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Opinion No. 10-43

Validity of SB 3498/HB 3433 and HJR 745 relative to health care

QUESTION

Are Senate Bill 3498/House Bill 3433 and House Joint Resolution 745 likely preempted by federal law?

OPINION

Yes. A court would likely determine that SB 3498/HB 3433 and HJR 745 are preempted by conflicting provisions of the federal Patient Protection and Affordable Care Act.

ANALYSIS

Senate Bill 3498, as amended, and House Bill 3433 would enact the Tennessee Health Freedom Act. The Act would declare that the public policy of the State of Tennessee is that every person within the State is free to choose or decline to choose any mode of securing health care services without penalty or threat of penalty by the federal government. It would prohibit public officials, employees and agents of the State and of its political subdivisions from imposing, collecting, enforcing or effectuating any penalty in the State that would violate the public policy declared by the Act. The Act would also direct the Attorney General and Reporter to seek injunctive and other appropriate relief and to defend the State, its officials, employees and agents in the event that any government enacted any law or regulation violating the public policy set forth in the Act.

House Joint Resolution 745 would amend Article XI of the Tennessee Constitution to provide that no law or rule may compel, directly or indirectly, any person, employer or health care provider to participate in any health care system. It would further prohibit persons, employers, and health care providers from being penalized or fined for paying directly for, or accepting direct payment for, lawful health care services.

The recently-enacted federal Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. Law No. 111-152, (collectively referred to as the "federal Act") establishes new responsibilities and requirements upon individuals, employers, and health insurers. For example, beginning in

2014, individuals[1] must ensure that they and their dependents are covered under "minimum essential coverage." Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) § 1501(b) (to be codified at § 5000A(a) of the Internal Revenue Code of 1986). "Minimum essential coverage" includes government sponsored programs such as Medicare and Medicaid, eligible employer-sponsored plans, health plans offered in a State's individual market, and other coverage. *Id.* § 1501(b) (to be codified at § 5000A(f)(1) of the Internal Revenue Code of 1986). If an individual fails to meet the coverage requirement during one or more months during a calendar year, he will be subject to a monetary penalty. *Id.* §§ 1501(b), 10106(b) (to be codified at § 5000A(b)(1), (2) of the Internal Revenue Code of 1986).

Large employers[2] who do not offer their full-time employees the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan and large employers who have one or more full-time employees that take advantage of subsidies in the Exchanges will be required to pay tax assessments and/or penalties. *Id.* § 1513(a), as amended by Pub. L. No. 111-152 (2010) § 1003 (to be codified at § 4980H(a), (b) of the Internal Revenue Code of 1986).

Group health plans and health insurance issuers offering group or individual health insurance coverage will be prohibited from establishing lifetime and annual limits on the dollar value of benefits as set out in the federal Act, and from rescinding coverage except in instances of fraud or intentional misrepresentation of material fact. *Id.* §§ 1001(5), 10101(a) (to be codified at §§ 2711 and 2712 of the Public Health Service Act). They will be subject to monetary sanctions for discouraging individuals from remaining enrolled in prior coverage based on their health status. *Id.* § 1101(e). They will also be required to provide coverage for certain preventive health services without imposition of any cost sharing requirements upon such services. *Id.* § 1001(5) (to be codified at § 2713(a) of the Public Health Service Act).

Congressional power to preempt state law arises from the Supremacy Clause of the United States Constitution. The Supremacy Clause provides that the laws of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding," U.S. Const. art. 6, cl. 2. Accordingly, a state statute cannot "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 647 (1971) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Congressional intent determines whether a federal statute preempts state law. *Wadlington v. Miles, Inc.*, 922 S.W.2d 520, 522 (Tenn. Ct. App. 1995) (citing *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 137-38, 111 S.Ct. 478 (1990)). The Supremacy Clause results in federal preemption of state law when: (1) Congress expressly preempts state law; (2) Congress has completely supplanted state law in that

[1] The federal Act exempts certain individuals from this requirement, *i.e.*, certain members of recognized religious sects or divisions having a religious conscience objection, certain members of health care sharing ministries, persons who are not citizens, United States nationals or lawful aliens, and certain incarcerated persons. Pub. Law No. 111-148 § 1501(b) (to be codified at § 5000A(d)(2), (3), (4) of the Internal Revenue Code of 1986).

[2] Generally speaking, such "large" employers are those who employ more than 50 full-time employees. Pub. L. No. 111-148 § 1513(a) (to be codified at § 4980H(c)(2) of the Internal Revenue Code of 1986).

field; (3) adherence to both federal and state law is impossible; or (4) the state law impedes the achievements of the objectives of Congress. *Id.* (citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476, 2481-82 (1991)).

Our comparison of SB 3498/HB 3433 and HJR 745 with the provisions of the federal Act leads us to the conclusion that the former are preempted by the latter. The public policy expressed in both SB 3498/HB 3433 and HJR 745 is directly opposed to the expressly stated Congressional intent of "achiev[ing] near-universal coverage" for health care insurance. Pub. L. No. 111-148 § 1501(a)(2)(D). While the federal Act does not contain express preemption language, each of the remaining three factors outlined in *Wadlington* would appear to apply here. Congress has completely supplanted any state law that is contrary to the mandatory obligations imposed by the federal Act upon individuals, employers, health care insurers and health plans for the achievement of expanded health care coverage.[3] If either or both SB 3498/HB 3433 and the constitutional amendment proposed by HJR 745 were enacted, adherence to both federal and state law would be impossible. Finally, the proposed state laws would impede the achievement of the objectives of Congress as stated in the federal Act.

SB 3498/HB 3433 would also add a section to the Tennessee Code that places a duty on the Attorney General and Reporter to initiate litigation against the federal government challenging the federal Act or any other federal law inconsistent with the public policy set forth in SB 3498/HB 3433 and to defend the State and state actors in related litigation. Because this statutory duty would require the enforcement of a state law or policy that is preempted by federal law, this Office could not act as counsel for the State pursuant to such a statute. *Compare* Tenn. Code Ann. § 8-6-109(b)(9) (Attorney General has a duty to defend the constitutionality and validity of all State legislation, except in those instances where the Attorney General is of the opinion that such legislation is not constitutional). Legislation aimed at regulating the Attorney General's discretion concerning which actions to prosecute and defend on behalf of the State could also raise separation of powers concerns, as the Office of the Attorney General and Reporter is a constitutional office that is part of the judicial branch of the State of Tennessee. *See* Tenn. Const., Art. VI, § 5.

[3] The federal Act contains a provision allowing States to apply to the Secretary of Health and Human Services for a waiver of certain important provisions of the Act for plan years beginning on or after January 2017. *See* Pub. L. 111-148 § 1332. These waivable provisions include the sections of the federal Act that impose requirements upon individuals to maintain minimum essential coverage and those that impose shared responsibilities upon employers, *i.e.*, §§ 4980H and 5000A of the Internal Revenue Code of 1986. *Id.* § 1332(a)(1), (2). However, such waiver applications may be granted only if the Secretary determines, *inter alia*, that a State will enact a law ensuring that it will provide coverage that is at least as comprehensive as the coverage set out in the federal Act, will provide coverage to at least a comparable number of its residents as the provisions of the federal Act, and will not increase the Federal deficit. *Id.* § 1332(b). Absent receiving an approved waiver as set out above, States are bound by the waivable provisions of the federal Act.

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