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More Unlawful ACA Premium Tax Credits, by Andy Grewal

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I might be accused of picking at low-hanging fruit, but I'd nonetheless like to devote another blog post to more IRS regulations that expand and contradict Section 36B. My prior blog posts, which I've adapted into an essay upcoming in Bloomberg BNA, discuss regulations that improperly extend ACA premium tax credits to persons in the Medicare coverage gap and to some unlawful aliens. In this post, I want to highlight regulations that improperly penalize employers and that give credits to taxpayers already enrolled in employer-sponsored minimum essential coverage.

Broadly speaking, Section 36B offers premium tax credits, on a month-by-month basis, to taxpayers who purchase Exchange policies only when they can't otherwise obtain minimum essential coverage. However, the mere offering of minimum essential coverage by an employer to a taxpayer will not disqualify her from tax credits. Instead, the employer coverage must be affordable and provide minimum value. See Sections 36B(c)(2)(C)(i) & (ii).

Congress recognized that some taxpayers would enroll in minimum essential coverage through their employer, whether or not that coverage was affordable or provided minimum value. In these circumstances, Congress decided that premium tax credits should not be allowed. Why should the federal government subsidize a second set of health insurance coverage?

Section 36(c)(2)(C)(iii) consequently indicates that the employer affordability and value limitations "shall not apply if the employee . . . is covered under the eligible employer-sponsored plan." In proposed regulations, the IRS followed the statutory command and denied credits for a given month when a taxpayer was covered under an employer plan that offered minimum essential coverage. See Prop. Reg. 1.36B-2(c)(3)(vii), 76 F.R. 50942 (2011).

The IRS, however, eventually expanded the statute. Commenters worried that many employers automatically enrolled employees in coverage, and taxpayers might unwittingly find themselves with employer-sponsored minimum essential coverage for a given month, thereby disqualifying them from credits.

The final regulations address this and give credits to taxpayers when they are automatically enrolled in employer minimum essential coverage. In so doing, the IRS explicitly acknowledged that "Section 36B(c)(2)(C)(iii) and the proposed regulations provide that an individual who enrolls in an eligible

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employer-sponsored plan is not eligible for the premium tax credit even if the plan is unaffordable or fails to offer minimum value." See 77 F.R. 30381 (2012) and Treas. Reg. 1.36B-2(c)(3)(vii)(B). In refreshingly candid terms, the IRS thus noted that its regulations contradicted the language of the law.

As a matter of abstract policy, the substance of the IRS's re-write seems somewhat reasonable. The problem is that it has no statutory basis. Congress plainly denied credits to taxpayers who actually receive health benefits from their employers. Nothing in Section 36B(c)(2)(C)(iii) allows the IRS to rewrite the law whenever it thinks that doing so is a good idea.

The IRS's re-write is especially problematic because it leads to further employer penalties under Section 4980H(b). Employers who offer minimum essential coverage generally don't face penalties unless an employee receives a credit under Section 36B. Under the language of Sections 36B and 4980H, employers will avoid penalties when minimum essential coverage is actually provided, because no credit is allowable in these circumstances. But the IRS regulation ignores this limitation and essentially demands a penalty from employers. This seem quite unfair.

As I hinted in the opening line of this post, the IRS's flippant approach to Section 36B is nothing new. However, taken together, the various IRS re-writes paint an odd picture. When one compares Section 36B to the IRS regulations, one does not see a legislative enactment with a complementing set of administrative regulations. Instead, when viewed together, Section 36B and the IRS regulations look more like a legislative proposal by one house of Congress and a counterproposal by another house. That is, the IRS has, in various circumstances, rewritten Section 36B to reflect the statute it believes should have been enacted, rather than that which was enacted. The IRS's aggressive approach will ensure continuing litigation over Section 36B, regardless of how *King v. Burwell* turns out.

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