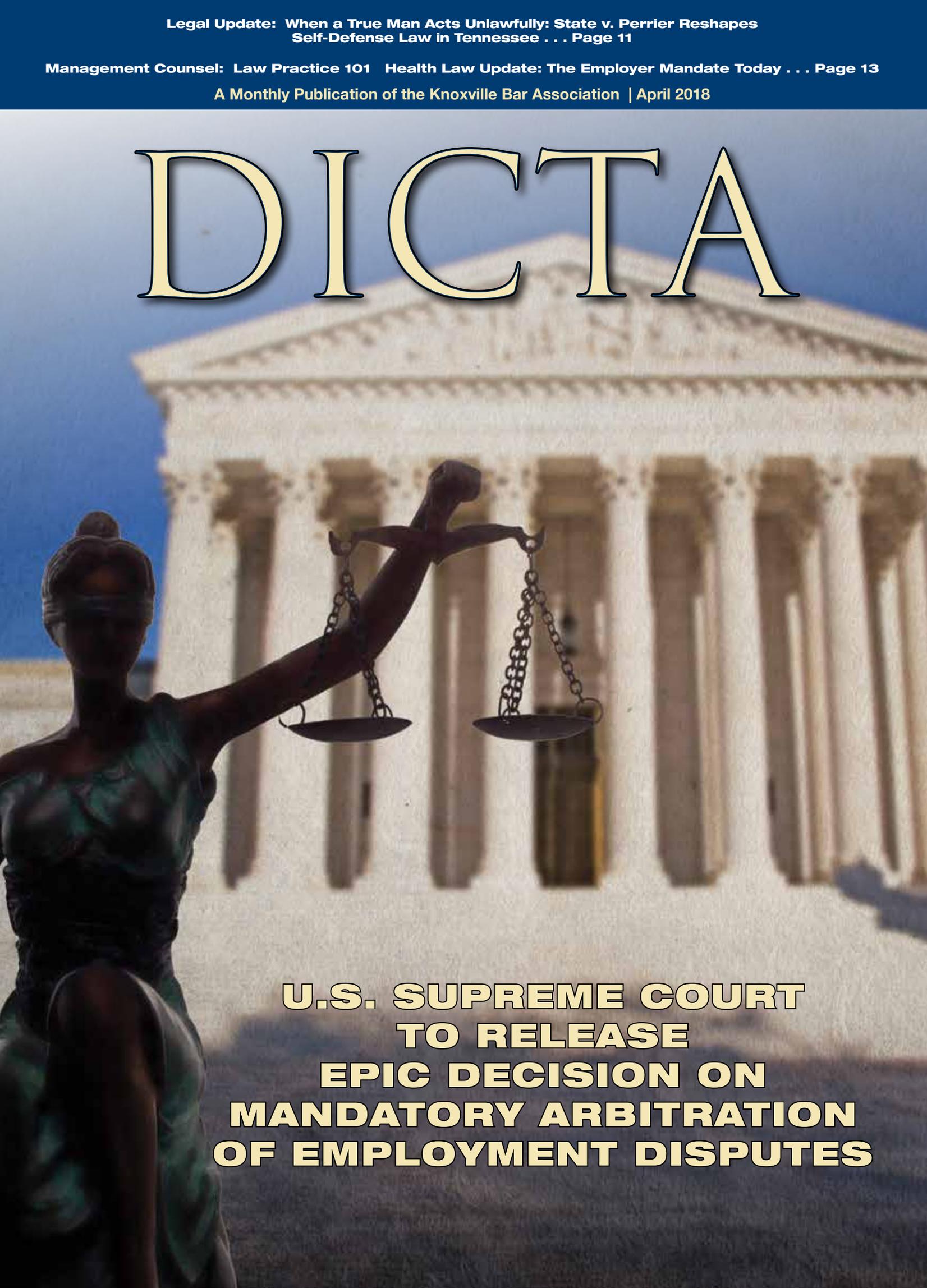


DICTA

The background of the cover is a photograph of the U.S. Supreme Court building. In the foreground, the bronze statue of Lady Justice is visible, holding a pair of scales. The building's white columns and pediment are clearly visible in the background under a clear blue sky.

**U.S. SUPREME COURT
TO RELEASE
EPIC DECISION ON
MANDATORY ARBITRATION
OF EMPLOYMENT DISPUTES**



By: Ashley Trotto

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HEALTH LAW UPDATE: THE EMPLOYER MANDATE TODAY

Late December 2017, media outlets were abuzz with news that the Affordable Care Act's Individual Mandate had been repealed. Had he done it? Had President Trump delivered on his promise to repeal Obamacare? Well, not exactly; at least not yet anyway.

Although the Individual Mandate was effectively repealed, the Tax Cuts and Jobs Act ("TCJA") had no effect on the Employer Mandate or its associated reporting requirements.¹

In fact, the Employer Mandate seems to be thriving. Almost simultaneously with the adoption of the business-friendly TCJA, the Internal Revenue Service ("IRS") began issuing Employer Mandate penalty assessments to large employers for the 2015 calendar year. Depending on the alleged failure, the penalties are based either on Internal Revenue Code ("Code") § 4980H(a) or (b). The largest penalties are for failures under Code 4980H(a) and are based on an employer's failure to offer minimum essential coverage to at least 70% of its full-time employees.² The penalty is only assessed if at least one of the employer's full-time employees receives a premium tax credit through the Exchange.³ That penalty is calculated by subtracting 80 from the employer's total number of full-time employees then multiplying that number by \$2,080.⁴ For many large employers, this calculation results in penalties in the millions.

