

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

Volume 37 | Issue 97 | July 23, 2014

## Federal Appeals Courts Disagree on Availability of Marketplace Premium Subsidies

The D.C. Circuit and the Fourth Circuit Courts of Appeals issued conflicting opinions yesterday regarding the availability of low income subsidies to individuals enrolled in federally-facilitated health insurance marketplaces. While the D.C. Circuit held that subsidies are available only to individuals purchasing health coverage in marketplaces established by the states, the Fourth Circuit determined that the subsidies are available in all marketplaces – federal as well as state-operated. Both decisions are likely to be appealed, and the Supreme Court may ultimately resolve this key issue.

### Background

The Affordable Care Act (ACA) called for each state, by January 1, 2014, to establish an American Health Benefit Exchange (exchange or marketplace) through which individuals may purchase affordable health care coverage. If a

#### Health insurance marketplaces: the current landscape

- 27 federally facilitated marketplaces
- 7 partnership marketplaces
- 17 state-based marketplaces (includes D.C.)

state did not establish its own marketplace by this deadline, the federal government would establish a federally facilitated marketplace (FFM) on the state's behalf. A state also could adopt a "partnership" exchange where the state would take responsibility for some functions of an FFM.

Additionally, the ACA generally requires individuals to obtain "minimum essential health coverage" or pay a penalty for any month for which they do not have such coverage. Minimum essential health coverage includes employer-sponsored coverage, government-sponsored coverage such as Medicaid or CHIP, and coverage purchased through a marketplace. Individuals whose household income is between 100% and 400% of the federal poverty level are eligible for financial assistance in the form of a low income subsidy to help with the purchase of coverage through a state-run marketplace. Although the ACA language provides that the subsidy applies when an individual is covered by a health plan through a marketplace "established by a State," IRS regulations extend the application of the subsidy to FFMs.

The availability of the subsidy in the FFMs has been the subject of nationwide litigation. In two recent cases, *Halbig v. Burwell* in the D.C. Circuit Court of Appeals (which covers the District of Columbia) and *King v. Burwell* in the Fourth Circuit Court of Appeals (which covers North Carolina, Maryland, South Carolina, Virginia and West Virginia), individuals residing in states with FFMs challenge the authority of the IRS to provide low income subsidies to residents in states with FFMs. Specifically, these individuals argue that the plain language of the ACA authorizes low income subsidies only for individuals who purchase health insurance through a state-operated marketplace, and that the IRS exceeded its regulatory authority in making subsidies available in FFMs. In both cases, the trial courts rejected this position, finding that the ACA's language, structure, and purpose illustrated Congress' intent to make low income subsidies available nationwide, in both state-run marketplaces and FFMs.

**Comment.** Challenges to the availability of low income subsidies in FFMs are also pending at the federal trial court level in Indiana and Oklahoma.

These cases have attracted considerable attention because of the high stakes involved; the unavailability of low income subsidies for individuals who purchase coverage through FFMs could leave many of the millions who have purchased subsidized coverage in FFM-run states unable to afford coverage, and thereby disrupt the individual insurance market. Additionally, the employers of such individuals might not be subject to employer shared responsibility assessments, which are triggered only when an eligible employee purchases subsidized coverage through a marketplace. For more information about employer shared responsibility assessments, please see our [April 17, 2014 FYI In-depth](#).

## Difference of Opinion between the Circuit Courts

Yesterday, three-judge panels in both the D.C. Circuit and the Fourth Circuit issued conflicting opinions. In [Halbig v. Burwell](#), the D.C. Circuit held that the ACA “unambiguously forecloses the interpretation embodied in the IRS Rule and instead limits the availability of premium tax credits to state-established Exchanges,” emphasizing that the role of the court is to apply the statute as it is written. In contrast, in [King v. Burwell](#), the Fourth Circuit accepted the IRS interpretation that low income subsidies apply in the FFMs, observing that the ACA “clearly gives the IRS authority to resolve ambiguities” and that “widely available tax credits are essential to fulfilling the Act’s primary goals.”

Following the D.C. Circuit’s determination, a Department of Justice spokesperson confirmed that the subsidies remain available in all marketplaces pending appeal of this ruling.

## What’s Next?

The losing side in each case can ask the entire appeals court of the respective Circuit to review the decision, which will happen if a majority of the court’s judges agrees. A ruling by the entire appeals court could reverse the three-judge opinion. Ultimately, each of these cases could be appealed to the Supreme Court, which has discretion to pick the cases it wants to hear. If there continues to be a split between the Circuit Courts on this critical aspect of the ACA, this issue may well be one that the Supreme Court chooses to take up.

Discussing the D.C. Circuit Court decision Justice Department spokeswoman, Emily Pierce, said in a statement “[t]he government will therefore immediately seek further review of the court’s decision. In the meantime, to be clear, people getting premium tax credits should know that nothing has changed. Tax credits remain available.”

**Comment.** Decisions in the Indiana and Oklahoma cases may create additional conflicts between the circuits and could increase the likelihood that the Supreme Court will agree to consider this issue.

## In Closing

The issue presented by these cases is one of the most critical legal challenges to the ACA since its inception and could have significant consequences for individuals and employers. There is speculation in the media that this controversy will lead to a further delay of the employer shared responsibility requirements; however, the federal government has given no indication that this is the case. Stay tuned for further updates as we continue to follow this topic.

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