THE DAILY CALLER

States' refusal to establish exchanges could undo Obamacare

By: John Davidson – January 17th, 2013

The Obama administration is waiving the deadline for states to establish a health insurance exchange in accordance with Obamacare, reports The New York Times. But it should not be taken as a sign of deference to the states, or a willingness to be flexible; it should be taken as a sign of desperation.

The announcement is in fact an attempt by the administration to shore up the health care law's inherent weaknesses and to cajole states into enacting a federal scheme. Contrary to what the feds now claim, the latest and most glaring weakness of Obamacare is that it was crafted to depend on states to establish health insurance exchanges. These exchanges are meant to be the vehicles for the distribution of tax credits and subsidies to buy qualified health insurance plans.

If a state refuses to set up an exchange, and so far 25 have refused, the federal government must step in and create one. However, the law does not authorize tax credits and subsidies to flow through federally created exchanges, only those created by states. An Internal Revenue Service (IRS) rule issued in May 2012 attempted to fix this problem — initially dismissed as a "drafting error" — by extending credits and subsidies to federal exchanges and so-called "partnership exchanges," which a number of states have indicated they will adopt.

But the law's plain meaning, and Congress' intent, cannot be swept aside by a rule issued by the IRS. Oklahoma Attorney General Scott Pruitt is challenging the IRS in federal court over the rule and the case will likely end up before the U.S. Supreme Court. It has huge implications. If federal exchanges cannot facilitate tax credits and subsidies, they also cannot be used to impose penalties on employers that fail to comply with the law's "employer mandate" — a fine of $2,000 per employee per year. States that refuse to set up an exchange could therefore shield thousands of their residents and small businesses from onerous federal taxes and penalties.

The Cato Institute's Michael Cannon has made this argument forcefully and in great detail, and it seems to be gaining ground. Cannon, along with Jonathan Adler, a law professor at Case Western Reserve University, have authored what will likely be the definitive argument against the legality of the IRS rule in a forthcoming *Health Matrix* article.

They argue that once it became clear that a significant number of states were not going to set up exchanges, the IRS sought to fix the problem by regulatory decree. However, by stipulating that tax credits and subsidies would be available only through state-created exchanges, Congress sought to create an incentive for states to set up their own exchanges — because it could not simply order states to create them without overstepping constitutional boundaries. It seems that it did not occur to Obamacare's authors that many states would simply refuse, or that offering tax credits and subsidies would not be sufficient inducement for them to comply. It was a gross miscalculation, and could mean the undoing of Obamacare.

Seen in this light, this week's announcement by HHS Secretary Kathleen Sebelius looks more like a plea to recalcitrant states to cooperate and set up exchanges so the feds won't have to. Sebelius was supposed to determine by January 1 whether states were prepared to run an exchange, but she knew as far back as Nov. 15 that Texas, at least, would not establish one. Waiving the deadline isn't a deferential gesture by HHS to the states; it is the latest attempt by the federal government to deputize states into implementing federal policy, and a desperate attempt at that.

Texas and other states should remain steadfast in their resolve not to become tools for Washington, D.C. If the feds want Obamacare exchanges, let them set up those exchanges themselves. Americans would be much better off with weak federal exchanges than they would with the state-based exchanges Congress first envisioned in the law.

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