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Circuit Courts Split on Availability of Premium Tax Credits under the ACA

August 1, 2014

On July 22, 2014, the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the D.C. Circuit reached opposite conclusions regarding the validity of a Treasury Regulation promulgated under Section 36B of the Internal Revenue Code of 1986, as amended (***?ÃÂ£Code?ÃÂ¥***). Code Section 36B provides that premium tax credits are available for qualifying taxpayers to subsidize the purchase of qualifying health insurance ?ÃÂ£enrolled in through an Exchange established by the State?ÃÂ¥ under the ACA. By regulation, the IRS has ruled that premium tax credits are available under Code Section 36B regardless of whether insurance is purchased on a state or federally-established Exchange (the ***?ÃÂ£IRS Rule?ÃÂ¥***). Because various penalties under the ACA (including those under the employer shared responsibility or ?ÃÂ£play-or-pay?ÃÂ¥ provisions of the ACA) are linked to the availability of premium tax credits under Code Section 36B, the IRS Rule subjects more employers and individuals to such penalties than if the premium tax credits were only available for insurance purchased through a state-established exchange. Several employers and individuals from states that had not established Exchanges challenged the IRS Rule, claiming that the rule impermissibly extended the Code Section 36B premium tax credits to insurance purchased through a federally-established Exchange (rather than solely through an ?ÃÂ£Exchange established by the State?ÃÂ¥). In *King v. Burwell*, the Fourth Circuit upheld the IRS Rule as being a valid interpretation of Code Section 36B; however, in *Halbig v. Burwell*, the D.C. Circuit sided with the plaintiffs and struck down the IRS Rule as being contrary to the plain language of Code Section 36B. These conflicting decisions mean that it is likely the U.S. Supreme Court will ultimately determine the validity of the IRS Rule. Therefore, the practical impact that the July 22 decisions will have on employers, individuals, and the ACA as a whole remains to be seen. The Obama Administration has confirmed that it will ask the entire D.C. Circuit ?ÃÃ¶ 11 judges in total ?ÃÃ¶ to review the decision ?ÃÂ£en banc.?ÃÂ¥ However, any ?ÃÂ£en banc?ÃÂ¥ review likely will not occur until early fall. *King v. Burwell*, No. 14-1158 (4th Cir. July 22, 2014). *Halbig v. Burwell*, No. 14-5018 (D.C. Cir. July 22, 2014).