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Fight over tax credit 'a mortal threat to the health care law'

Affects 25 states without their own exchanges

By: Tom Howell Jr - January 10, 2013

President Obama's health care law may have been ruled constitutional last year, but it now faces a legal challenge over whether the federal government can pay out subsidies in states that have refused to set up their own insurance exchanges.

Congressional Republicans and Oklahoma's attorney general say only states that have set up their own virtual insurance markets, or "exchanges," are eligible for the tax credits to help individuals buy insurance. The Obama administration disagrees.

The fight could be worth $500 billion — the value of tax credits that would be paid over the next decade to 25 states that have refused to run their own exchanges and instead say they will let the federal government take control, according to House oversight committee staff.

"This issue is a mortal threat to the health care law," said Michael F. Cannon, who has tracked the issue closely as director of health care policy studies at the Cato Institute.

At issue is part of the 2010 Patient Protection and Affordable Care Act — familiarly known as "Obamacare" — that critics say shows the tax credits were intended solely for exchanges set up by the states and don't apply to a federally run exchange.

If the government cannot pay out subsidies in those other states, it makes the president's health care plan much less appealing.

Oklahoma raised the issue in a lawsuit against the Department of Health and Human Services, and Rep. Darrell E. Issa, California Republican and chairman of the House Committee on Oversight and Government Reform, has been battling the Internal Revenue Service to try to get documents related to the administration's thinking.

So far, the issue mainly has attracted the attention of policy analysts and legal scholars. Yet the dispute, which simmered throughout last year in correspondence between members of Congress and the administration, could boil over if the court challenge and political pressure on Capitol Hill gain traction.

"Transparency and accountability in the administration's implementation of the president's health care law will remain a major focus of the committee's efforts in the 113th Congress," Mr. Issa said Wednesday.

The Treasury Department says it is implementing the law appropriately while states work to reach benchmarks.

“We are confident that interpreting this provision to provide tax credits to individuals in every state is supported by the statute and our authority to interpret it,” Treasury spokeswoman Natalie Wyeth Earnest said.

Oklahoma Attorney General E. Scott Pruitt has argued that the IRS rule exposed states like his to the “employer play-or-pay mandate” section of the law, which imposes penalties on companies with more than 50 full-time employees that fail to provide adequate medical insurance coverage.

Because the penalties apply when at least one full-time employee is in line for the premium tax credit, states that opted for a federally run exchange say the rule no longer will allow them to be insulated from the fines, according to court documents and House oversight aides familiar with the situation.

“We’ve been denied the benefit of our policy decision,” Mr. Pruitt said Wednesday in an interview.

If every state created its own exchange, then the debate would be moot, House oversight aides said. But it has become clear that half of the states have opted for a federally run exchange, putting the issue front and center as states and the federal government take on the weighty task of building the infrastructure for their exchanges.

States had to declare whether they intended to set up state-run exchanges in early December, while states that partner with the federal government in a hybrid exchange must apply by Feb. 15. So far, 17 states and the District of Columbia have obtained conditional approval for in-house exchanges, including several Republican-governed Western states.

Yet 25 states have indicated that they want a federally run exchange, according to the latest data from the Henry J. Kaiser Family Foundation, which has closely tracked the process.

Court papers in the Oklahoma case show a group of business owners attempting to intervene in the case in support of Oklahoma’s position, arguing that the IRS rule will subject them to the health care law’s employer mandate “under circumstances not authorized by law.”

So far, the federal government’s motions to dismiss the case have focused on whether Oklahoma and the intervening business have the proper standing and jurisdiction to bring their lawsuit. In other defenses of the IRS rule, the Treasury has pointed a section of the health care law that requires federally run exchanges to report data about health plan enrollments.

“There would be no reason for Congress to impose this obligation unless the enrolling individuals were eligible for the premium tax credit,” Emily S. McMahon, acting assistant secretary for tax policy, wrote in a letter to Sen. Orrin G. Hatch, Utah Republican, when the topic stirred controversy last year.

The department has argued that opponents of Mr. Obama's law are attempting to deny billions of dollars in tax credits to middle-class families.

In a November op-ed, Mississippi's insurance commissioner said the attempt to poke holes in the IRS rule-making is "flawed in that it is based solely on speculation and unproven legal theories."

But those critical of the IRS say the administration figured that conservative-led states would jump at the chance to run their own affairs instead of letting the feds step in. The tax credit for state-run exchanges was an intentional move aimed at compelling governors to set up their own exchanges, Mr. Cannon said.

"They meant to do this," he said.

Republican House members say they are trying to enforce the law as it was written and will sharpen their examination of IRS decision-making in the coming year.

In a December letter, Mr. Issa and two Republican colleagues — House Ways and Means Committee Chairman Dave Camp of Michigan, and Rep. Charles Boustany Jr. of Louisiana — asked Treasury Secretary Timothy F. Geithner to turn over unredacted documents related to the decision to extend the tax credits "despite having no authority to do so under ObamaCare."