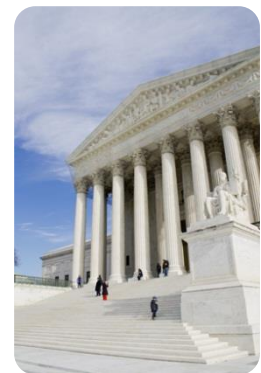


Supreme Court to Hear ACA Subsidies Case

In a decision surprising to many Supreme Court observers, the Court has decided to hear a case challenging the availability of subsidies for the purchase of health insurance coverage on the Affordable Care Act's federally facilitated marketplaces. The case is significant for employers since employer shared responsibility assessments are triggered only when a full-time employee purchases subsidized coverage through a marketplace. The case also threatens the viability of the marketplaces and of the ACA.



Background

The Affordable Care Act (ACA) contemplated that the states would establish American Health Benefit Exchanges through which individuals may purchase healthcare coverage. If such an exchange was not created by January 1, 2014, the federal government was authorized to establish a federally facilitated marketplace (FFM) on the state's behalf. A state could also adopt a partnership exchange where the state would operate some functions of an FFM. Currently, there are 27 FFMs, 7 partnership exchanges, and 17 state-based marketplaces (including the District of Columbia). Individuals are eligible for tax subsidies to purchase coverage through a marketplace if they satisfy certain requirements, including household income. The IRS issued regulations in 2012 that permitted tax subsidies in marketplaces operated by either a state or the federal government.

The availability of subsidies for healthcare coverage obtained through an FFM has been the subject of nationwide litigation, including two cases that have reached appellate courts. The first case is *King v. Burwell*, in which the Fourth Circuit Court of Appeals (which covers Maryland, North Carolina, South Carolina, Virginia, and West Virginia), held in July that subsidies are available through an FFM. The second is *Halbig v. Burwell*, in which a three-judge panel of the DC Circuit Court of Appeals held in July that subsidies are not available through an FFM. Two other cases are also pending at the federal trial court level in Indiana and Oklahoma. Please see our [July 23, 2014 FYI Alert](#) for more information on the *King* and *Halbig* circuit court decisions.

In September, the entire DC Circuit decided to hear the *Halbig* case, which had the effect of vacating the three-judge panel's decision and eliminating the circuit court split on the issue of subsidy availability through FFMs.

Supreme Court Review

On Friday, the Supreme Court of the United States [decided](#) to hear the *King* case. Oral arguments will probably take place in spring 2015, with a decision likely by June 2015.

Given the Supreme Court's decision to take the *King* case, the DC Circuit will probably stay its proceedings in the *Halbig* case.

The Court's acceptance of the case is something of a surprise to court watchers, as there is not currently a circuit split on the issue of the availability of subsidies through an FFM.

In Closing

The cases challenging the availability of subsidies in the FFM have attracted considerable attention because of the high stakes involved. If the subsidies are not available, millions of lower-income individuals could be unable to afford coverage in the public marketplaces, which could potentially disrupt the individual insurance market. For those individuals who no longer have access to "affordable" coverage, the individual mandate would also no longer apply. Furthermore, employers of such individuals might not be subject to employer shared responsibility assessments, which are triggered only when a full-time employee purchases subsidized coverage through a marketplace.

What would happen if the Court rules subsidies are not available through an FFM?

Given last week's mid-term elections that gave Republicans a majority in both the Senate and the House of Representatives, a federal legislative response to such a decision is not assured. While President Obama would likely support a legislative fix, a Republican-controlled Congress would probably have mixed feelings about the decision — with some pushing for a legislative fix and other pushing to let the decision stand. It is possible that Congress might view such a decision as an opportunity to extract concessions from the administration for further changes to the ACA. The court's decision will likely come after an expected round of ACA repeal attempts by Congress in the spring of 2015.

Such a decision by the Supreme Court might prompt some states to reconsider the status of their marketplaces as FFMs. As with Congress, however, a number of states have governors and legislatures (or both) who are opposed to the ACA. These states may decide to do nothing. Even if a state were to act, such action may not be quick enough to blunt the impact of the decision on individual insurance markets.

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