TAHP
The Texas Association of Health Plans

Representing health insurers, health maintenance organizations, and other related health care entities operating in Texas.

Issue Brief

June, 2015

King v. Burwell: Understanding the Texas Impact

Overview

By month's end, the Supreme Court is expected to rule on King v. Burwell, which challenges the validity of federal tax subsidies that help millions of Americans afford health insurance not provided through an employer. The case was argued before the Supreme Court in March 2015.

The Affordable Care Act gives states the option of establishing their own marketplaces. Currently, a handful of states are operating federally-supported state-based marketplaces. For states that do not choose to establish their own marketplace, the ACA provides for a federally facilitated marketplace (FFM) as an alternative, so that marketplaces are available in each state.

In its implementing regulations, the IRS interpreted the ACA to authorize premium subsidies for individuals who purchase coverage in all marketplaces, including FFMs.

In King v. Burwell, the petitioners argue that ACA language clearly conveys that an FFM is not a marketplace "established by the state," and therefore individuals purchasing health plans through an FFM are not eligible for subsidies.

The language in question is included in an ACA provision that amends § 36B of the Internal Revenue Code: "the premium subsidy amount" is based on the cost of a "qualified health plan. . . enrolled in through [a Marketplace] established by the State under § 1311 of the [ACA]."

The petitioners argue that the language clearly states that subsidies only are available in state-based marketplaces, and that the IRS lacks authority to issue the rule that makes subsidies available to individuals purchasing health plans in a state with an FFM.

If the court rules against the Obama Administration, also called an adverse ruling, the subsidies, or premium tax credits, could expire for more than 6 million individuals in the roughly three dozen states that use an FFM. This population represents more than 80 percent of the total enrolled population of the federal exchanges as of February 22, 2015.

Impact on Texas and the Nation

National health care analysts' conclusions vary widely on the number of individuals who will lose their subsidies, the number who will become exempt from the individual mandate, and the average increase in premiums should the court rule against the Administration.

Kaiser

- In states that do not have their own marketplace, nearly 7.5 million enrollees qualified for premium subsidies.
- More than 12.5 million people are eligible for premium subsidies in these states.
- In Texas, 832,334 enrollees currently receive subsidies, at a total of nearly $205.6 million in tax credits a month. The average tax credit per enrollee is $247. If the subsidies are not available, the average premium will increase by 305 percent.

