



HEALTH CARE REFORM

OUR UPDATE & ADVICE

MORRIS & REYNOLDS INSURANCE PRESENTS ADVICE & ANSWERS ON AMERICA'S HEALTH CARE REFORM

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SUPREME COURT TO REVIEW IRS RULE ON FEDERAL SUBSIDIES

Already dealing with the aftermath of a Republican takeover of the Senate and additional seats in the House, the Obama Administration received some more bad news today (November 7) when the Supreme Court announced it was going to review **King v. Burwell**. At issue in King is whether the IRS exceeded its authority when it released a rule in 2012 that federal subsidies under the Affordable Care Act are available in both state and federally operated exchanges. While the Act on its face only provides for subsidies in state exchanges, the IRS has claimed it was clarifying the statute by also providing subsidies in federal exchanges.

A Friday announcement by the Court itself is unusual. What is also unusual is that the Supreme Court will often wait for a true "split in the circuits" where the federal courts in different circuits disagree on a major point before it agrees to hear a case. The Obama administration had asked the Supreme Court to wait until further action was taken in the lower courts on the issues (particularly in the Halbig case), hoping that there

would be no split in the circuits. A 3-judge panel in the US Federal Circuit in DC had ruled against the government, in contrast to the King court, but the DC Circuit had agreed to a rehearing of the case by the full court—a so-called en banc review—a majority of whom were appointed by either President Obama or President Clinton. The Administration had hoped that on review the full DC Circuit would reverse the Halbig decision and there would be no split in the circuit (at least for now).

But the Supreme Court has elected not to wait. It will hear King in the current term. This means that unless the President can craft some compromise with a Republican Congress by June to statutorily fix the language in the statute, the Supreme Court may hold that subsidies are not available in the federal exchanges.

A Supreme Court decision ruling that the IRS had exceeded its authority by authorizing subsidies in federal exchanges would certainly be disastrous for the Affordable Care Act: it would mean that subsidies are not available in a majority of states and, by

extension, penalties, which are triggered only if subsidies are received by full-time employees, would not apply in those states.

We will provide future updates as they become available.

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