

State GOP Officials Mum About Joining Obamacare Lawsuits

N.C. Chamber calls health law 'impediment to job creation'

By: Dan Way – June 3, 2013

One of the state's largest business organizations is keeping a close eye on two federal lawsuits challenging the authority of the IRS to collect Obamacare taxes in states, including North Carolina, that did not set up state-run health insurance exchanges.

"We are aware of what's happening in Oklahoma and other places. We're digging in and watching what's happening very carefully," said Gary Salamido, vice president of government affairs for the North Carolina Chamber of Commerce.

Notwithstanding the Chamber's interest, top state Republican elected officials have not taken a position on whether the state should join any of the lawsuits.

Oklahoma, which did not create a state-run exchange, is suing the federal government to block the IRS from enforcing the taxes that fund the significant federal subsidies uninsured individuals would use to buy insurance off the health exchanges.

As written, the law limits taxation funding the subsidies to states that have authorized state-run exchanges. North Carolina has not set up such an exchange.

Sam Kazman, general counsel for the Washington, D.C.-based Competitive Enterprise Institute, said his organization is suing to block the Obamacare taxes on behalf of several small businesses and four individuals in Virginia, West Virginia, Texas, Missouri, Tennessee, and Kansas.

If the lawsuit is successful, "Given the way that the court ruling on a federal issue works, it would pretty much invalidate the rule" in what Kazman called the 33 "refusenik states" that refused to set up state health exchanges.

There is some difference between the suits.

"Oklahoma as a state is raising a number of constitutional issues in addition to whether the regulation was authorized by Congress, whereas we're just raising that last point," Kazman said.

"Our members are very concerned about it, both the large companies and, in particular, the small companies," Salamido said of the Obamacare mandates.

"What we're doing is we're talking to our member companies, we're talking to folks in the HR groups of those member companies. They're monitoring it. ... That being said, we've not taken any position or made any decision to go any further yet" with legal action, Salamido said.

“The key point for us is one of the leading impediments to economic recovery, and job creation, and job retention is the Affordable Care Act,” the official name for Obamacare, Salamido said. “If the IRS was to get more aggressive in any regard we would have a hard time not opposing it.”

Karen Harned, an attorney in the National Federation of Independent Business Legal Center in Washington, D.C., helped to prepare arguments her organization used before the U.S. Supreme Court to block implementation of Obamacare’s individual mandate. Though the NFIB’s challenge was not successful, Harned thinks “there is a good statutory challenge” in the pending lawsuits.

“I think the statute clearly does say that the subsidy and the mandate applies to the state-run exchanges and not to the federal exchanges,” Harned said.

While still “very disappointed” that the Supreme Court ruled 5-4 against the suit brought by the NFIB and 26 states, Harned said her organization is “trying to repeal the most onerous parts of the bill,” with overall repeal of Obamacare the ultimate goal. That is being pursued through legislative and regulatory processes, not the courts.

The way Obamacare is set up, employers face a penalty, which the Supreme Court deemed a tax, for failing to provide health insurance if someone on their payroll is eligible for Medicaid.

“The subsidies are in effect the trigger point for the employer mandate,” said Michael Tanner, senior fellow at the Washington, D.C.-based Cato Institute. “If there’s no subsidy, there’s no employer mandate.”

The law as written “says subsidies are only available on a state-run exchange. The Obama administration says this is a typo,” and will collect the tax regardless, Tanner said.

Tanner said if Oklahoma’s lawsuit makes it through the first round of legal challenges by the Obama administration, “you’ll see a lot of states joining.”

It’s uncertain how North Carolina would respond.

Kim Genardo, spokeswoman for Gov. Pat McCrory, said the administration would have no comment on the lawsuits as they progress through the courts.

Amy Auth, spokeswoman for Senate leader Phil Berger, R-Rockingham, said Senate staff has been busy with legislative deadlines, budget, and tax reform issues and has not studied the lawsuits. The office of House Speaker Thom Tillis, R-Mecklenburg, did not respond to requests for comment.

The Obama administration has asked the court to dismiss the Oklahoma suit. “That may give you some indication of how they’re going to approach our case,” Kazman said, although the filing deadline for a response to that suit is still more than a month away.

If the courts rule in favor of the lawsuits, “As an immediate effect, you would have thousands of companies and millions of people in the refusenik states [that] would be

free of the employer mandate, and to some extent the individual mandate itself,” Kazman said.

It is possible more than the 33 federal exchange states could be excluded from participating in the Obamacare tax plan as well. Although the deadline has passed for states to decide whether they would create a state exchange or opt in for a federal exchange, “that’s not set in stone,” he said.

There are other concerns about how the law is being implemented.

In writing the law, Congress said companies relocating from a state where there are state-run exchanges to a state where there is not would not have to abide by the employer mandate.

“Under the IRS rule, [companies] cannot do that any longer,” Kazman said. “That’s not the sort of thing that the IRS on its own can change.” Taxation is “one of those powers that the framers were very careful about” because it is a formidable control mechanism, so they limited its imposition to Congress, not regulatory agencies, Kazman said.

Another significant concern is “If statutes like Obamacare become the norm, we’re in for a lot of mega-statutes coming out of Congress” whose content nobody will know or understand until well after it’s passed, he said.

That is the path Obamacare took, with then-House Speaker Nancy Pelosi, D-Calif., saying, “We have to pass the bill so that you can find out what is in it,” Kazman said. “Now that we’re seeing what’s in it, it’s not very appetizing.”

Salamido said Chamber of Commerce member businesses complain that as regulations continue to be written, it compounds “a huge burden on the cost of a job” and the uncertainty grows over whether expansion or additional hiring is possible.

“It makes North Carolina a more expensive place to do business. It hurts our regional competitiveness, and it hurts our national competitiveness, and because we have a large number of [international] companies, particularly in the Triangle and in Charlotte, it hurts our global competitiveness,” Salamido said.

“The uncertainty around this law is really impeding job creation, more than anybody will publicly talk about. It’s a real challenge, it’s a real problem,” Salamido said.

When President Obama first introduced the Affordable Care Act, he said it would cost \$900 billion over its first decade. Tanner said the price tag now is \$2.5 trillion and growing, to nearly three times the initial estimate even though it has not been implemented fully.

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