The potential to sink Obamacare?

By: Gina Binole - November 1, 2013

Politics have been part of the Patient Protection and Affordable Care Act since its passage in 2010. And politics, according to legal experts, stand in the way of fixing a glitch in the law that's at the center of several lawsuits challenging its legality.

"With a normal, less-polarized law, so many of these issues that have popped up, Congress would go back and fix," said Iris Tilley, an employment and benefits attorney in Portland, Ore. "But because (the PPACA) is so politically polarized, Congress won't go back and fix anything. So, you have the executive branch fixing the law through regulation."

At the moment, at least four lawsuits are pending, all aimed at blocking the administration's attempt to fix the language surrounding the law's tax credits, or subsidies.

These legal challenges root back to the two types of exchanges envisioned under the law.

The first is the state-established exchange. States that set up their own exchanges are promised federal dollars for subsidies and tax credits to people who have incomes below 400 percent of the poverty line. To receive these dollars, the law says they must buy insurance "through an exchange established by the state." It says so in two places.

But under the law, states also were allowed to refuse to establish their own exchanges and default to the federally-operated exchange. Those federally run exchanges, however, were not explicitly included in the language about subsidies.

So far, just 19 states have set up their own exchanges, while 17 others have gone with federal exchanges.

In its effort to address the issue, the IRS issued a rule in May 2012 saying the subsidies would be available through the federally-operated exchanges, too.

One day after the IRS issued its ruling, a group of business owners from six states filed the first big suit. A federal judge recently denied a request from the U.S. Department of Justice to dismiss the suit.

The legal action, Halbig et al v. Sebelius, pits Jacqueline Halbig, an Alexandria, Va., business consultant and senior policy adviser in the U.S. Department of Health and Human Services during the George W. Bush administration, against HHS Secretary Kathleen Sebelius.

Halbig and her co-plaintiffs – all of whom are located in states that have chosen not to set up an exchange – contend the PPACA only allows for subsidies when plans are purchased through state exchanges. Their suit also asserts that the IRS exceeded its legal authority when it issued its rule.

The PPACA explicitly states the tax credits are for those who bought health insurance “through an exchange established by the state.”

“The ambiguous language in the law could be clarified with the change of a few words, but a deeply divided Congress is unlikely to make that effort,” said Robert Klein, an employment law attorney in Alexandria, Va. “I don’t think anyone at the time the law was passed expected Republican-controlled states would refuse to set up an exchange because they were politically opposed to Obamacare.”

The plaintiffs further argue PPACA is written in a way that does not force penalties on individuals who don’t purchase health insurance in the states where the federal government will run the exchanges, because without the subsidies, many would not be able to afford coverage.

“Agencies (like the IRS) are bound by the laws enacted by Congress,” said Sam Kazman, general counsel of the Competitive Entreprise Institute, a libertarian public policy-focused non-profit that is coordinating the legal challenge. “Obamacare is already an incredibly massive program. For the IRS to expand it even more, without congressional authorization and in a manner aimed at undercutting state choice, is flagrantly illegal.”

Kazman said the plaintiffs filed suit for several reasons – including objections to paying for costly insurance packages they neither need nor want.

“Contrary to the clear language in the Affordable Care Act, government is directly impeding my ability to design a quality affordable health plan for my employees,” said Dr. Chuck Willey, one of the plaintiffs and head of Innovare Health Advocates in St. Louis, Mo.

Opponents of the law think their odds of winning are good.

"My jaw dropped when I first saw this," Michael F. Cannon, a health policy expert at the Cato Institute and a fierce critic of the law, told the Los Angeles Times. "This has the potential to sink Obamacare. It could make the current website problems seem minor by comparison."

The judge in the Halbig case, U.S. District Judge Paul Friedman in Washington, D.C., is expected to rule on the overall merits of the case by mid-February.