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Two Appellate Courts issued opposing rulings on July 22, 2014 regarding the status of premium tax credits and cost-sharing subsidies (referred to as “subsidies”) in the federal Health Insurance Marketplaces (also referred to as the “Exchange”).

- The U.S. Court of Appeals in the District of Columbia held that subsidies cannot be provided for coverage purchased in federal (and federal-state partnership) marketplaces. *Halbig, et al., v. Burwell*.
- The U.S. Court of Appeals in the 4th Circuit ruled subsidies may be provided in the federal marketplaces. *King vs. Burwell*.

These dueling opinions create further confusion under the Affordable Care Act (ACA) and set the stage for another challenge at the Supreme Court.

What’s the Issue?

The issue is one of legislative intent versus text of the law. In other words, did the IRS set forth rules consistent with the statutory language of the ACA, or did the agency overstep its bounds?

The text of the ACA (§ 36B) provides that subsidies are available in “an Exchange established **by the State** under § 1311 of the ACA.” IRS regulations interpret this section to permit eligible individuals enrolled in qualified health plans in either a state-based or a federally-facilitated marketplace to access these subsidies. The federally-facilitated marketplaces are not authorized under § 1311 of ACA, but rather § 1321. Stakeholders challenged the IRS regulation, based on a strict reading of the language in § 36B that referenced only § 1311 of the ACA.

The D.C. Circuit, in a 2-1 decision (led by two Republican appointees), found the plain language of the statute to mean subsidies are only available in the state marketplace.

The 4th Circuit, in a unanimous decision, held that the agency was within its discretionary authority when interpreting § 36B to include marketplaces with federal involvement.

Why is this Important?

The availability of subsidies is important for two reasons:

1. It aids individuals in the purchase of affordable health insurance coverage in order to avoid the individual mandate tax; and
2. It serves as the trigger for an employer penalty if a full-time employee of a large employer receives one of these subsidies.

These subsidies are intended to help middle and lower income Americans purchase health insurance coverage to comply with the individual mandate (the requirement all Americans have health insurance or pay a tax).

Only 14 states and the District of Columbia currently offer state-based marketplaces. The other 36 marketplaces are federally run (including joint federal and state partnerships). Thus, this ruling could, at a minimum, deny access to subsidized health care for individuals in 36 states.

Impact on the Employer Mandate

If upheld, a loss of subsidies in federal marketplaces has the potential to reduce an employer's exposure to penalties under both employer penalty provisions (the "No Coverage" penalty and the "Offer Coverage" penalty). Both penalties are predicated on a full-time employee receiving a subsidy in a marketplace. If subsidies are not available to full-time employees because coverage is accessed through a federal marketplace, there may be nothing to trigger a penalty.

It is also important to note that the particular circumstances of a large employer must be reviewed. For a large employer with full-time employees in multiple states, the "No Coverage" penalty may remain unaffected if one full-time employee can access subsidies through a state-based marketplace because the employer does not offer coverage to enough full-time employees and their dependent children. All it takes is one full-time employee to receive a subsidy to trigger the penalty across a significant majority of the full-time employee population. However, if the employer is subject to the "Offer

Coverage" penalty, then the potential penalty exposure would presumably be reduced to the extent any full-time employee resides in a state with a federal marketplace since no subsidies could be accessed.

These scenarios are all speculation premised on the assumption that the D.C. Circuit's ruling is upheld. Further legal action and regulatory changes may alter this analysis.

Employer Action

Right now, status quo. The administration will appeal the D.C. Court decision and we understand the decision will be stayed pending that appeal. This means that subsidies should remain available in federal marketplaces for the time being. The administration could immediately appeal the decision to the Supreme Court; however, the current Supreme Court has been reluctant to grant *certiorari* before exhaustion of traditional appellate procedures, which in this case is an *en banc* review.

Things are quickly developing, so stay tuned -- we are likely headed for another Supreme Court showdown.