

Administration uses employer mandate delay to swat at court challenges

By: Tom Howell, Jr. – July 8, 2013

The Obama administration is using last week's delay of the health care law's employer mandate to try to get some of the legal challenges to the Affordable Care Act thrown out of court, arguing that with the changes, it's no longer clear what the final policy will look like so businesses shouldn't sue yet.

On Wednesday, a day after it announced a one-year delay in requiring businesses with 50 or more workers to provide health coverage, the administration told a federal appeals court to reject Liberty University's lawsuit against "Obamacare," saying that the delay in the mandate shows the issue is not developed enough for judges to make a decision.

"This one-year delay only underscores that Liberty University's challenge is unripe," Justice Department attorney Alisa B. Klein wrote in a filing with the 4th U.S. Circuit Court of Appeals. Administration attorneys followed up Monday with a filing that says the university is no longer entitled to an expedited briefing aimed at settling the matter before the end of the year.

Also this week, the administration told a federal judge in Oklahoma that last week's changes undercut a challenge by state Attorney General E. Scott Pruitt to the Affordable Care Act.

"The Department of the Treasury's announcement underscores that Oklahoma has not pleaded, and could not plead, that it [faces] impending injury from the large employer tax," the administration lawyers said in their filing.

Michael F. Cannon, the Cato Institute's director of health policy studies, said the use of the government's use of the delay to fight Liberty's suit over Obamacare is "very interesting."

"Within hours of announcing its illegal decision to delay the employer mandate, the Obama administration asked a federal court to block a legal challenge to the mandate based on that delay," he said.

Attorneys for Liberty University, founded by late pastor Jerry Falwell in Lynchburg, Va., said in a statement Monday that their case is far from moot. They also said the administration is ignoring university's objection to a second mandate, which requires many employers to insure birth control and morning-after pills.

Last month, the Department Health and Human Services green-lighted a final rule on that mandate to provide free contraception.

HHS has tried to accommodate religious nonprofits by letting them insure contraception through policies they neither manage nor directly pay for, but their offer has been widely rejected by the religious objectors.

Liberty University said it is leading "the only pending case in the country that challenges the entire employer mandate and not just the HHS contraceptive-abortion abortifacient mandate.

"That distinction sets this case apart from every other pending case in the country," the university's lawyers said.

One attorney, Mathew D. Staver, said in court papers that a final rule published by the Obama administration last month "made clear the government has no intentions of altering" the contraception mandate.

HHS declined to comment on the cases. Justice Department spokeswoman Allison Price said nothing beyond confirming that “to date, the delay has been mentioned in one appellate case and two district court cases.”

The decision to delay the employer mandate also could have fiscal consequences, since the overhaul consists of delicately balanced funding mechanisms — like the employer mandate — that offset the cost of expanding Medicaid eligibly in select states and paying for government subsidies to Americans who will buy insurance through state-based health exchanges.