



2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

March 5, 2015

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker LLP

Re: *Court Denies Preliminary Injunction in Northern Arapaho Tribe's Challenge to the ACA's Employer Mandate*

On February 26, 2015, the United States District Court for the District of Wyoming denied the Northern Arapaho Tribe's (Tribe) request for a preliminary injunction in *Northern Arapaho Tribe v. Burwell* (Case No. 14-CV-247-SWS). The case involves the Tribe's challenge to Internal Revenue Service (IRS) regulations that extend the Affordable Care Act's (ACA) Employer Mandate to tribal government employers.

The ACA requires all "applicable large employers" with 50 or more full-time employees to offer their full-time employees health insurance coverage that meets certain minimum standards. 26 U.S.C. § 4980H. Applicable large employers that fail to offer coverage to their employees, or fail to offer coverage that is affordable and meets minimum value requirements, must pay significant tax penalties to the IRS. (For a more detailed summary of the employer mandate rules, please see our March 5, 2014 memorandum summarizing the final employer mandate regulations).

The ACA's Employer Mandate applies to all applicable large employers, but does not specifically state that it applies to tribal governments. The IRS regulations implementing the Employer Mandate, however, specifically include governmental entities and define them to include Indian tribal governments. 26 C.F.R. §§ 54.4980H-1, 301.6056-1, 1.0655. The net effect of these regulations is that tribal government employers are now forced to pay for health care coverage for their tribal member employees because of their status as employees.

Under the mandate, a Tribe must either: (1) furnish health insurance that meets certain minimum standards; or (2) pay a fine to the IRS if they fail to do so. There is no exception for tribal member employees, even though they are exempt from the individual mandate. This means that Tribes must pay for health care coverage for any member who is an employee, either by purchasing insurance coverage, or by paying fines if they do not. The Employer Mandate also raises particular concerns for tribal government employers because once they offer coverage to their tribal member employees, tribal

members are disqualified from getting the premium tax credits and special Indian cost-sharing exemptions to which they would otherwise be entitled when purchasing insurance on the new Health Insurance Exchanges.

The Northern Arapaho Tribe argued that the IRS regulations conflict with the ACA and are therefore invalid under the Administrative Procedure Act (APA). The Tribe argued that the IRS regulations were invalid because the ACA does not specifically include tribes in the employer mandate and Congress never intended the Employer Mandate to apply to tribes. As evidence of this, the Tribe pointed out that Congress exempted individual Indians from the individual mandate. The Tribe also asserted that application of the Employer Mandate to the Tribe would make insurance more expensive for its tribal member employees, depriving them of the tax credits and cost-sharing benefits Congress intended.

The court ruled that the Tribe's suit was prohibited by several threshold issues. First, the court found that the Tribe's suit was prohibited by the Anti-Injunction Act, which bars all lawsuits seeking to prevent the assessment of a tax. As a general matter, the Anti-Injunction Act only permits lawsuits to seek refunds of erroneously assessed taxes. The court determined that the Employer Mandate tax penalties that the Tribe would be subject to under the IRS regulations were taxes. As a result, the court ruled that the Anti-Injunction Act prohibited the suit. The court also noted that the Declaratory Judgment Act also prohibits declaratory relief with respect to federal taxes. Finally, the court ruled that even if the suit were not prohibited by the Anti-Injunction Act or Declaratory Judgment Act, the Tribe had waived its right to challenge the Treasury regulations by not raising its objections during the public notice and comment period. As a general matter, you may not bring a lawsuit to challenge a regulation under the Administrative Procedure Act unless you (or in some cases others) raised the objection during the public notice and comment period.

The court went on to rule that even if the suit were not prohibited, the Tribe would not be entitled to a preliminary injunction. The court determined that the Tribe was not likely to succeed on the merits because the ACA clearly and unambiguously intended the Employer Mandate to apply to all large employers, which includes Indian tribes. The court reasoned that if Congress wished to exempt tribes from the Employer Mandate, it needed to have done so explicitly. The court also found that a preliminary injunction was not warranted because the Tribe would not be irreparably harmed, the balance of hardship did not favor granting such relief to the Tribe, and issuing a preliminary injunction would be adverse to the public interest.

We will update you as this case progresses. We are continuing to work to obtain relief from the Employer Mandate for tribal government employers from the Administration.

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For more information, please contact Elliott Milhollin at (202) 822-8282 or emilhollin@hobbsstrauss.com or Geoff Strommer at (503) 242-1745 or gstrommer@hobbsstrauss.com.