

# Modern Healthcare

## Speculation swirls around what happens if fed subsidies go away

By [Lisa Schencker](#)

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New language in contracts between the [CMS](#) and [insurers](#) operating on HealthCare.gov is grabbing attention, with some calling it an admission by the government that it might lose upcoming court battles dealing with insurance subsidies on the health portal and others saying the new wording is just a practical precaution.

The new language appears to allow insurers to stop offering their plans should federal premium subsidies disappear. A number of cases regarding the legality of the subsidies in states without their own exchanges are now working their way through the courts.

The language says, “CMS acknowledges that (the insurer) has developed its products for the (federal exchange) based on the assumption that (advance payments of the premium tax credit) and (cost-sharing reductions) will be available to qualifying enrollees. In the event that this assumption ceases to be valid during the term of this agreement, CMS acknowledges that issuer could have cause to terminate this agreement subject to applicable state and federal law.”

Michael Cannon, director of health policy studies for the Cato Institute, a libertarian think tank, said the new CMS contract language is significant in that it shows the seriousness of the legal challenges facing the subsidies.

“It's the first indication that we've gotten that the administration and its allies are nervous about these losses,” Cannon said. “They've tried to project this image of confidence, of the law is obviously on their side, these lawsuits are frivolous and of course they're confident they're going to prevail in court, but now they're facing two losses.”

In July, in a split decision in [Halbig v. Burwell](#), a three-judge panel from the U.S. Court of Appeals for the District of Columbia Circuit [struck down the subsidies](#), saying residents shouldn't be eligible for them in states that haven't adopted their own exchanges. That decision, however, was invalidated when the full D.C. Circuit Court [agreed to reconsider the case](#). Oral arguments are scheduled for Dec. 17.

That same day in July, a 4th U.S. Circuit Court of Appeals panel [ruled unanimously in favor of the administration](#) on the same issue in *King v. Burwell*. That case has been appealed to the Supreme Court, but the justices have not indicated whether they will hear it.

But Timothy Jost, a professor at Washington and Lee University School of Law in Virginia, said the new language might not necessarily be directly connected to those court cases. Subsidies could also be in danger if Republicans take control of Congress and succeed in defunding or repealing the Affordable Care Act, he said.

Jost doesn't agree with the argument that the language is an admission of possible defeat by the Obama administration.

“This is not, again, a validation of this litigation,” Jost said. “It's simply recognition that this is a risky world.”

Also at issue with the new language is exactly what it might mean should subsidies evaporate. The clause explaining that the new language is “subject to applicable state and federal law” raises a number of questions.

“People are just kind of shaking their heads going, 'I don't know what this means,' ” said Robert Laszewski, president of the Health Policy and Strategy Association, a consulting firm in Washington, D.C.

But Laszewski said if subsidies vanish, it's possible that healthy people will stop paying their premiums and only sick people who really need their insurance would remain. A RAND Corp. report found that eliminating the ACA's tax credits would result in premiums rising by nearly 45% and enrollment falling by nearly 70%.

“If you lose your insurance it's devastating, and if you're an insurance company and you lose 87% of your block and only keep the sick people that's pretty devastating too. This would be chaos and devastation in these 36 markets,” Laszewski said, referring to the states that have not adopted their own state exchanges.

It's unclear whether and how insurance companies might be able to exit the exchanges should subsidies be taken off the table. Laszewski said the federal Health Insurance Portability and Accountability Act says if an insurer cancels coverage for those who bought it through the exchange then it has to cancel that entire class of coverage, meaning that type of coverage offered off the exchange as well. Also, the Patient Protection and Affordable Care Act prohibits canceling policies because of nonpayment for three months. That means if subsidies ended and people stopped paying their premiums, they would still have to be covered for at least three months. It's possible insurance companies might, if subsidies stopped mid-2015, decide to stay on the exchange until they can exit Jan. 1 without complications because the government has agreed to cover most of any losses the companies experience on the exchanges through 2016, he speculated.

Complicating the issue are varied laws at the state level as well. For example, Linda Sheppard, with the Kansas Health Institute, said companies in Kansas would likely have to provide 60- to 90-days notice to consumers, depending on the situation.

It's also unclear whether insurance companies would actually try to leave the exchanges if subsidies stopped.

Clare Krusing, a spokeswoman with America's Health Insurance Plans, which represents the health insurance industry, said insurers and the government developed the new language and agreed on it together. But she said Friday it's still unknown exactly how things would play out should subsidies stop, given all the different state and federal legal questions.

Matt Wiggin, an Aetna spokesman, said Friday that the company is monitoring the situation but can't speculate on what might happen. The court cases involving subsidies aren't changing the company's strategy, he said.

“The courts have a process, and we'll continue to monitor where they go,” Wiggin said, “and then following any court ruling, we'll assess what that ruling means.”

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