



For your information

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## ACA's Contraceptive Services Coverage Mandate: Regulatory and Judicial Update

In recent weeks, there have been administrative and judicial developments relating to the contraceptive services coverage mandate in the Patient Protection and Affordable Care Act (ACA). First, on August 15, 2012, HHS reissued a bulletin to clarify that enforcement safe harbor protection from the contraceptive services coverage mandate will extend to a certain subset of nonprofit organizations that have religious objections to offering contraceptive services under their group health plan, but appear not to have met all the criteria set out in the original bulletin. In addition, over the last several months, a number of states, organizations, private companies, and individuals filed suit against the Obama administration, alleging that the contraceptive services mandate violates the United States Constitution and laws protecting religious freedom. As of now, employers with non-grandfathered group health plans that do not qualify as religious employers or as employers eligible for the temporary enforcement safe harbor must comply with the mandate beginning with the first plan year that begins on or after August 1, 2012. Employers seeking the enforcement safe harbor or a religious employer exemption should confer with trusted advisors to ensure that all criteria are met.

### Background

The ACA (under section 2713 of the Public Health Service Act) requires non-grandfathered group health plans to provide, at a minimum and without cost-sharing (e.g., copayments, coinsurance, deductibles), coverage for specified preventive health services, including preventive care and screening, targeted to the unique needs of women.

On February 10, 2012, the Departments of Health and Human Services (HHS), the Treasury, and Labor (collectively, the Departments) published the preventive services final regulations. Generally, under the final regulations, beginning on the first plan year that begins on or after August 1, 2012, non-grandfathered group health plans and health insurance issuers must cover, without cost-sharing, FDA-approved contraceptive services and other listed preventive services. The final regulations give the Health Resources and Services Administration (HRSA) discretion to exempt religious employers and health insurance coverage provided in connection with group health plans established or maintained by

religious employers from the requirement to cover contraceptive services. Under the final regulations, a “religious employer” is one that:

- Has as its purpose the inculcation of religious values
- Primarily employs individuals who share its religious beliefs
- Primarily serves individuals who share its religious beliefs
- Is a nonprofit organization under Internal Revenue Code Section 6033(a)(1), which refers to churches, their integrated auxiliaries, and conventions or associations of churches.

In the preamble to the final regulations, the Departments announced that before the end of the enforcement safe harbor period, they would develop alternative ways of providing contraceptive services coverage without cost to participants of plans sponsored by organizations with religious objections to providing this coverage. (See our August 11, 2011 [For Your Information](#).)

At the same time the final regulations were published, HHS issued a bulletin announcing a temporary enforcement safe harbor with respect to certain plans sponsored by organizations that do not cover otherwise required contraceptive services because of religious beliefs but do not qualify as religious employers. During the enforcement safe harbor period, which is effective until the first plan year beginning on or after August 1, 2013, the Departments will not take enforcement action against a plan that satisfies the following conditions:

- The plan is sponsored by an employer that:
  - Is organized and operates as a nonprofit entity
  - From February 10, 2012 onward did not cover contraceptive services, consistent with applicable state law, because of the religious beliefs of the organization.
- The plan notifies participants that contraceptive services coverage will not be provided. The notice must be included with any enrollment/new hire materials for plan years that begin on or after August 1, 2012.
- The organization certifies that it satisfies all the criteria necessary to qualify for the enforcement safe harbor. The certification form must be completed and made available for examination by the first day of the plan year to which the temporary safe harbor applies.

In March 2012, the Departments published an advance notice of proposed rulemaking in which they announced their intention to propose amendments that would establish alternative ways to fulfill the contraceptive services requirement when health coverage is sponsored or arranged by an organization that objects to the coverage of contraceptive services for religious reasons and that is not exempt under the definition of religious employer provided in the February 2012 final regulations. (See our April 18, 2012 [For Your Information](#).)

## Contraceptive Coverage Mandate: Latest Developments

On August 15, 2012, HHS issued an amendment to its February 10, 2012 bulletin regarding the Departments' contraceptive services coverage mandate temporary enforcement safe harbor. The amended guidance further clarifies which plans can invoke the safe harbor. In addition, in recent weeks, federal trial courts issued preliminary decisions in four cases challenging the contraceptive services coverage mandate.

### *HHS Amended Guidance*

HHS issued an [amendment](#) to its bulletin relating to the temporary enforcement safe harbor. First, the amended guidance provides that the temporary enforcement safe harbor is available to nonprofit organizations with religious objections to only some, but not all, FDA-approved contraceptive services. The required notice to plan participants must make clear whether the plan is covering all or only some contraceptive services during the safe harbor period.

Next, the amended guidance states that a group health plan will be considered not to have provided all or only some FDA-approved contraceptive services as of February 10, 2012 if the plan took some action to try to exclude or limit contraceptive services coverage and was unsuccessful. Such a plan may still be eligible for the safe harbor.

Finally, under the amended guidance, if an employer that might qualify for the religious employer exemption in the final regulations instead opts for the temporary enforcement safe harbor, the employer is not precluded from being eligible for the religious employer exemption in the future.

### INSIGHT

**Under the amended guidance, an employer will suffer no prejudice if it instead opts for the enforcement safe harbor. In making this choice, an employer is not conceding that it is not a religious employer with respect to the definition in the final regulations and is free to later claim a religious employer exemption. This gives an employer time to consider the requirements and whether or not it would meet the religious employer exemption requirements.**

### *Court Decisions*

In recent weeks, federal trial courts issued preliminary decisions in four cases challenging the contraceptive services coverage mandate. Three cases were brought by individuals, colleges, and Catholic organizations claiming the mandate violates the free exercise of their religious beliefs under the Constitution and federal law. Seven states joined one of the suits, claiming that organizations with religious objections to the contraceptive services mandate would discontinue providing health insurance and charitable services rather than comply with the mandate, which would result in increased enrollment in the states' Medicaid plans and thereby create a drain on the states' budgets. The

complaining parties were unable to show actual injury caused by the mandate, and because of the enforcement safe harbor and the Departments' indication that they might change the rules, the cases were dismissed as premature.

In a fourth case, an owner of a for-profit, secular company with a non-grandfathered health plan that excluded contraceptive coverage challenged the mandate. The owner of the company, which does not qualify for the religious employer exemption or the enforcement safe harbor, asserted that the mandate violates his constitutional rights and infringes on statutorily protected freedom of religious expression. The court granted a temporary injunction, providing that this specific employer does not have to comply with the mandate while the court considers the merits of the claims.

## Conclusion

The amended bulletin broadens the types of employers and plans that can take advantage of the enforcement safe harbor. Now, organizations that tried to exclude but were unsuccessful in excluding contraceptive services coverage or that offered some, but not all, contraceptive services coverage under their group health plans can also receive safe harbor protection. The bulletin also clarifies that organizations are not precluded from seeking a religious employer exemption in the future merely because they first claimed enforcement safe harbor protection. However, for-profit and nonprofit employers that do not meet the criteria set out in the safe harbor must still comply with the contraceptive services coverage mandate beginning with the first plan year that begins after August 1, 2012.

In addition, lawsuits filed by states, organizations, companies, and individuals are pending in federal trial courts throughout the United States. To date, no court has decided the merits of the constitutional and statutory claims of the complaining parties. Whether other courts will enjoin enforcement of the contraceptive services coverage mandate remains to be seen.