

COURTS DIFFER ON HEALTHCARE REFORM

July 23, 2014

Yesterday, two separate courts of appeals rendered contrary decisions on whether the subsidy provision of the Affordable Care Act (ACA) applies in states that have opted not to run their own insurance exchanges. Currently, only 14 states have established their own exchanges, while 36 states, including Pennsylvania and New Jersey, have opted to allow the federal government to run the exchange.

The first decision, *Halbig v. Burwell*, was handed down by the United States Court of Appeals for the District of Columbia and strikes a powerful blow to the key subsidy provision in the ACA. At issue was whether the IRS rules applying the subsidies to states in federally-run exchanges violated the ACA. Under the ACA, states are encouraged to form state health benefit exchanges to create health insurance marketplaces. A key to healthcare reform is increasing the number of healthy insureds so that the costs of healthcare are spread out. In order to facilitate the purchase of health insurance, the ACA created tax credits for individuals based upon income. Thus, for some individuals, the cost of insurance would be minimal. Indeed, one of the plaintiffs in the case would have paid only \$23 for the coverage. As the penalty provisions take into account the amount of the subsidy to determine whether a penalty would apply, the plaintiffs (individuals and employers) argued that they were harmed in that, if the subsidy provisions would not apply, no penalty could be assessed against them.

Recognizing that Congress cannot force a state to create an exchange, the ACA also contained provisions that would allow the federal government to operate an exchange on behalf of the state if the state failed to do so. In an almost apologetic tone, the United States Court of Appeals for the District of Columbia analyzed the specific language of the ACA, which states that under the language of the ACA, subsidies are available only for plans "enrolled in through an exchange **established by the state under Section 1311 of the ACA.**" Reviewing the legislative history and the ACA itself, the court concluded that as a federal exchange was not an exchange established by the state, the IRS could not provide a subsidy for individuals residing in federal exchange states. Inasmuch as the penalty provisions for individuals and employers are triggered by the provision of subsidies, it followed that these penalties would likewise not apply in states where the federal government had set up the exchange. As the challenge was to an IRS regulation, the court had to first consider whether the provision was ambiguous and, if so, defer to the IRS's interpretation. The *Halbig* court, however, found that the plain reading of the statute mandated a finding that it was not ambiguous and, therefore, there was no deference given to the IRS.

Noting the seemingly devastating effects its ruling would have on the ACA and the potentially contradictory results, the court noted multiple

instances where Congress had created such unintended, but similarly contradictory, results. Accordingly, it concluded that interpreting the ACA to allow the subsidies for states in which the federal government runs the exchange would be a rewriting of the ACA. This, the court concluded, was a policy decision that is within Congress's sole discretion.

Ironically, two hours after the District of Columbia Court of Appeals ruled that the subsidies violated the plain language of the ACA, the Fourth Circuit Court of Appeals ruled to the contrary in *King v. Burwell*. The Fourth Circuit found that the ACA provisions regarding the application of the subsidy to federally-run exchanges were ambiguous and, therefore, subject to multiple interpretations. It went on to rule that the IRS's determination deserved deference and, therefore, upheld the IRS regulations allowing subsidies to non-state-based exchanges.

The White House has vowed to appeal the D.C. Court of Appeals' ruling to an en banc panel. If the D.C. Court of Appeals' ruling is upheld in light of the conflict with the Fourth Circuit, a showdown in the United States Supreme Court is likely. Nevertheless, until the Supreme Court rules definitively or Congress amends the ACA to clarify that these subsidies are available to individuals in states where the federal government runs the exchange, there will be considerable uncertainty as to whether the subsidies will apply to a majority of the states. Until the en banc panel has an opportunity to rule on the issue, it is unlikely that *Halbig* will have any immediate effect on the ACA. Additionally, there are other similar challenges pending in other states. ■

Should you have any questions regarding this decision or its implications, please contact:



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