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Departments Provide Guidance on Contraceptive Coverage Mandate for Religious Employers

On August 22, 2014, the Departments issued new guidance that takes into account the recent and highly publicized US Supreme Court decisions in the *Hobby Lobby* and *Wheaton College* cases involving employers with religious objections to providing coverage for certain contraceptive services. In interim final rules, the Departments set forth an alternate process for religious nonprofit entities to obtain relief from the contraceptive coverage mandate. The Departments also proposed definitions for the types of closely held for-profit employers with religious objections that can avail themselves of regulatory relief from this mandate. This latest guidance is of interest to employers with religious objections to providing employees with coverage for contraceptive services.

Background

The Affordable Care Act (ACA) requires non-grandfathered group health plans to provide in-network coverage without cost sharing for FDA-approved contraceptive services. This requirement is commonly known as the "contraceptive coverage mandate." In July 2013, the Departments of Labor, the Treasury, and Health & Human Services (Departments) issued final regulations exempting certain nonprofit religious entities considered churches or conventions of churches under the Internal Revenue Code (Code) from this mandate, and providing an accommodation for certain other nonprofit entities that do not meet the Code definition for a church or convention of churches, yet (1) hold themselves out as religious organizations, and (2) object on religious grounds to providing contraceptive services to their employees. (See our October 18, 2013 *For Your Information*.)

In order to avail itself of this nonprofit accommodation, an organization must sign EBSA Form 700 to self-certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered, is organized and operates as a nonprofit entity, and holds itself out as a religious organization. Then, in the case of an insured plan, the insurer assumes responsibility to provide separate payments for contraceptive services without any charge or cost-sharing for the participant or beneficiary, the organization, or the plan. If the plan is self-insured, its third-party administrator (TPA)

is required to provide or arrange for separate payments for contraceptive services without any cost-sharing, premiums, fees, or other charges to plan participants, beneficiaries, or the plan.

After the final regulations were issued, a number of nonprofit, religiously affiliated entities filed lawsuits objecting to the requirement that they self-certify by signing EBSA Form 700 in order to avoid compliance with the contraceptive coverage mandate. These groups take the position that signing the form essentially puts in place the chain of events that ultimately leads to providing contraceptive services to their employees, and thereby violates their principles of faith. (See our January 28, 2014 *For Your Information.*)

The Departments did not offer any relief to for-profit, secular employers or for-profit corporations with objections to providing contraceptive services, and a number of these entities also filed lawsuits challenging the contraceptive coverage mandate as applied to them.

Recent Supreme Court Rulings on the Contraceptive Coverage Mandate

On June 30, 2014, the Supreme Court decided in favor of closely held, for-profit employers with religious objections to providing coverage for certain contraceptive services. In this opinion, known as the *Hobby Lobby* case after one of the for-profit employers that filed suit, the Court found that the Religious Freedom Restoration Act (RFRA) gives those companies the right to refuse to offer coverage for contraceptive methods that conflict with the sincerely held religious beliefs of the companies' owners. (See our June 30, 2014 *FYI Alert.*)

Shortly thereafter, on July 3, 2014, the Court issued a temporary injunction pending appeal in *Wheaton College v. Burwell*, where a nonprofit entity challenged under RFRA the requirement that it send EBSA Form 700 to the insurance issuer or TPA. There, the Court stated that — rather than using EBSA Form 700 — a nonprofit religiously affiliated employer could inform the secretary of Health and Human Services (HHS) in writing that it has religious objections to providing contraceptive services.

> **Comment.** The decision in *Wheaton College* surprised many, given that the Court in *Hobby Lobby* appeared to look favorably on the EBSA Form 700 accommodation that the Departments had devised for religious nonprofit organizations.

New Guidance on Contraceptive Coverage Mandate Accommodations

On August 22, 2014, the Departments issued interim final rules and proposed rules on contraceptive coverage mandate accommodations for religious employers. According to the Departments, these rules aim to take into account the *Hobby Lobby* and *Wheaton College* decisions, while still ensuring that participants and beneficiaries in group health plans obtain the full range of no-cost contraceptive coverage services.

