AFFORDABLE CARE ACT UPDATE

Federal Appeals Courts In Conflict Over Legality of Consumer Subsidies For Coverage Obtained Via Health Insurance Exchanges Operated by the Federal Government

On July 22, 2014, two federal appeals courts issued conflicting rulings regarding subsidies for health insurance policies purchased on the federally-operated health insurance exchange organized under the Patient Protection and Affordable Care Act ("ACA"). Thirty-six states, including Wisconsin, have declined to establish their own exchanges, opting instead to allow the federal government to operate the health insurance exchange mandated by the ACA. The central focus in both decisions is whether Congress intended to provide subsidies to consumers purchasing coverage through both state *and* federally-operated exchanges; the ACA states that subsidies are available to those who are "enrolled through an Exchange *operated by the State*." The subsidies are available through tax credits and, therefore, the Internal Revenue Service ("IRS") promulgated a rule interpreting the ACA broadly, and authorizing subsidies to health insurance purchased on any exchange – state or federal.

The D.C. Circuit ruled 2-1 in *Halbig, et al. v. Burwell, et al.*, No. 1:13-cv-00623 (D.C. Cir. July 22, 2014) that the ACA restricts subsidies to health insurance policies purchased on exchanges established by the state and, therefore, subsidies for consumers purchasing policies on the federally-operated exchange, HealthCare.gov, are barred by the ACA. The federal government had argued that the federally-operated exchange stands in the shoes of a state when operating its exchange and, therefore, the ACA's allowance of subsidies for exchanges "operated by the State" applies with equal force to both federal and state exchanges. The majority of the three-judge panel of the D.C. Circuit disagreed, noting that the section of the ACA that discusses the availability of the subsidies specifically references the section that discusses the state exchanges and is silent with respect to the section discussing the federal exchange.

Nearly two hours after the D.C. Circuit released its opinion, the Fourth Circuit Court of Appeals came to the opposite conclusion. With its decision in *King, et al. v. Burwel, et al.*, No. 14-1158 (4th Cir. July 22, 2014), the Fourth Circuit ruled that the subsidies constitute "a permissible exercise of the [IRS] discretion." In a unanimous opinion by a three judge panel, the Fourth Circuit noted that the ACA does not specifically state whether subsidies are available to federally-operated exchanges and, therefore, the IRS determination that it could provide subsidies to health insurance policies purchased on federally-operated exchanges was appropriate.

The D.C. Circuit's ruling places in question the ACA's tax penalties for employers who do not offer health insurance to their employees, because those tax penalties are triggered when an employee receives a subsidy. The vast majority of Americans who purchased health insurance through an exchange received a subsidy – approximately 90%. The average tax credit received via the subsidies authorized by the IRS is $276 per year.

At the moment, the decision has no practical effect on consumers. The D.C. Circuit, on its own motion, stayed its decision pending the outcome of a hearing by the full panel of D.C. Circuit judges. The D.C. Circuit currently has seven judges nominated by Democratic presidents and four nominated by Republican presidents and, therefore, if the entire D.C. Circuit reviews the decision, it seems likely that the court would uphold the IRS' authorization of subsidies to health insurance purchased on the federally-operated exchange. Due to the potentially far-reaching impact of the split decisions of the D.C. and Fourth Circuits, there is a strong likelihood that there will be additional lawsuits and appeals and, possibly, that the U.S. Supreme Court will be asked to weigh in regarding whether the ACA authorizes the subsidies for the federally-operated exchanges.