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Status Quo for Contraceptive Coverage Mandate Accommodation

The Obama administration will retain the current ACA contraceptive coverage mandate accommodation process for nonprofit religious objectors – but it is unclear how the Trump administration will handle it going forward. While this issue has garnered significant media attention, it does not affect most employer plans subject to the contraceptive coverage mandate.

Background

The Affordable Care Act (ACA) requires non-grandfathered group health plans to provide in-network coverage, without cost-sharing (such as co-pays, co-insurance or deductibles), for FDA-approved contraceptive services – a requirement known as the “contraceptive coverage mandate.” Entities considered churches or conventions of churches under the Internal Revenue Code (Code) are exempt from this mandate.

Accommodations are available for certain nonprofits that do not meet the Code definition of churches or conventions of churches. To be eligible for an accommodation, a nonprofit must hold itself out as a religious organization and object on religious grounds to providing coverage for contraceptive services. To avail itself of an accommodation, a nonprofit may self-certify by completing [EBSA Form 700](#), and arranging for an insurer or the third-party administrator (TPA) to make separate payments for contraceptive services without any charge. (See our [September 9, 2014 For Your Information](#).)

Alternatively, a nonprofit may inform HHS in writing of its religious objections. If a nonprofit chooses to use this latter process, in the case of an insured plan, HHS would then notify the insurer and the insurer would provide the coverage. For a self-funded plan, DOL (working with HHS) would designate the relevant TPA as plan administrator for contraceptive services. (See our [November 16, 2015 For Your Information](#)).

Religious nonprofit organizations filed lawsuits in multiple jurisdictions objecting to the accommodation process on the ground that the act of self-certifying or providing notice triggers the chain of events that ultimately leads to providing contraceptive services to their employees – violating their faith principles. In May 2016, the US Supreme



Court punted on this issue, directing the lower courts to work out a mutually acceptable solution. (See our [May 17, 2016 For Your Information](#)).

Comment. To date, lower courts have not been able to facilitate a compromise on this issue.

On July 22, 2016, the Departments of Labor, Health and Human Services, and the Treasury (together, the departments) issued a [request for information](#) (RFI) on alternative ways for objecting religious nonprofits to obtain an accommodation while still ensuring that women enrolled in those organizations' health plans have "seamless coverage" of the full range of FDA-approved contraceptives without cost-sharing.

No Change in the Accommodation

On January 9, 2017, the departments issued an [FAQ](#) stating that the comments received in response to the RFI "indicate that no feasible approach has been identified at this time that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage." Stressing their continued view that the accommodation does not substantially burden objecting organizations' exercise of their religion and is the least restrictive means of furthering the government's compelling interest in ensuring women receive contraceptive coverage, the departments:

- Concluded that written notification is an administrative and practical necessity for insurers and that, in any event, eliminating the written notification requirement would not satisfy some objecting organizations' concerns.
- Identified significant problems under state contract and insurance laws with insured plans providing contraceptive coverage through separate insurance policies that cover only contraceptives and in which women would have to enroll affirmatively. For example, some state regulators lack the authority to approve single-benefit policies providing for contraceptive coverage.
- Noted that, under the current accommodation, issuers or TPAs could provide a separate enrollment card for contraceptive coverage – as several objecting organizations said could alleviate some of their concerns. So long as the arrangement does not unduly inhibit or hamper the access of contraceptive coverage, the card could be differently designed from enrollment cards used to access other services and omit the name of the employer.

In Closing

It remains to be seen how the departments under the incoming Trump administration will handle the current accommodation process. Unless the departments switch course, this issue may wind its way back to the US Supreme Court – which, by that time, may be back up to nine justices. (See our [February 29, 2016 Legislate](#) for additional information.)

In the meantime, recent steps to repeal the ACA leave the fate of the contraceptive coverage mandate unclear. For more information on the status of the ACA, see our [January 16, 2017 Legislate](#).

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