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## **Appeals Courts Issue Conflicting Rulings on ACA Marketplace Subsidies**

Just hours apart, federal appeals courts in Washington, D.C. and Virginia issued opposing rulings yesterday regarding the IRS' interpretation of the Affordable Care Act (ACA) provision for federal income-tax credits that act as premium subsidies for coverage purchased through ACA insurance exchanges (also called marketplaces). The eventual final outcome of this legal debate will likely be decided by the U.S. Supreme Court and has the potential to deal a major blow to the ACA.

### **THE ISSUE**

At the heart of the debate is whether the tax credits provided under the ACA for lower-income individuals should be available through any ACA exchange, either state-run or federally-facilitated, or only to those who enroll for coverage through a state-run exchange. Although the text in the ACA legislation states tax credits are available to people who enroll through an exchange "established by the state", the IRS has taken the position that it believes Congress' intent when drafting the law was to expand coverage as widely as possible and that the IRS has the authority to extend tax credits accordingly to individuals in both state and federal exchanges. It began doing so as of January 1, 2014.

On the other hand, a number of plaintiffs who filed lawsuits challenging the IRS' position contend the language in the ACA must be taken literally, that the tax credits were intended to encourage states to set up their own exchanges and the penalty for not doing so was withdrawal of tax credits for lower-income residents. Therefore, according to the plaintiffs, tax credits should not be available outside state exchanges.

### **THE POTENTIAL IMPACT**

Currently, 27 states have federally-facilitated exchanges. Invalidation of the IRS regulation permitting tax credits through all exchanges would mean the loss of premium subsidies for millions of Americans in those 27 states. (Another 7 states have state-federal partnership exchanges; the impact on those states is unclear at this time.) Many individuals would not be able to afford to continue coverage at unsubsidized rates.

It would also strike a blow to the individual and employer mandate provisions of the ACA. Individuals for whom the cost of minimum essential coverage exceeds 8% of household income are not subject to the individual mandate. Without subsidies, more people would be exempt from having to maintain coverage because their unsubsidized costs exceed the 8% threshold. Erosion

of the individual mandate has the potential to de-stabilize insurance exchange risk pools. For employers, such a decision could provide some relief from the employer mandate, as employer shared responsibility penalties are contingent upon an employee receiving a tax credit.

## **THE RECENT COURT DECISIONS**

Yesterday the D.C. Federal Circuit Court of Appeals overturned a lower court decision by ruling tax credits should not be offered through federal exchanges, concluding that the IRS' interpretation of the statute was an overreach of its authority. Meanwhile, a decision handed down the same day by the 4<sup>th</sup> U.S. Circuit Court of Appeals upheld a lower court ruling on another case that affirmed the IRS' regulation permitting tax credits in all exchanges, ruling that because the law's language is "ambiguous and subject to multiple interpretations" the IRS has regulatory discretion to interpret the statute as it did.

The debate is far from over. The Obama Administration swiftly announced its intention to seek an "en banc" review of yesterday's decision from the D.C. Circuit Court. Additionally, yesterday's split decisions raise the possibility that the dispute will ultimately be resolved by the U.S. Supreme Court. With the Supreme Court in recess until October, however, it is unlikely this matter will be resolved prior to fall elections. In the meantime, it's expected that the D.C. Appeals Court decision will be stayed pending a final resolution, which will enable the IRS to continue tax credits through all exchanges while the matter makes its way through the courts.

While the outcome could significantly affect an employer's exposure to shared responsibility penalties, employers should continue to plan their shared responsibility compliance strategies for employees in all states until the matter is resolved. This debate does not impact other ACA provisions, so employers should also continue implementation of other ACA requirements such as health plan fees, mandated health plan services and employer reporting requirements.

## **PPACA REGULATIONS & GUIDANCE ISSUED IN THE LAST 3 MONTHS**

- May 2014: [Agencies Issue ACA FAQs Part XIX – COBRA Notices, Cost Sharing Limits, Preventive Services, FSA Carryover & SBCs](#)
- May 2014: [Agencies Issue Bulletin on COBRA Special Enrollment](#) and [Proposed Rules](#)
- May 2014: [CMS Issues FAQ on Transitional Reinsurance Contribution Process](#)
- Jun. 2014: [Agencies Issue Final Rules on Orientation and 90-Day Waiting Periods](#)
- Jun. 2014: [IRS Issues Final Regulations on Small Employer Tax Credit](#)
- Jul. 2014: [Agencies Issue ACA FAQs Part XX – Preventive Services Disclosure Regarding Contraceptives](#)

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