

CLIENT ALERTS

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WILL THERE BE TAX CREDIT SUBSIDIES FOR HEALTH COVERAGE PURCHASED ON THE FEDERAL

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There is no letup in the intensity of the litigation wars surrounding the Affordable Care Act (ACA) or in the significance of the matters at issue. In 2012, the Supreme Court narrowly upheld the ACA in the face of a full-scale attack while invalidating the ACA's Medicaid expansion requirements. A month ago, the Court invalidated the ACA's requirement that employers provide contraceptives if doing so violates the employer's religious beliefs. And this week, two federal circuit courts of appeals split on the important question of whether subsidies are available for individuals who purchase insurance on the federal exchange (which operates in 36 states) as distinguished from a state exchange (and similar challenges are pending in other courts). This latest challenge is likely bound for the Supreme Court.

In its decision issued on July 22, 2014, the U.S. Court of Appeals for the District of Columbia invalidated the IRS regulation that provides tax credit subsidies to individuals who purchase health insurance through marketplace exchanges, whether operated by individual states or the federal government. *Halbig v. Burwell*, No. 14-5018 (D.C. Cir. July 22, 2014). In reaching its decision, the Court relied on what it said was a plain reading of Internal Revenue Code Section 36B, promulgated by the ACA, which makes tax credits available to individuals who purchase insurance on state exchanges but makes no direct reference to the federal exchange. The Court concluded that the ACA unambiguously restricts the tax credit subsidy to insurance purchased on the state exchanges, as opposed to the federal exchange, and vacated the IRS regulation.

In contrast, the U.S. Court of Appeals for the 4th Circuit unanimously came to the opposite conclusion on the same issue on the same day. *King v. Burwell*, No. 14-1158 (4th Cir. July 22, 2014). The Court determined that Section 36B is ambiguous when read in the context of the ACA as a whole and that the IRS has the authority to resolve such ambiguities. Thus, the Court upheld the IRS regulation making premium tax credits available to consumers who purchase health insurance coverage regardless of whether it is purchased through a state-run exchange or the federal exchange.

The issue of whether tax credits apply to insurance purchased through the federal exchange will need to be resolved quickly. The government has asked the full D.C. Court of Appeals to review the case *en banc* and the issue could ultimately be decided by the U.S. Supreme Court. If the decision is upheld by the Supreme Court, individuals residing in federal exchange states will no longer be eligible to receive tax credits that are passed on to insurance companies to defray the cost of insurance. In addition, fewer individuals will be subject to penalties for the failure to comply with the individual mandate because the penalty only applies if the annual cost of the least expensive available coverage, less any tax credits, exceeds 8% of projected household income. Thus, without additional changes to the ACA, there will be less incentive for individuals to comply with the individual mandate in federal exchange states. Plus, insurance companies in the 36 federal exchange states may continue to be required to comply with guarantee issue and community ratings rules but with fewer policy holders to offset such costs. Moreover, although not applicable until 2015, the penalties under the employer mandate are triggered only if an individual employee receives tax credit subsidies.

Stakeholders will anxiously await resolution of this issue which has significant repercussions for the ACA's goal of expanded healthcare coverage.