



ACA Backers Hope For Swift 'Halbig' Review In DC Circuit As Courts Issue Opposing Rulings

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ACA supporters hope the U.S. Court of Appeals for the DC Circuit will quickly grant the Obama administration's upcoming request for an en banc review of Tuesday's *Halbig v. Burwell* decision that, if ultimately upheld, would deal a significant blow to the health law's promise of providing affordable health insurance, though attorneys note en banc petitions are rarely accepted. Meanwhile, an attorney whose organization is coordinating the challenges against the IRS' policy of granting premium tax credits to enrollees in federal exchange states says the group is weighing several options, such as seeking a separate en banc review of the competing Fourth Circuit Court of Appeals ruling that sided with the federal government or appealing that decision directly to the Supreme Court.

On Tuesday (July 22), the DC appellate court ruled 2-1 that premium tax credits cannot be available for insurance obtained through federally facilitated exchanges, and within hours the Fourth Circuit unanimously ruled in the opposite direction, upholding IRS regulations that allow premium subsidies to be available in all states. Immediately following the *Halbig* ruling, the administration made it clear that it would seek a rehearing of the case in front of all 11 active judges of the DC Circuit, which if granted would likely play in the administration's favor due to the court's makeup, sources say.

Matthew Lawrence, an academic fellow at Harvard University's Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics, says it's extremely rare for the court to grant en banc requests, but this is a special sort of case and it could be a plausible candidate based on the court's standard of rehearing cases that are exceptionally important.

Additionally, Lawrence says the government doesn't often ask for en banc reviews and is quite cautious about making such a request. For the administration to say it will ask for that review the same day the *Halbig* ruling was released shows the importance of the case, and that might be something the court takes into account.

Elizabeth Taylor, executive director of the National Health Law Program, said it would be key for the DC Court of Appeals to hold an en banc review quickly. She believes it is possible for the court to resolve the issue this fall, before the next open enrollment period begins. A quick decision by that court would be important to remove any concerns people might have about enrolling in coverage and then having their subsidies be taken away, as that could deter people from signing up, she said. National Health Law Program filed amicus briefs in support of the Obama administration.

Exchange open enrollment begins on Nov. 15 and other sources believe that if the DC Circuit grants the en banc hearing, an opinion could come down as early as mid-October.

CMS would not respond to questions Tuesday as to whether the administration plans to tweak its outreach messaging this fall to put even more emphasis on the fact that subsidies are available, as a way to stem any consumer confusion that might manifest as a result of the dueling decisions.

The DC Circuit wrote that the ACA unambiguously restricted premium tax credits for insurance purchased on the exchanges established by the state, so the IRS' regulatory position was invalid. The 2-1 ruling applies to the 36 states in which the federal government is helping or entirely operating the exchange. At issue are 4.7 million people that enrolled through the federally facilitated exchanges during the first open enrollment period and are getting premium tax credits to help afford their insurance. In total, roughly 8 million people signed up for exchange plans across all states and 85 percent of them chose plans with financial assistance.

We reach this conclusion, frankly, with reluctance, the opinion of the court stated. At least until states that wish to can set up exchanges, our ruling will likely have significant consequences both for the millions of individuals receiving tax credits through federal exchanges and for health insurance markets more broadly. But, high as those stakes are, the principle of legislative supremacy that guides us is higher still.

In a statement slamming the Halbig decision, Department of Justice spokesperson Emily Pierce said that premium tax credits are still available and despite the court's ruling nothing has changed. An administration official said that on average, monthly premiums for people who receive premium tax credits fell 76 percent, reducing the cost of premiums from \$346 to \$82 across all plan types.

State-based exchanges are already seeking to distance themselves from the Halbig ruling. In a statement, Connect for Health Colorado Communications Director Linda Kanamine said the DC appeals court decision has no impact on exchange customers in that state, and there is no reason for concern about their coverage.

Plaintiffs argued that the IRS overstepped its authority in issuing regulations that said ACA subsidies are available in state-based and federally facilitated exchange states, because the law states that the tax credits will be offered for insurance purchased through an exchange established by the state. The Cato Institute's Michael Cannon, who has spearheaded the lawsuit,

said Tuesday the IRS offered no justification in its regulations as to why it departed from the text of the statute. The agency only said its regulatory stance was consistent with the ACA, he said.

If tax credits were not available in the federally-run exchange states, the number of people who would be required to purchase health insurance or face a penalty because of the individual mandate would be significantly reduced, they said. The law outlines a hardship exemption from the penalties, in which an individual is not subject to the individual mandate if the annual cost of coverage exceeds 8 percent of projected household income. Without the subsidies, most individuals would likely pay more for coverage than that threshold.

Tossing out subsidies in federal exchange states would also carry implications for the law's employer mandate, because penalties against employers are triggered when an employee is not offered coverage meeting certain standards and they then go to the exchange and get subsidized coverage.

Overall, the uncertainty created by these cases and their possible Supreme Court resolution constitutes another reason why large employers are likely to continue to provide health coverage for employees, even as rising costs are causing employers to make significant changes in how they provide that coverage, American Health Policy Institute President Tevi Troy said in a statement.

Conflicting with the DC appeals court's decision, the Court of Appeals for the Fourth Circuit unanimously agreed that the IRS rule was a permissible exercise of the agency's discretion, so the tax credits could be offered in all of the states regardless of whether the state or federal government was running the exchange. The ACA's statutory language is ambiguous and subject to multiple interpretations, the opinion from the three-judge panel stated.

Sam Kazman, general counsel for the Competitive Enterprise Institute, says the group was disappointed with the Fourth Circuit ruling and the group is considering its options, including requesting an en banc hearing or appealing directly to the Supreme Court. Kazman's group is coordinating the lawsuits and funding them.

Ron Pollack, executive director of pro-ACA consumer group Families USA, notes if the full DC Appeals Court rules in favor of the government with an en banc hearing there wouldn't be a split in the decisions, so it's unclear if the Supreme Court would take on an appeal request. Matthews agrees that the Supreme Court would be inclined to wait and see the outcome of the DC Circuit before deciding whether to consider a challenge. But if the three-judge panel ruling from the federal DC court is upheld or an en banc review is not granted, sources believe it's much more likely the high court would hear the case.