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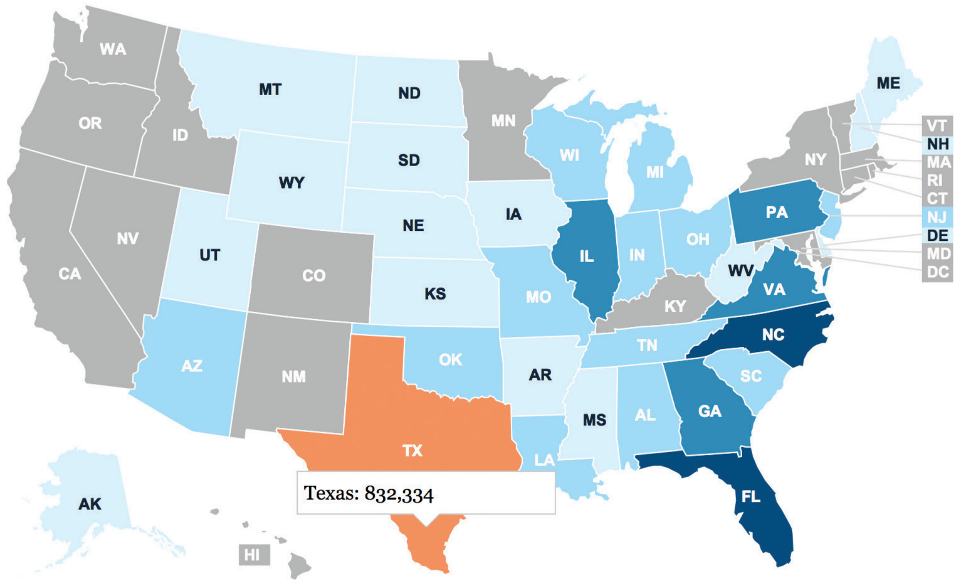
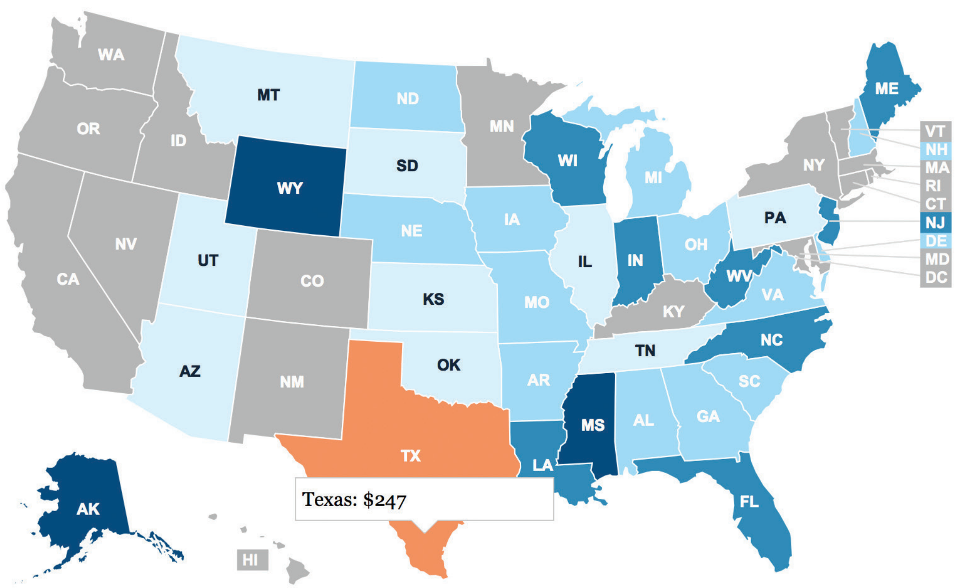
832,334 Individuals in Texas Currently Receive Subsidies



14,115 - 87,135 | 87,136 - 232,370 | 232,371 - 458,737 | 458,738 - 1,324,516 | N/A

Average Tax Credit per Texas Enrollee: $247



$158 - $231 | $232 - $293 | $294 - $350 | $351 - $536 | N/A

Note: Pennsylvania and Delaware have received conditional approval to operate State-Based Marketplaces (SBM) in 2016, but neither state currently has an operational SBM.

American Action Forum

- Nationally, around 6.6 million people would lose their health insurance subsidies.
- This is roughly 87 percent of the total enrolled population of the federal exchanges.
- Nearly 11.1 million individuals would become eligible for an exemption from the individual mandate penalty.
- In Texas, 1.66 million individuals would become exempt from the individual mandate and an average annual penalty of $1,305.

Individual Market Impacts of a Ruling for the Plaintiffs

6.6 million	Individuals to Lose Health Insurance Subsidy
$3,156	Average Annual Subsidy Impacted Individuals will Lose
11.1 million	Individuals Freed from Individual Mandate
$1,200	Average Annual Penalty Impacted Individuals will be Freed from

Urban Institute Analysis

- The national number of uninsured would increase by 8.2 million people.
- $28.8 billion in tax credits and cost-sharing reductions would be eliminated in 2016 for 9.3 million people.
- Average non-group premiums in 34 states would increase by 35 percent.
- In Texas, 1.57 million individuals would lose their tax credits and the number of uninsured in Texas would increase by approximately 1.4 million.

Federal Legislative Fixes

U.S. Senate Republicans and House Republicans held separate meetings recently to discuss their plans for responding to the upcoming Supreme Court ruling. While there was no official announcement about any decisions made, the discussion among Senate Republicans reportedly focused on a legislative option offered by Sen. Ron Johnson from Wisconsin that would extend ACA subsidies for enrollees in the federal Exchange, possibly for as long as two years, while at the same time repealing some of the law's mandates.

