



Tuesday, November 18, 2014

Supreme Court to Review IRS Rule on Federal Subsidies

Already dealing with the aftermath of a Republican takeover of the Senate and additional seats in the House, the Obama Administration received some more bad news recently when the Supreme Court announced it will review *King v. Burwell*, one of the lawsuits at the center of a controversy over whether marketplace insurance premium subsidies in the form of federal income tax credits should be available to qualified enrollees in both state and federally operated Marketplaces or only in state operated Marketplaces.

At issue is whether the IRS exceeded its authority when it released a rule in 2012 that federal subsidies under the Affordable Care Act are available in both state and federal marketplaces even though the statute specifies marketplaces “established by the state”. The IRS has claimed it was clarifying the statute by also providing subsidies in federal marketplaces, but several plaintiffs who have filed similar lawsuits said, “Not so fast...”

As we reported in our [July 23, 2014 HCRAAlert!](#), lower courts have come to opposite conclusions on two of those suits – *King v. Burwell* and *Halbig v. Burwell*. On the same day in July, the Fourth Circuit Court of Appeals decided in *King* that the IRS made a reasonable interpretation of the statute, while the D.C. Court of Appeals decided in *Halbig* that the IRS regulation should be vacated as it overstepped the IRS’ authority.

The timing of the Supreme Court move is a surprise to some. The Supreme Court will often wait for a true “split in the circuits” – where the federal courts in different circuits disagree on a major point – before it agrees to hear a case. The Obama administration had asked the Supreme Court to wait until further action was taken in the lower courts, hoping there would be no split in the circuits because the D.C. Circuit Court had agreed to a rehearing of the case by the full court—a so-called *en banc review*— a majority of whom were appointed by either President Obama or President Clinton. The Administration had hoped that on review the full D.C. Circuit would reverse the *Halbig* decision and there would be no split in the circuit (at least for now).

But the Supreme Court has elected not to wait. It will hear *King* in the current term. This means that unless the President can craft some compromise with a Republican Congress by June to statutorily fix the language in the statute, the fate of subsidies in federal marketplaces will lie in the hands of the Supreme Court. A Supreme Court decision ruling that the IRS exceeded its authority by authorizing subsidies in federal marketplaces would certainly be disastrous for the Affordable Care Act. It would mean subsidies are not available in a majority of states and, by extension, employer penalties, which are triggered only if subsidies are received by full-time employees, would not apply in those states.

We will provide future updates as they become available.

PPACA REGULATIONS & GUIDANCE ISSUED IN THE LAST 3 MONTHS

- Sep. 2014: IRS Issues [Notice 2014-49 Guidance on Employer Shared Responsibility Look-Back Method Changes in Measurement Period](#)
- Sep. 2014: IRS Issues [Notice 2014-55 Guidance on Additional Permitted Cafeteria Plan Election Changes](#)
- Sep. 2014: IRS Issues [Notice 2014-56 Guidance on Adjusted 2014 PCORI Fee](#)
- Oct. 2014: ACA FAQs Part XXI – [Limitations on Cost Sharing](#)
- Oct. 2014: HHS announces [Delay of HPID Compliance](#)
- Nov. 2014: IRS Issues Notice 2014-69 [Minimum Value Plans and Hospital Coverage](#)
- Nov. 2014: ACA FAQs Part XXII – [Premium Reimbursement Arrangements](#)
- Nov. 2014: HHS announces [Extension of 2014 Transitional Reinsurance Contribution Filing Deadline](#)

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