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Determination of Employer "Pay or Play" Assessment Under Affordable Care Act Cast into Doubt Following Recent Court Split

TIFFANY N. SANTOS

As employers prepare to comply with the Affordable Care Act's employer shared responsibility provision (or "Pay or Play" requirement) under Section 4980H of the Internal Revenue Code (the "Code"), two recent conflicting Court of Appeals decisions regarding the availability of the premium tax credit to purchase Marketplace/Exchange coverage could impact the Section 4980H's employer assessment provision.[1] Section 4980H permits the Internal Revenue Service ("IRS") to assess one of two payments on an "applicable large employer" (generally, an employer with more than 50 full-time employees, taking into account hours worked by part-time employees), depending on whether:

- The employer offers its full-time employees the opportunity to enroll in "minimum essential coverage" (for a discussion of these penalties, see our February 2014 newsletter); AND
- At least one full-time employee purchases individual Marketplace/Exchange coverage with a federal premium tax credit or cost sharing reduction.

For those employers with employees in any of the 37 states (including Oregon) whose Marketplace/Exchange is run by the federal government, any assessment due under Section 4980H may be significantly reduced or eliminated entirely if the D.C. Circuit Court of Appeals ruling stands and residents of such states cease to qualify for the premium tax credit to purchase Marketplace/Exchange coverage.[2]

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[1] See the Fourth Circuit Court of Appeals' decision in King v. Burwell (http://www.ca4.us courts.gov/opinions/published/141158.p.pdf) and the District of Columbia Court of Appeals decision in Halbig v. Burwell (http://www.cadc.uscourts.gov/internet/opinions.nsf/10125254d91f8bac85257d1d004e6176/$file/14-5018-1503850.pdf).

[2] Section 1321 of the Affordable Care Act provides that a state may elect to establish a Marketplace/Exchange. If a state opts not to establish its own Marketplace/Exchange or fails to establish one by January 1, 2014, then, under Section 1321(c), the federal government will establish and operate such Marketplace/Exchange within that state.

The IRS's interpretation that the premium tax credit is available to taxpayers enrolled in coverage in either a state-run or federally-run Marketplaces/Exchanges is found in 26 CFR Section 1.36B-2(a)(1).[3] See, §§ 4375(d) and 4376(d) and Treas. Reg. §§ 46.4375-1(c)(4) and 46.4376-1(c)(3).

Split Decisions

On July 22, 2014, both the D.C. Circuit Court of Appeals and the Fourth Circuit Court of Appeals issued decisions in *King v. Burwell* and *Halbig v. Burwell*, respectively, construing the Affordable Care Act's premium tax credit provision under Section 36B of the Code and related 2012 Treasury Department regulations, wherein the IRS interpreted the statute to grant the credit to individuals who purchase health insurance on either the state-run insurance Marketplaces/Exchanges or the federally-facilitated Marketplace/Exchange. Section 36B defines the annual premium tax credit available to a taxpayer by reference to the coverage months in which the taxpayer is enrolled in a health plan "through an Exchange established by the State".

King v. Burwell

Ruling that the aforementioned language was ambiguous and subject to multiple interpretations, the Fourth Circuit Court of Appeals applied deference to the IRS's interpretation and found that Section 36B permitted the IRS to grant the credit to taxpayers enrolled in both state *and* federally-facilitated Marketplace/Exchanges. The Fourth Circuit further reasoned that the IRS's interpretation of Section 36B was consistent with the ACA's goal of expanding access to health insurance coverage, and subsidizing the purchase of insurance through federal exchanges helped further that goal.

Halbig v. Burwell

In *Halbig,* a three-judge panel for the D.C. Circuit Court of Appeals ruled that the language above "unambiguously restricts the Section 36B subsidy to insurance purchased on Exchanges 'established by the State'" and vacated the IRS's interpretation, but withheld its effect until the decision could be appealed. In contrast to the Fourth Circuit, the panel concluded there was no evidence of Congressional intent to establish subsidies to purchase health insurance coverage on both federal and state Marketplaces/Exchanges.

What Should Employers Do?

While we understand that one or both decisions are likely to be appealed and may even be reviewed by the United States Supreme Court if upheld, Section 4980H remains in full effect. Thus, to the extent that it provides an incentive for employers to offer coverage to minimize any potential assessment, any decision to discontinue coverage would probably be premature until the cases are resolved. Employers should continue their efforts to comply with Section 4980H while monitoring the status of these cases. If you have any questions, please contact the author of this article.

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