

## AFTER LIBERTY, PRUITT AND HALBIG CHALLENGES THREATEN PPACA

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Last year the nation awaited the fate of the Patient Protection and Affordable Care Act (“PPACA”) as the U.S. Supreme Court considered *National Federation of Independent Business v. Sebelius*. Today, two lesser-known Federal cases threaten to undermine not just the individual mandate but possibly the entire PPACA structure for expanding health care coverage for all Americans.

PPACA requires the creation of a health insurance exchange (“Exchange”) in each State that will serve as a competitive marketplace where individuals and small businesses can purchase private health insurance. If a State refuses to establish an Exchange then the Federal government must implement and operate one.

Section 1401 of PPACA provides that premium assistance is available to taxpayers who are enrolled in coverage through an Exchange established by the State under Section 1311 of PPACA. Nonetheless, the Internal Revenue Service (“IRS”) promulgated a regulation that bases eligibility for premium assistance subsidies on enrollment in coverage through any Exchange, including a Federally-established Exchange. Specifically, the regulation states that subsidies shall be available to anyone “enrolled in one or more qualified health plans through an Exchange,” and subsequently defines an “Exchange” to mean “a State Exchange, regional Exchange, subsidiary Exchange and Federally-facilitated Exchange.”

*Pruitt v. Sebelius* (U.S. District Court for the Eastern District of Oklahoma) and *Halbig v. Sebelius* (U.S. District Court for the District of Columbia) challenge the IRS regulation expanding the availability of premium subsidies to individuals enrolled in a Federally-operated Exchange. The plaintiffs claim that the issuance of the subsidies to individuals enrolled in a Federal Exchange is contrary to the specific provisions of PPACA and injures them in several ways, including forcing individuals to either pay a penalty or purchase insurance and subjecting employers to the play or pay penalties under the employer mandate from which they would otherwise be exempt due to the unavailability of subsidies to individuals in their respective State.

Since a majority of the States (34 States) have refused to establish a State Exchange, a ruling in favor of the plaintiffs in *Pruitt* or *Halbig* could seriously jeopardize the future of PPACA since the subsidies are key to the operation of other parts of the law, including the calculation and collection

of the individual and employer mandate penalties. First, a vast number of lower-income Americans will not be able to afford coverage in the absence of the premium assistance subsidy. Yet, these individuals are unlikely to be subject to the individual mandate penalty due to the exception under Section 1501 of PPACA for individuals who cannot afford coverage. Second, the availability of the premium assistance subsidy triggers the play or pay penalty under the employer mandate. Under PPACA, an employer with 50 or more full-time employees will be subject to a penalty for failure to offer full-time employees the opportunity to enroll in affordable, employer-sponsored health coverage that provides minimum value; provided at least one employee enrolls in coverage through an Exchange and qualifies for a Federal premium assistance subsidy. Consequently, if no Federal premium assistance subsidies are available to employees in a State due to the State having a Federally-operated Exchange, no penalty can be imposed on an employer with respect to employees in that State. Without the revenue collected under the individual mandate and the play or pay penalty, a major source of funding for PPACA is eliminated.

The Obama administration has sought to dismiss *Pruitt and Halbig* on several grounds. It has taken the position that the penalties are a tax and the Anti-Injunction Act precludes plaintiffs from challenging the imposition of the tax before it is actually assessed. Another argument is that the plaintiffs lack standing due to the speculative nature of their claimed injuries. In addition, following its announcement of the one-year delay of the implementation of the employer mandate, the administration argued that the delay should also delay the courts' consideration of the cases. These are the same arguments presented by the Obama administration in the recent case, *Liberty University v. Geithner*, but explicitly rejected by the Fourth Circuit despite that fact that the court upheld the individual and employer mandates as constitutional.

As the cases are currently at the District Court level, the issue of the permissibility of providing premium tax subsidies to individuals enrolled in Federally-operated Exchanges is unlikely to be resolved before the Exchanges' initial open enrollment period that begins October 1, 2013.

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