The Affordable Care Act—Countdown to Compliance for Employers, Week 48: Obamacare Dodges Another Bullet

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A recent Federal Court decision turned back a potentially debilitating challenge to the **Affordable Care Act's** rules governing premium subsidies. (We discussed the issue in a prior blog post here.) The decision, ***Halbig v. Sebelius***, has consequences for large employers, i.e., those that are subject to the Act's employer shared responsibility or "pay-or-play" rules. The dispute giving rise to the claim before the court related to a final **IRS regulation**—**26 C.F.R. § 1.36B-2**—authorizing the grant of premium tax credits to low- and moderate-income individuals who qualify for and purchase qualified plan coverage under either a state-run public exchange or a "federally-facilitated" public exchange (i.e., an exchange operated by the Department of Health and Human Services in a state that declines to establish its own public exchange).

The nub of the challenge involved the language of **Internal Revenue Code Section 36B**, which calculates the amount of the premium tax credit based in part on the premium expense for the health plan. Here's how we explained it previously:

Section 1401 of the Affordable Care Act provides that eligible taxpayers may receive income tax credits for purchase of insurance "through an Exchange established by the State under [Act Section 1311]" (emphasis added). Section 1311 is the provision of the Act that enables the states to establish health insurance exchanges. That provision does not refer to federally-facilitated exchanges. Act Section 1321 provides that if a state does not elect to create an exchange that meets federal requirements, the federal government will "establish and operate" an exchange. This invites the question whether, in a state that fails to create an exchange, there can be any tax credits for insurance bought on a federally run exchange?

The plaintiff in *Halbig* urged the court to hold that individuals in states that fail to establish an exchange will be ineligible for premium tax credits to assist with the purchase of coverage. For employers, such a holding would be good news since assessable payments under the Act's employer shared responsibility provisions are triggered only where one or more employees qualify for a premium tax credit. If no employee is eligible, then there can be no liability for any assessable payments. The court rejected the plaintiff's central claim, however, holding instead that individuals who qualify for and purchase health insurance through public exchanges may receive federal tax credits regardless of whether they buy a plan on a state-established exchange or one that is federally facilitated.

As an aside, one of the claims in the case involved the application of the Anti-Injunction Act, with respect to which the court had to determine whether the employer shared responsibility penalty was a tax. That the court determined that the penalty is a tax is not all that interesting, but its reasoning is priceless:

“The Section 4980H assessment acts like a tax and looks like a tax. The Court therefore embraces a modified version of the “now-infamous ‘duck test’”: “WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck,” and WHEREAS it is called a duck by Congress on multiple occasions, “[THE COURT] THEREFORE HOLD[S] that it is a duck.”

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