

FYI[®] Alert

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High Court Upholds ACA Subsidies in Federally Facilitated Marketplaces

In a 6-3 decision authored by Chief Justice John G. Roberts, the US Supreme Court held today that low-income subsidies are available to offset the cost of coverage purchased in federally facilitated marketplaces (FFMs). For individuals receiving subsidies in the FFMs and for employers, this eagerly anticipated ruling affirms the status quo. The individual mandate and employer shared responsibility assessments — and associated reporting requirements — remain unchanged.

Background

The Affordable Care Act (ACA) called for each state to establish an American Health Benefit Exchange (exchange or marketplace) through which individuals can purchase affordable health coverage. If a state did not establish its own marketplace by January 1, 2014, the federal government established a federally facilitated marketplace (FFM) on the state's behalf. At present, there are 27 FFMs, seven “partnership” marketplaces, and 17 state-based marketplaces (including the District of Columbia).

Under the ACA, individuals must obtain “minimum essential coverage” or face a tax penalty (i.e., the individual mandate). To help facilitate this purchase, the ACA added [Section 36B](#) to the Internal Revenue Code. Section 36B provides a subsidy in the form of a premium tax credit to qualified individuals who obtain coverage through a marketplace “established by a State.” IRS regulations state that premium tax credits are available in the FFMs.

Focusing on the “established by a State” language from Section 36B, litigants have brought cases nationwide arguing that the subsidies should not be available in the FFMs. The Obama administration took the position that other provisions of the ACA, as well as the ACA's overall structure and purpose, show that subsidies should be available in FFMs — in addition to the state-based marketplaces. In *King v. Burwell*, the Fourth Circuit Court of Appeals ruled that subsidies are available through an FFM. In *Halbig v. Burwell*, on the other hand, a three-judge panel of the DC Circuit Court of Appeals (DC Circuit) held that the subsidies are not available through an FFM. For more information on these and



other circuit court decisions on this issue, see our [July 23, 2014 FYI Alert](#) and our [November 11, 2014 For Your Information](#).

In fall 2014, the Supreme Court agreed to hear *King*. The March 4, 2015 oral argument, as expected, featured fierce debate between the Court's liberal and conservative wings. (See our [March 5, 2015 FYI Alert](#).)

A Win for the Obama Administration

Earlier today in a 6-3 opinion, the [US Supreme Court ruled](#) that premium tax credits are available to qualified individuals purchasing coverage in the FFMs. Stating that Congress passed the ACA "to improve health insurance markets, not to destroy them," the Court interpreted Section 36B to refer to any marketplace — including an FFM. Chief Justice John G. Roberts wrote for the majority, joined by Justices Stephen G. Breyer, Ruth Bader Ginsburg, Elena Kagan, Anthony M. Kennedy, and Sonia Sotomayor.

The Court found that, when read in context, the ACA's "established by a State" language is ambiguous; it might refer only to state-based marketplaces, or it might refer to all marketplaces — including FFMs. While acknowledging the literal reference to a state-based exchange, the Court pointed to several other parts of the ACA that suggest Section 36B's applicability to all marketplaces. It also noted that the ACA contains "more than a few examples of inartful drafting."

The Court then focused on the broader structure of the ACA to decide that Section 36B should be interpreted to refer to FFMs as well as state-based marketplaces. It highlighted three "major" ACA reforms that function in an intertwined manner: (1) the "guaranteed issue and community rating requirements" that allow anyone (regardless of health status) to buy insurance; (2) the individual mandate requiring people to purchase insurance before they get sick; and (3) the low-income subsidies designed to make insurance more affordable. Together, these reforms minimize "adverse selection" (i.e., people who are sick purchase insurance whereas people who are healthy may not do so) and broaden the health insurance risk pool to include healthy people, which then lowers health insurance premiums for all.

The unavailability of subsidies in the FFMs, according to the Court, "could well push a State's individual insurance market into a death spiral," and the Court found it "implausible that Congress meant for the [ACA] to operate in this manner." Rather, the Court determined, Congress wanted the subsidies available in every state.

Supreme Court Once Again Tackles the ACA, Same-Sex Marriage

Please join us on Thursday, July 9, from 2:30-3:30 p.m. for a Buck Consultants At Xerox webinar to discuss the *King* decision, the imminent decision on same-sex marriage in *Obergefell v. Hodges*, and other recent cases involving key employee benefits issues. (The link above will bring you to a registration page.)

In this webinar, **Tami Simon** and **Julia Zuckerman** (Managing Director of the Career Practice and Knowledge Resources Center and Director in the Knowledge Resources Center at Buck Consultants At Xerox, respectively), and **Gretchen Young** (Senior Vice President, Health Policy, for the ERISA Industry Committee (ERIC)) will discuss:

- The basis for these decisions
- The impact of these decisions on employers' ACA and benefit compliance strategies
- Possible actions Congress and the regulators may take in response to these decisions

(See our *FYI Alert* from [January 19, 2015](#) for information on *Obergefell v. Hodges*.)

Comment. To support its “death spiral” prediction, the Court highlighted examples from the 1990s where states adopted guaranteed issue and community rating requirements without an individual mandate or low-income tax subsidies. These scenarios resulted in skyrocketing insurance premiums and major insurance players leaving the market.

Justice Antonin Scalia, joined by Justices Samuel A. Alito, Jr. and Clarence Thomas, wrote the dissent, which focused on the plain language of the Section 36B. “Words no longer have meaning,” Justice Scalia maintained, “if an Exchange that is not established by a State is ‘established by the State.’”

In Closing

The subsidies will continue to be available in FFMs as a result of the Supreme Court’s ruling. This holding avoids the expected chaos that would have resulted from millions of lower-income individuals losing their ability to obtain affordable marketplace coverage — and the ensuing disruption to the individual insurance market. It also keeps intact employer shared responsibility assessments (and associated reporting requirements) triggered when a full-time employee purchases subsidized coverage through a marketplace.

Nevertheless, congressional Republicans will likely press on in efforts to enact legislation that dismantles all or part of the ACA, and/or cuts off ACA enforcement funding. President Barack Obama has announced intentions to veto such efforts. The ACA’s provisions will no doubt remain a hot topic in the 2016 presidential election.

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