

## Republicans Question IRS Determination Regarding Exchange Subsidies

Welcome to *legislate*, the recess edition. During the five-week summer recess, *legislate* will focus on policy issues that have not made it to the legislative process, reports that could influence legislation, and possible legislative trends in Congress. When Congress returns in September, the weekly roundup of events on Capitol Hill that affect employee benefits and human resources will resume.

### Summing It Up

The Patient Protection and Affordable Care Act (ACA) continues to be controversial. During the Republican National Convention, many speakers voiced their opposition to it. Earlier this summer, the Supreme Court settled the controversy regarding the constitutionality of the individual mandate and Medicaid expansion. (See our July 11, 2012 [For Your Information](#).) At the beginning of August, the House of Representatives' Committee on Oversight and Government Reform (Committee) held a hearing examining how the Internal Revenue Service (IRS) is implementing the ACA. Recently, three Republican members sent a letter to the Commissioner of the IRS, questioning the authority of the IRS to extend premium and cost-sharing subsidies to individuals purchasing coverage from federally established Exchanges. Although the letter is not directed at employer plans, employers should be concerned with the IRS's interpretation of the ACA subsidy provisions because it could affect the application of the employer shared-responsibility penalty.

### Individual Subsidies and the Committee's Request

#### Individual Subsidies

The ACA mandates that, beginning in 2014, individuals either have minimum essential coverage or pay a penalty. Health insurance Exchanges will serve as the marketplace where individuals and small employers (generally employers with 100 or fewer employees) can purchase coverage. Lower-income individuals who buy coverage through an Exchange will be eligible for federal subsidies in the form of a premium tax credit and/or cost-sharing assistance. Generally, employers that provide coverage that is deemed unaffordable or does not meet a 60% actuarial value threshold will pay a penalty if an employee purchases coverage through an Exchange and qualifies for a subsidy. Although the law envisions that the Exchanges will be established on a state-by-state basis, it also provides that if a state does not establish an Exchange, the federal government will either establish one on behalf of the state or work with a state to establish one.

The ACA expressly states that an individual is eligible for a subsidy if that individual receives coverage “through an Exchange established by the state.” However, the IRS regulation provides that an individual is eligible for a subsidy regardless of whether the individual receives coverage through an Exchange set up by a state or by the federal government, or by some combination of the two. The IRS explains in the preamble to its premium subsidy regulation that the statutory language, the legislative history, and Congressional intent support its interpretation.

Some legal experts argue that the ACA only provides premium subsidies for individuals who receive coverage from state-established Exchanges, and the IRS does not have the authority to determine otherwise. In a recent article, Michael Cannon, Cato Institute, and Jonathan Adler, Case Western Reserve University School of Law, argue that because the ACA only allows for subsidies for individuals who receive coverage from a state-established Exchange, an employer whose employees receive coverage from a federally established Exchange will not be subject to a shared-responsibility penalty. (Adler and Cannon, “Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA,” Case Research Paper Series in Legal Studies Working Paper 2012-27, July 2012). Given that so far only 14 states have committed to setting up an Exchange, it is likely that most Exchanges will be federal, at least at the beginning. Therefore, under Cannon and Adler’s interpretation, employers would be subject to a penalty in very few states. As such, they argue that an employer could challenge the IRS regulation in court because it potentially exposes employers to higher penalties.

Conversely, in a recent [post](#) to Health Affairs blog, Timothy Jost, Washington and Lee University School of Law, argues that the ACA’s legislative history clearly contemplates that subsidies would be available through both state and federal Exchanges. He also states that although the ACA could have been clearer, it nevertheless supports the IRS’s determination that subsidies are available in both state and federal Exchanges.

### Committee’s Request

Early in August, the Committee held a hearing on the IRS’ implementation of the ACA. A variety of issues were discussed at the hearing, including the IRS’ authority to provide subsidies for individuals who receive health coverage through federally established Exchanges. On August 22, 2012, three Republican members of the Committee sent a [letter](#) to the IRS arguing that the ACA only allows subsidies for individuals who receive coverage through a state-established Exchange, not through a federally established Exchange. The Congressmen requested that the IRS provide them the following:

- All legal analysis, internal or external, conducted by the IRS which authorizes the IRS to grant premium assistance tax credits in federal Exchanges
- All documents and communications between IRS employees and employees of the White House Executive Office of the President or any other federal agency or department referring or relating to the proposed IRS rule or final IRS rule between March 23, 2010, and August 17, 2012

Although the outcome of this request may result in little more than a Committee hearing (and likely discussions at other committee hearings, such as the Ways and Means September 11, 2012 hearing on the IRS’ implementation and administration of the ACA), the entire debate is stirring up more controversy and possible legal challenges, at a time

when most employers and employees are seeking certainty. However, with the upcoming elections, right now, the only certainty is uncertainty.

### A note about the party conventions

Last week, the Republicans held their national convention. Although short on specifics, some of the speakers made mention of overhauling the tax code, reducing the national debt, and cutting funding for Medicare, among other things. This week, at the Democratic National Convention, speakers are expected to extoll the virtues of the ACA, Medicare reform to help seniors, and the growing American economy. Because of the tax and policy implications, both parties will continue to mention employee benefit issues in the run-up to the November election. Stay tuned for future issues of *legislate* that will cover these subjects as the candidates further discuss their platforms.

### Did you know?

When both houses of Congress pass bills dealing with the same matter but cannot agree on certain provisions, a conference may be requested. The leadership in both houses appoints the conferees, who negotiate and craft a compromise version that both houses must accept without changes. In addition, the conference committee prepares a report that explains the provisions of the law and, often, why changes were made. This report can help determine Congressional intent when a law is challenged. Unfortunately, the ACA did not go through a conference, so proving Congressional intent is much more difficult.

Next week: Are there special rules to adjourn for more than three days?

*This legislate is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*