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Appeals Courts Issue Conflicting Decisions on Legality of Subsidies under the Affordable Care Act

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On July 22, 2014, the Fourth Circuit Court of Appeals and the Court of Appeals for the District of Columbia handed down conflicting decisions in the matters of *King v. Burwell* and *Halbig v. Burwell*. In both of these cases, the plaintiffs were challenging an IRS rule that allows any individual enrolled in a qualified health plan under the Patient Protection and Affordable Care Act ("PPACA") to receive federal tax subsidies, whether that individual lives in a state that has established its own Exchange (a health insurance marketplace) or an Exchange established by the federal government.

The PPACA permits individual states to set up their own Exchanges; however, if a state does not set up its own Exchange, the federal government instead operates an Exchange. To date, only sixteen states and the District of Columbia have opted to set up their own Exchange, so the federal government operates Exchanges in the other states. The PPACA further sets forth that subsidies, in the form of tax credits, are available to individuals enrolled in "through an Exchange established by the State."

At the heart of the controversies in both *King* and *Halbig* is an IRS rule that states that under the PPACA, subsidies may be provided to individuals purchasing health insurance from both state-founded Exchanges and those run by the federal government. The plaintiffs in both *King* and *Halbig* were individuals and employers in states that do not operate their own Exchanges who filed suit because they claimed the applicability of subsidies to anyone purchasing health insurance from an Exchange (whether or not established by a state) will subject them to monetary penalties.

Specifically, the PPACA imposes a penalty on individuals who choose not to purchase insurance, if they do not fall within one of the exemptions set forth in the Act, which includes individuals for whom the annual cost of the least expensive coverage (less tax credits) would exceed eight percent of annual household income. The individual plaintiffs in *King* and *Halbig* argued that, by making tax credits available, their income may rise to the extent that they are no longer within this exemption and would have to purchase insurance or face a penalty.

With regard to employers who employ fifty or more individuals, the PPACA requires that the employer offer insurance consistent with the minimum requirements of the PPACA. If it does not, and one employee receives a subsidy, the employer will be subject to tax penalties. Thus, the plaintiffs in *King* and *Halbig* argued, that the IRS rule expanded the number of people potentially entitled to subsidies, increasing employers chances of facing penalties.

In *Halbig*, the Court of Appeals for the District of Columbia agreed with plaintiffs, holding that there was no ambiguity in the PPACA with regard to whether subsidies could be provided to individuals purchasing health insurance in a state that does not operate its own Exchange. The Court rejected the government's argument that there were numerous provisions of the PPACA that rendered it ambiguous as to whether subsidies are available to those purchasing insurance from federally-run Exchanges. For example, while one Section of the PPACA says that states must establish Exchanges (although the establishment of an Exchange by a state is not actually mandatory), and another section defines Exchanges as "a governmental agency or nonprofit entity that is established by a state," that tall Exchanges are technically established by the state thus suggesting that subsidies were permissible in all circumstances. The Court also rejected the argument that the legislative history of the PPACA did not demonstrate intent to permit subsidies only to individuals living in states that had established their own Exchanges. In sum, the Court held that the language of the PPACA was clear: subsidies are available only to individuals who purchase insurance from an Exchange established by a state.

In contrast, in *King*, the Fourth Circuit Court of Appeals in Virginia agreed with the government that there were numerous ambiguities in the PPACA with regard to whether an individual purchasing insurance from a federally-run Exchange could receive subsidies. The Court assessed numerous provisions of the Act, defining Exchanges and their roles. Additionally, the Court held that the legislative intent of the PPACA certainly suggested that the purpose of the PPACA was to provide tax subsidies for insurance to all Americans to incentivize the purchase of health insurance. Accordingly, the Court held that it would defer the IRS rule stating that all subsidies were available to individuals purchasing from both state and federal Exchanges.

Because of the conflicting opinions, the next stop for these cases is likely the Supreme Court. Ultimately this case can have an important impact on PPACA generally—if only individuals purchasing insurance from a federally-run Exchange are permitted to receive tax subsidies, the number of people receiving such subsidies will be drastically reduced, seriously hindering the impact of the PPACA in the majority of states.

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