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Client Alert: A Tale of Two Decisions: Circuit Courts Divided on ACA Tax Credits

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Two federal appeals courts ruled yesterday on a key provision of the Affordable Care Act (ACA) – and reached opposite conclusions. At issue is the component of the ACA that allows individuals who earn between 100% – 400% of the federal poverty level (FPL), or \$11,670 and \$46,680 for an individual, to be eligible to receive a subsidy to purchase insurance in a Health Insurance Marketplace (www.HealthCare.gov). Specifically at issue is the actual language of the ACA provision that says individuals living in states that have a Marketplace “established by the State” are eligible to receive subsidies if they meet the income eligibility criteria specified in the ACA.

In June 2012, the U.S. Supreme Court upheld the ACA individual mandate, which requires that most people maintain health coverage. The law requires that each state have a Marketplace to facilitate the purchase of individual health insurance. Sixteen states (and the District of Columbia) currently operate their own Marketplaces. The rest of the states have a Marketplace run by the federal government or run in partnership with the federal government (“federally facilitated Marketplaces”).

The D.C. Circuit ruled 2-1 that the Internal Revenue Service (IRS) lacks the authority to allow subsidies to be provided in federally-facilitated Marketplaces. Conversely, the Fourth Circuit – based in Richmond, VA – ruled that the law’s language is ambiguous, and that the IRS is free to allow the subsidies in all states, including those with federally-facilitated Marketplaces. Because there is uncertainty about the provision’s application, the question may end up in the Supreme Court.

The Obama administration has indicated that it will appeal the D.C. Circuit’s ruling. The Justice Department will ask the entire D.C. Circuit appeals court panel to review the decision (called an *en banc* hearing). That panel is dominated by judges appointed by Democrats, 7-4. The court’s rules indicate that the ruling will not become effective for 45 days to give the government time to ask for an *en banc* hearing, or 7 days after the *en banc* hearing has been denied.

If the D.C. Circuit ruling stands, it could mean that at least five million individuals in states with federally-facilitated Marketplaces would face an average **premium increase of 76%**. The loss of subsidies will make health insurance unaffordable for many individuals who were planning to use those subsidies in the Marketplace. **As reported** by the *Washington Post*, at least nine in 10 people in states with federally-facilitated Marketplaces bought health insurance with the help of subsidies. The average tax credit to those people for coverage this year is \$276, lowering their premium from an average price of \$345 per month to an average of \$69.

Employer pay or play penalties are triggered by one or more full-time employees receiving a subsidy for the purchase of insurance in a Marketplace. Therefore, the negation of subsidies in states with federally-facilitated Marketplaces would greatly diminish employers' exposure to pay or play penalties. However, employers should continue to prepare for exposure to pay or play penalties in all states in which they have employees (including those states with federally-facilitated Marketplaces) while continuing to monitor developments.

These Circuit Court decisions add a layer of uncertainty to a law that already has been besieged by legal attacks. Most recently, the U.S. Supreme Court held in *Burwell v. Hobby Lobby*, that a closely held, for-profit corporation is exempt from providing insurance coverage of contraception if the requirement violates the corporation's religious beliefs. In addition, there has been a focus on the issues related to the narrowness of Marketplace health plan provider networks.

Vorys will continue to provide updates on new developments regarding the ACA. If you have any questions, contact your Vorys attorney.