The Departments also released a fact sheet with the new guidance, as well as an updated version of EBSA Form 700.

Alternative Accommodation for Nonprofit Entities

In light of the Court's directive in *Wheaton College*, the interim final rules provide an alternative process by which a religious nonprofit entity can give notice of its objections to providing contraceptive coverage services. Instead of signing EBSA Form 700 and providing that form to an insurer or TPA, the nonprofit entity may notify HHS in writing of its religious objection to coverage of all, or a subset of, contraceptive services. This notice must include the name

of the organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to providing the coverage; the plan name and type; and the name and contact information for the plan's health insurance issuers or TPAs. The organization may, but need not, follow the model notice issued in connection with this guidance.

In the case of an insured plan, HHS will notify the insurer of the objection, and the issuer will be responsible for compliance with the contraceptive coverage mandate. For self-funded plans, DOL (working with HHS) will notify each TPA of the objection and will designate the relevant TPA(s) as plan administrator for those contraceptive services.

> **Comment.** Notably, a religious nonprofit entity could self-administer its self-insured plan directly rather than contracting with a TPA, or engage a religious TPA that, in turn, objects to providing contraceptive coverage. In those situations, the entity's employees would appear not to be able to obtain contraceptive coverage services.

Additionally, the interim final rule disposes of the "non-interference" requirement set forth in the final rules that religious nonprofit entities "not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange for separate payments for contraceptive services" and "not, directly or indirectly, seek to influence a third party administrator's decision to make any such arrangements." Some nonprofits had argued that this rule violated their religious freedom rights. Reasoning that this requirement simply prohibited bribery, threats, and other forms of economic coercion, the Departments concluded that such conduct is sufficiently prohibited by other laws.

Effective Date and Comments Due Date

The interim final rule are effective August 27, 2014, with comments due by October 27, 2014 on whether these regulations should be made permanent, or changed.

Proposed Rule Directed at For-Profit Employers with Religious Objections

Responding to the *Hobby Lobby* decision, the Departments issued proposed rules that would relieve closely held for-profit entities with religious objections to providing coverage from any obligation to contract, arrange, pay, or refer for contraceptive coverage. Rather, payments for contraceptive services would be provided separately by an insurer or TPA, consistent with the accommodations directed at nonprofit entities. In other words, for-profit entities would follow the regulatory processes established for nonprofit entities.

As *Hobby Lobby* did not specifically define what constitutes a closely held for-profit corporation for purposes of contraceptive coverage mandate relief, the proposed rules set forth two possible definitions designed to identify for-profit entities "controlled and operated by individual owners who likely have associational ties, are personally identified with the entity, and can be regarded as conducting personal affairs through the entity" — the types of employers the Departments believe the Court sought to accommodate in *Hobby Lobby*.

Under the first approach, the entity is not publicly traded and ownership of the entity is limited to a specified number of shareholders or owners. Under the second approach, the entity is not publicly traded and a minimum percentage of ownership is concentrated among a certain number of owners. The proposed rules do not specify numbers or percentages of concentration, but rather request comments on those factors, and well as suggestions for other approaches to defining a closely held for-profit entity.

As far as establishing a closely held for-profit entity's religious objections, the proposed rules provide that valid corporate action taken in accordance with the entity's governing structure, as well as state law, stating the owners' religious objections to providing some or all of the required contraceptive coverage, will suffice. The Departments seek comment on this approach, as well.

Comments will be accepted through October 21, 2014.

In Closing

It is not clear whether the alternative approach provided in the interim final rules will satisfy the religious nonprofit groups that have filed lawsuits challenging the EBSA Form 700 process. While the alternative approach does not require self-certification on a federally provided form, nonprofit religious employers may still object to providing HHS with any information as part of an administrative process that ultimately results in the provision of contraceptive coverage services to their employees. Likewise, religious for-profit corporations that have challenged the contraceptive coverage mandate may object to a process whereby their employees are ultimately offered coverage through an insurer or a TPA.

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