Senate Finance Committee Chairman Orrin Hatch (R-UT) commented: "We're going to be prepared. We wouldn't call them subsidies. But we'd certainly keep people whole so that they wouldn't suffer because of this interim time."

Johnson's proposal has 31 co-sponsors. It is co-sponsored by Senate Majority Leader Mitch McConnell (KY) and Senate Finance Committee Chairman Orrin Hatch (UT).

The Johnson bill:

- Extends premium tax credits for existing enrollees through August 2017, which would mean no immediate loss of coverage for individuals currently receiving subsidies. However, it could potentially leave millions of people without access to subsidies, such as the currently uninsured or people who lose a job or whose employer drops coverage.
- Repeals the individual and employer coverage mandates and allows for skimpier health coverage by eliminating the ACA's essential health benefits requirements.
- Extends the life (and may increase the number) of ACA non-compliant plans and exempts these plans from additional ACA requirements, such as the provision allowing young adults to stay on their parents' policies. If the mandates are removed, younger and healthier people could be less inclined to secure coverage, and insurance pools would be disproportionately filled with older and sicker people. As a result, it is expected that premiums would spike, and, in the process, the cost of premiums would continue to escalate as increasing numbers of healthier people drop coverage.

How Will States Respond?

Under any ruling, states will have the ability to restore their residents' subsidies if they establish their own exchanges. Some states face more hurdles than others.

States that were politically, financially, or technologically unable to establish their own exchanges in 2013 may attempt to do so before the next open enrollment period. Especially those that have Democrat governors or Democrat majorities in their state legislatures. But others are unlikely to even try to establish exchanges, instead taking advantage of the tax exemptions the King ruling would apply to the states' citizens and businesses.

The challenges are substantial. "Anyone who thinks you can just snap your fingers and you've got a state exchange is just wrong," Timothy Jost, a law professor at Washington and Lee University, recently told the *New York Times*.

Political challenges:

- States would need to endorse an exchange through legislation or executive action, as they have declined to do previously.
- Some states have passed legislation which precludes the establishment of an exchange, known as Health Care Freedom Acts.
- A handful of states took this to the next level, passing Health Care Freedom Amendments to their state constitutions. Those states would need to meet the enhanced constitutional threshold for an amendment, rather than just reach a simple majority required to pass a typical bill, in order to establish an exchange—enough of an obstacle that it makes it unlikely for these states to pursue the establishment of an exchange.

Operational challenges:

- Every state marketplace needs a staff and the ability carry out a series of core functions, including regulating insurance plans, running a call center and managing a website that can enroll people in insurance coverage.
- Some of the states relying on the federal government are doing one or two of these functions, in an arrangement known as a partnership exchange, but most are not.
- Most states will rely on contractors for major tasks, and state laws tend to require a lengthy process for contract procurement that can run six months or longer.
- Many of the 15 state marketplaces that started up last fall struggled to accomplish all of those things. Several states experienced website crashes and failures. And those early states had had more than three years to approve and design their exchanges.
- Daniel Schuyler, a director at Leavitt Partners, a consulting firm that helped several states establish exchanges, estimates that building an exchange today would cost a typical state $40 million to $60 million and take between a year (if a state expedited its contracting schedule) and 18 months.

Sources: New York Times, American Action Forum

Helpful Links

http://www.scotusblog.com Written by lawyers, law professors, and law students, this blog is devoted to comprehensively covering the U.S. Supreme Court without bias and according to the highest journalistic and legal ethical standards.

http://kff.org/king-v-burwell-resources-on-the-u-s-supreme-court-case/ Includes interactive state-by-state maps as well as issue briefs that discuss the major questions raised by the King case, explain the parties' legal arguments, and consider the potential effects of a Supreme Court decision.

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