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Health Law Faces New Legal Challenges

A judge on Monday will consider a lawsuit that claims the wording of President Obama's health law prevents federally run online insurance exchanges from offering subsidies to consumers.

By Joe Palazzolo

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The health law championed by President Barack Obama survived one major legal challenge in last year's Supreme Court ruling, but it will face fresh legal tests starting this week.

Federal judges in Washington, D.C., and Virginia will consider whether the text of the statute prevents the administration from offering subsidized health insurance to millions of low- and middle-income Americans.

The 2010 federal law says people qualify for subsidies if they obtain health insurance through an exchange "established by the state." But dozens of states refused to set up their own marketplaces, leaving the task to the federal government.

The question before the courts is whether the Affordable Care Act's wording is a drafting mistake contrary to what Congress intended—or a barrier to subsidies for coverage in the 36 states where the federal government is running some or all of the online exchanges.

On Monday, a federal judge in Washington will consider whether the Internal Revenue Service exceeded its authority when it issued a rule last year making clear that subsidies should extend to coverage acquired through federal exchanges.

The dispute may seem technical, but the stakes are huge. The subsidy is available to households with incomes ranging from the federal poverty level up to four times that amount, or \$78,120 for a family of three.

The lawsuits aren't the only legal challenge to the health law. Other suits target a requirement that companies include birth-control coverage in insurance plans for their employees. Dozens of employers have opposed the provision on religious grounds, while the government has argued that for-profit enterprises don't have religious rights.

The Congressional Budget Office estimates that by 2016, 19 million people will be enrolled in subsidized health plans, more than four-fifths of all the people expected to get coverage through exchanges by that year.

If successful, the lawsuits could hobble the Affordable Care Act's mandate that large employers sponsor health insurance for employees. That is because penalties against employers kick in only after one of their workers enrolls in a subsidized plan through an exchange, so if employees can't get a subsidy their employer presumably won't face a fine. The Obama administration has delayed such penalties until 2015.

"If we're right on the law, then there are no subsidies or employer penalties" in states not running their own exchanges, said Michael A. Carvin, a partner at the law firm Jones Day who is handling the lawsuits in Washington and Virginia.

The Competitive Enterprise Institute, a libertarian think tank, is coordinating the suits and helping with their legal costs, a spokeswoman said.

Mr. Carvin's clients include a community bank in Kansas and Dave Klemencic, a small-business owner in West Virginia who also was involved in the suit challenging the constitutionality of the health law's individual mandate, which the Supreme Court upheld in 2012.

The Justice Department has argued that the "larger structure" of the health law suggests that Congress intended for subsidies to be available regardless of whether an exchange was run by state or federal authorities.

"When Congress enacted the ACA, it did not enact a statute that would be at war with itself," Justice Department lawyers wrote in a Sept. 27 brief filed in the Washington, D.C., suit.

The legislative record isn't so clear, some legal scholars say. "Fundamentally, [the Affordable Care Act] was large and put together very hastily," said Anup Malani, a law professor at the University of Chicago, who supports expanded coverage but has been critical of the health law. "As a result, there are a lot of errors in the bill, and this is just one of them."

Timothy S. Jost, a professor at Washington and Lee University School of Law who supports the law, said the issue of whether subsidies would be available through federally run exchanges never arose in legislative debate.

"No one noticed it until months after the law was adopted," he said.

So far, there is no move in Congress to pass legislation that would clarify the law's language.

The lawsuits filed in Washington and Virginia, and two others filed by authorities in Oklahoma and Indiana, say the statute unambiguously restricts subsidies to coverage purchased on state exchanges.

On Monday, a federal district judge in Washington will consider Mr. Carvin's motion to temporarily block the IRS regulation while the case is under review. At the same time, the court will consider the Justice Department's motion to dismiss the case. A similar hearing is scheduled for Oct. 31 in Richmond, Va.

When laws are written ambiguously, courts typically defer to executive agencies to sort out the meaning. But judges owe no such deference if they find the meaning of the law is clear.

Jonathan Adler, a law professor at Case Western Reserve University who has been critical of the law, was among the first to raise the idea of a potential legal challenge to the IRS regulation, in a July 2012 paper published in an academic journal.

Mr. Adler said he and his co-author, Michael F. Cannon, pored over the legislative history, expecting to find evidence that lawmakers made a drafting mistake. “But there is no evidence,” Mr. Adler said.

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