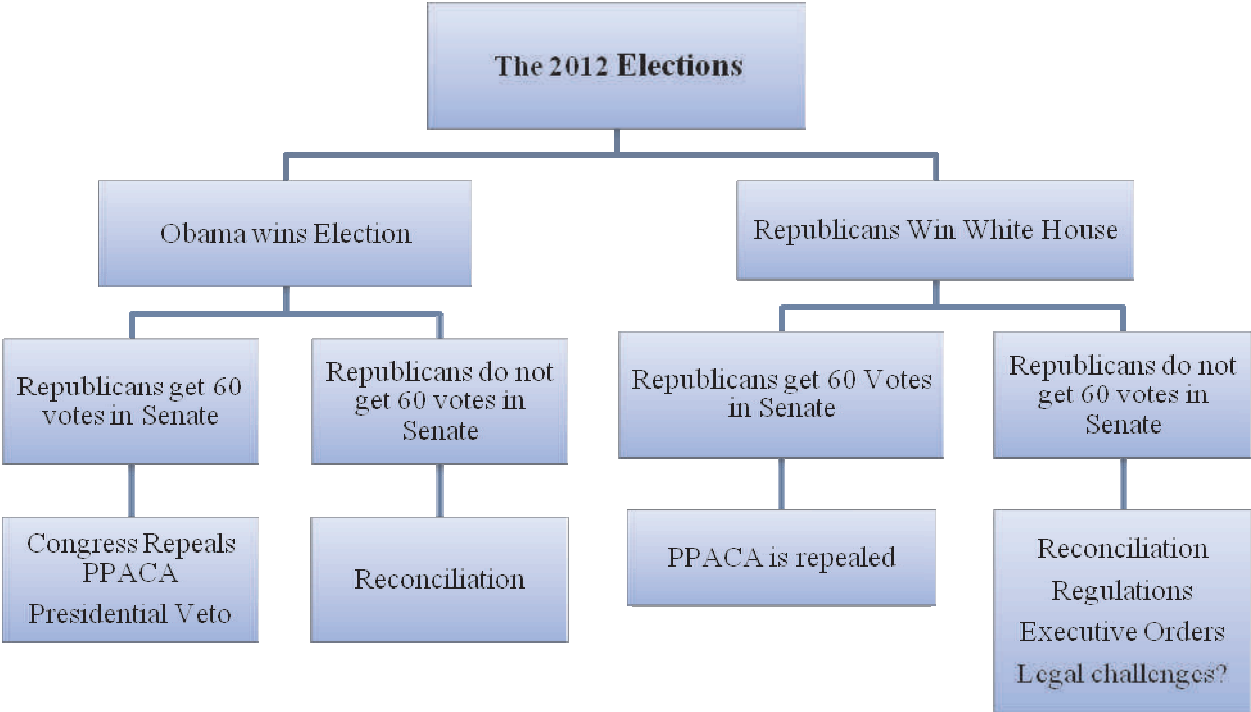
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PPACA. Democrats employed this procedure to amend the health care law. Therefore, Republicans can use reconciliation to repeal any PPACA provisions passed through reconciliation.

- Appropriations: Republicans will try to de-fund the implementation of the law through the annual appropriations process.

The flowchart below gives a broad overview of the various ways in which the 2012 elections may impact PPACA. Table 2 details the impact of these scenarios on employers.

**2012 Election Scenarios**



\* This flowchart and Table 2 assume that Republicans maintain control of the House.

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**Table 2: The 2012 Elections**

<b>Election Results</b>	<b>What Happens to PPACA?</b>	<b>What does it mean for employers?</b>
<p><b>If Obama wins election BUT Republicans get 60 votes in the Senate</b></p>	<p>Repeal: With 60 votes in the Senate, Republicans will repeal PPACA.</p> <p>Veto: President Obama will veto any repeal bills passed by Congress. If Republicans do not have two-thirds majority vote to override the veto, PPACA stays in effect.</p>	<p>Most of the PPACA requirements go into effect in 2014; therefore, employers would have to comply with all the requirements of PPACA, including the employer mandate, at least until 2015. Under PPACA, a large employer (an employer with 50 employees or more) must offer minimum essential coverage to full-time employees or pay a penalty for each employee that obtains premium tax credits in a health insurance Exchange.</p>
<p><b>If Obama wins election AND Republicans do not get 60 votes in the Senate</b></p>	<p>Reconciliation: Without 60 votes in the Senate, the Republicans cannot repeal PPACA. However, they can use reconciliation to repeal certain parts of the bill that have budgetary impact. This includes the penalties for employers who do not offer affordable, minimum essential coverage; the penalty for the individual mandate; premium tax credits and cost sharing reductions for individuals to purchase health insurance in the exchange; Medicaid expansion and other provisions with budgetary impact.</p> <p>Veto: However, President Obama will veto any bill that repeals or significantly weakens PPACA.</p>	<p>Employers would have to comply with all the requirements of PPACA, including the employer mandate. Under PPACA, a large employer (employer with 50 employees or more) must offer minimum essential coverage to full-time employees or pay a penalty for each employee that obtains premium tax credits in a health insurance exchange.</p>
<p><b>If Republicans win the White House AND Republicans get 60 votes in the Senate</b></p>	<p>Repeal: All the Republican presidential candidates have pledged to repeal PPACA. If Republicans win the White House and get 60 votes in the Senate, Republicans presumably will repeal PPACA. It is unclear what will happen to popular provisions of the law, including provisions related to pre-existing conditions, coverage for individuals under 26, annual and lifetime limits, rescissions, and appeals.</p>	<p>Employers do not have to comply with any requirements.</p> <p>It is unclear what will happen to popular provisions that have already gone into effect.</p>

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Election Results	What Happens to PPACA?	What does it mean for employers?
<p><b>If Republicans win the White House BUT Republicans do not get 60 votes in the Senate</b></p>	<p>Executive Order: It is unclear how much a president can do through an executive order. However, the Administration can affect implementation through regulations.</p> <p>Regulations: A Republican Administration can delay implementation of PPACA, waive provisions, and give states broader discretion through regulations. However, this will open the Administration to legal challenges that it is not implementing the statute as enacted.</p> <p>Reconciliation: Without 60 votes in the Senate, Republicans cannot repeal PPACA. However, they can use reconciliation to repeal certain parts of the bill that have budgetary impact, including the penalty for the individual mandate, premium tax credits and cost sharing reductions for individuals to purchase health insurance in the exchange, the expansion of Medicaid, and others.</p> <p>A Republican president can then sign the reconciliation legislation into law, repealing parts of PPACA.</p>	<p>It is unclear what will happen to PPACA. Using a combination of regulations, reconciliation and executive orders, Republicans may be able to make major changes or repeal various provisions in PPACA. Employers have to be prepared to implement provisions that Republicans are unable to repeal or waive.</p>



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