Will the US Supreme Court Eliminate Affordable Care Act Subsidies in the Federal Exchange?

| Who | The US Supreme Court will hear oral arguments (scheduled for March 4, 2015) in King v Burwell and is expected to issue its decision by the end of June 2015. |
| What | The issue is whether premium tax credits (subsidies) under the ACA apply to individuals who purchase health insurance in the federal exchange (HealthCare.gov) or only to those who buy insurance in state-based exchanges. |
| Why | The plain language of the ACA (new Tax Code section 36B) says tax credits apply only for insurance purchased “through an Exchange established by the State.” But the Obama Administration and others say the clear legislative intent was to provide premium tax credits to low- and middle-income Americans who purchase health insurance in either state or federal exchanges. In addition, other sections of the ACA use the term “such exchange” when referring to state and federal exchanges and require federally facilitated exchanges to report on the premium tax credits. |
| Ramifications | If the Court eliminates the subsidies, there are ramifications for employers, individuals, health insurers and state exchanges. |
| | King v Burwell (lower court Fourth Circuit Court of Appeals) held unanimously that subsidies are available to enrollees in the federal exchange, [http://www.ca4.uscourts.gov/Opinions/Published/141158.P.pdf](http://www.ca4.uscourts.gov/Opinions/Published/141158.P.pdf). |
| | • IRS Ruling May 23, 2012 said subsidies are available in both federal and state exchanges. 45 CFR 155.20. |
| | • Halbig v Burwell, DC Court of Appeals (3-judge panel) held 2-1 that subsidies are not available to enrollees in the federal exchange, [http://www.cadc.uscourts.gov/internet/opinions.nsf/10125254D91F8BAC85257D10004E6176/$file/14-5018-1503850.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/10125254D91F8BAC85257D10004E6176/$file/14-5018-1503850.pdf). |

On November 7, 2014, the US Supreme Court announced that it will hear King v Burwell this term. The issue in this case (and also in Halbig v Burwell, DC Court of Appeals) is whether the premium tax credits under the Affordable Care Act are available to low- and middle-income Americans who purchase health insurance in the federal exchange (HealthCare.gov) or only to qualified individuals who buy health insurance in a state exchange.
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As background, states had to decide whether to run a state exchange, have a partnership exchange with the federal government, or to not be involved and consequently let the federal government facilitate the exchange for that state. Individuals residing in a state that defaulted to a federally facilitated exchange use healthcare.gov for individual coverage.

The issue before the US Supreme Court is critical and could undermine/gut the entire health care reform act if the Supreme Court says the subsidies apply only in state exchanges. This is because only 13 States and the District of Columbia have established their own exchanges, and the other 37 states have defaulted to the federal exchange or have hybrid state-federal exchanges. (Seven of those have state-federal partnership exchanges and three have federally-supported state-based exchanges).

On May 23, 2012, the IRS issued guidance stating that subsidies are available in both federal and state exchanges, and this is incorporated in the regulations at 45 CFR 155.20, which state: Exchange means a governmental agency or non-profit entity that meets the applicable standards of this part and makes QHPs available to qualified individuals and qualified employers. Unless otherwise identified, this term refers to state exchanges, regional exchanges, subsidiary exchanges, and a federally-facilitated exchange.

For readers who want more detail on this issue and this case, two interesting articles are The Stage is Set: Predicting State and Federal Reactions to King v. Burwell by Leavitt Partners (at http://leavittpartners.com/payer-publications/ ) and an interview with law professor Larry Tribe (constitutional law expert) where he explains how he thinks the Supreme Court might rule in this case (available at http://www.washingtonpost.com/blogs/plum-line/wp/2015/01/22/for-scotus-chief-justice-john-roberts-anti-obamacare-lawsuit-poses-major-dilemma/ ). There are a plethora of excellent articles if one Googles “King v Burwell.”

