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Critics Question Legality of Health-Care Delay

By: Amy Schatz – July 3, 2013

It didn't take long after the administration's surprise announcement Tuesday night of its decision to delay a key part of the health insurance overhaul to 2015 for critics to complain the White House was breaking its own law.

Within hours, Rep. Darrell Issa, the Republican chairman of the House Oversight and Government Reform committee said it "is unclear that [President Obama] has the authority to do this without Congress."

Tennessee Rep. Phil Roe, a Republican, asked Congress's research arm to examine the legality of the move.

The delay is the latest in a series of steps by the Obama administration to ignore or weaken provisions which upset interest groups, said Michael Cannon, director of health-policies studies for the Cato Institute and a former adviser to Senate Republicans.

"The Obama administration has violated their own health care law so many times you can assume whatever they're doing is illegal," Mr. Cannon said. "This is the best window we have on how they see the rollout going. It belies their claims that everything is going smoothly."

A Treasury department official said the action was taken under authority of a section of the Internal Revenue Code which gives the agency discretion in writing rules and regulations. Additionally, the agency "has a longstanding administrative authority to grant transition relief when implementing new legislation," like health-care reform, the official said.

Technically, the administration is delaying a requirement that employers provide information on their healthcare plans and covered employees to the Internal Revenue Service. That information is needed to assess penalties against employers who don't offer minimum coverage and also identify people who qualify for health insurance tax credits.

Under the law, employers have provide that information "at such times as the Secretary may prescribe" and the announcement Tuesday essentially pushes that deadline until 2014, said Thomas Barker, an attorney at Foley Hoag who served as general counsel of the Department of Health and Human Services during President George W. Bush's administration.

"They're saying 'We can't enforce the law because we don't have the information'," Mr. Barker said. "They aren't really delaying the penalty, although that's the effect."

It's not uncommon for administrations to selective determine which laws they'll enforce, no matter how much those decisions infuriate Congress.

Mr. Obama has frequently taken to directing agencies to delay or not enforce certain provisions of laws when he's been unable to push through legislation. In February 2011, the Justice Department said it would stop defending the constitutionality of the Defense of Marriage Act. (That law was essentially overturned by the Supreme Court last week.)

And after immigration legislation stalled in Congress in 2012, Mr. Obama announced the Department of Homeland Security would no longer begin deportation proceedings against young undocumented immigrants who came to the U.S. before they were 16.

Republicans complaints about the Obama administration's selective enforcement decisions in many ways mirror similar Democratic complaints about George W. Bush's administration, which routinely issued "signing statements" detailing parts of laws his administration didn't agree with and wouldn't enforce.

Even if the administration's decision to delay the employer mandate provision were illegal, it's not clear what anyone could do about it. House Republicans have tried to repeal the health reform law dozens of times to no avail. The U.S. Chamber of Commerce and other business groups who routinely provide campaign contributions to Republicans support the change.

And it could be difficult to raise a legal challenge to the change since it's not clear who could prove they have been injured by it.