Although some large employers may have actually failed to comply with the Employer Mandate, others are receiving assessment letters due to simple reporting errors. You might be thinking, wait; didn't the IRS waive reporting penalties? It did. Recognizing the challenges faced by employers in complying with the reporting requirements, the IRS published guidance providing a waiver of reporting penalties so long as an employer made a good faith, timely effort to meet its filing requirements.⁵ However, that guidance has not hindered the issuance of penalty assessments under Code § 4980H. It is up to each employer to prove to the IRS that the alleged failure was solely due to incomplete or incorrect reporting and was not a substantive Employer Mandate compliance failure.

Additionally, this assessment activity seems to fly in the face of President Trump's first Executive Order, signed hours into his presidency, which provides, "to the maximum extent permitted by law, the Secretary of Health and Human Services (Secretary) and the heads of all other executive departments and agencies (agencies) with authorities and responsibilities under the Act shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden on individuals, families, healthcare providers, health insurers, patients, recipients of healthcare services, purchasers of health insurance, or makers of medical devices, products, or medications."⁶

In response to a Wall Street Journal article raising this apparent inconsistency, the IRS issued a written statement providing: "The ACA's 'employer mandate' unfortunately remains the law of the land, and IRS has informed Treasury that it is sending notices to employers assessing their tax obligation under the law. Treasury lawyers see no ground for the Secretary to direct the IRS to not collect the tax . . . In fact, when the

Obama administration delayed collecting this tax, the Wall Street Journal called the delay a "lawless rewrite" and of "dubious legality." This tax is yet another example of how Obamacare is hurting the American people and needs to be repealed."⁷

As you might expect, business groups are demanding that Congress take some action to retroactively repeal the Employer Mandate to avoid the penalty assessments. To that end, Representatives Devin Dunes (R-Calif.) and Mike Kelly (R-Pa.) are pushing to have a suspension of the mandate included in an upcoming long-term spending deal. Additionally, House Ways and Means Committee Chairman Kevin Brady (R-Tx.) has told reporters that he has discussed a repeal or delay of the Employer Mandate with members of the Committee and the new Health and Human Services Secretary Alex Azar. Brady stated, "we want to make sure our businesses aren't caught up in some sort of fines or punitive measures for the past three years," and that "the goal would be to delay or repeal it in total, but retroactive as well."⁸

Penalty assessment issue aside, we must consider the fact that the Individual and Employer Mandates are somewhat intertwined. The Individual Mandate was adopted, in part, to increase the number of healthy individuals in the insurance marketplace, with the idea that the healthy could subsidize the sick. If healthy individuals are now permitted to opt-out of coverage without penalty, employer premiums are likely to spike, and overall, may create an unsustainable system.

Because the mandates were intended to support one another, there are some strong opinions in the employee benefits community that, following effective repeal of the Individual Mandate, repeal of the Employer Mandate is not far behind. For example, James Klein, President of the American Benefits Council, recently stated, "the whole legal basis for the employer mandate in the ACA was to support the individual mandate, and with the repeal of the individual mandate, there's no legal or logical basis for the employer mandate."⁹

So, as of today, the Employer Mandate maintains its status as the law of the land.¹⁰ How long its reign will last is yet to be determined.

¹ PL 115-97, 2017 HR 1, PL 115-97, Part VIII, Section 11081, December 22, 2017 (reducing the Individual Mandate penalty to zero, effective January 1, 2019).

² 26 U.S.C.A. §4980H.

³ 26 U.S.C.A. §4980H(a).

⁴ 26 U.S.C.A. §4980H(c).

⁵ See Preamble to the §§ 6055 and 6056 regulations; IRS Notice 2016-70; and IRS Notice 2018-06.

⁶ Executive Order 13765, Section 2 (January 20, 2017).

⁷ US Department of the Treasury, *Statement from Treasury Spokesperson on the Wall Street Journal Editorial*, Nov. 7, 2017, <https://www.treasury.gov/press-center/press-releases/Pages/sm0210.aspx>.

⁸ Jessie Hellman, *Business groups pressing for repeal of ObamaCare employer mandate*, The Hill, Feb. 16, 2018, <http://thehill.com/policy/healthcare/374116-business-groups-pressing-for-repeal-of-obamacare-employer-mandate>.

⁹ *Id.*

¹⁰ This article was drafted on March 7, 2018.

About this column: "The cobbler's children have no shoes." This old expression refers to the fact that a busy cobbler will be so busy making shoes for his customers that he has no time to make some for his own children. This syndrome can also apply to lawyers who are so busy providing good service to their clients that they neglect management issues in their own offices. The goal of this column is to provide timely information on management issues. If you have an idea for a future column, please contact Cathy Shuck at 541-8835.