Implications

This implications section is not a prediction that that the Supreme Court will invalidate the subsidies (premium tax credits and cost-sharing reductions) for individuals who purchase health insurance through HealthCare.gov. However, if it does, there are significant ramifications for individuals, large employers, health insurers, and states that have not established their own exchanges (or have but are considering changing to the federal exchange in the future). Here’s a summary:

Individuals:
It is expected that many or most of the people who receive a premium tax credit to purchase health insurance in the federal exchange would drop coverage if the premium tax credits were no longer available. In 2014 approximately 8.1 million Americans enrolled in state and federal exchanges, 5.4 million were enrolled in the federal exchange, and over 4 million of them received premium tax credits. As of January 16th, 7.1 million people had enrolled in HealthCare.gov, and another 2.4 million had enrolled in state exchanges. HHS estimated at the end of December that 90% of 2015 enrollees (as of December 30) qualify for premium tax credits.

Most of these people would not be subject to the individual mandate tax if they drop health insurance, because the tax does not apply if the lowest cost of health insurance would be more than 8% of household income; for most people who currently qualify for a premium tax credit, the cost of coverage on the exchange would be more than 8% of household income if there were no premium tax credit.

Query: If the Supreme Court decides in mid-2015 that the subsidies cannot legally be paid to individuals who buy insurance through HealthCare.gov, will it require individuals who have received premium tax credits to repay amounts previously received? This seems highly unlikely, although technically if the subsidies were not valid in the federal exchange that would apply retroactively to January 2014.
**Employers:**
Under the Employer Shared Responsibility provisions of the ACA, large employers will be subject to penalties if they do not offer “minimum essential coverage” to at least 70% of all full-time employees in 2015 (increasing to 95% after 2015), or if coverage does not meet ACA criteria for “affordable” and “minimum value” – and at least one full-time employee buys coverage in the exchange and receives a premium tax credit. If tax credits do not apply in the federal exchange, large employers in federal exchange states will not be subject to the “employer mandate” penalty, but employers in state exchange states will be if any full-time employee receives a premium tax credit. The irony is that this would incent large employers to move to federal exchange states and incent low- and middle-income workers to move to state exchange states.

Small employers are not subject to the employer mandate or the potential penalties, but for many small employers the decision of whether to offer health coverage to some or all employees is affected by whether employees would be eligible for less expensive coverage through the exchange. This is particularly the case if many low-wage workers need family coverage. Thus, small employers in state exchange states might be more inclined not to offer coverage to low-wage workers, but small employers in federal exchange states might be more likely to offer coverage if workers would not be eligible for subsidies to buy insurance through the exchange.

**Health Insurers:**
If enrollees in HealthCare.gov lose their subsidies, it is likely most healthy individuals will drop coverage, but unhealthy individuals will pay the higher premium amounts because they are likely to have medical bills. The result is a less healthy risk pool, which insurers have argued will destabilize insurance markets and require significant premium increases to cover increased claims costs. If the subsidies in federal exchanges are eliminated mid-year in 2015, it is unlikely insurers will be allowed to raise rates mid-year. This will have ramifications both for the risk-shifting programs (risk corridor, risk adjustment and transitional reinsurance) as well as for premium rates in 2016.

**State Exchanges:**
States that defaulted to HealthCare.gov have not rushed to establish state-bases exchanges, even since the US Supreme Court in November 2014 announced it would take *King v Burwell*. Perhaps one reason is that many states that defaulted to the federal exchange are Republican states, and they believe a Supreme Court decision invalidating subsidies in the federal exchange would incent large employers to move to their states, more than it would incent low- and middle-income workers to move out of their states.

The Obama Administration has said repeatedly that it does not have a contingency plan because it does not think the US Supreme Court will invalidate the subsidies for HealthCare.gov. However, it’s hard to believe there is not really a behind-the-scenes contingency plan, given that an adverse ruling could gut the ACA.

**What Should Employers Do Now?**
There is no specific action for employers at this time, except to see where you, your employees, and your state exchange fit in the categories listed above, and consider how you will be affected if the Supreme Court strikes down subsidies in the federal exchange. And, of course, continue to make ACA compliance a priority as it is possible nothing will change.

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