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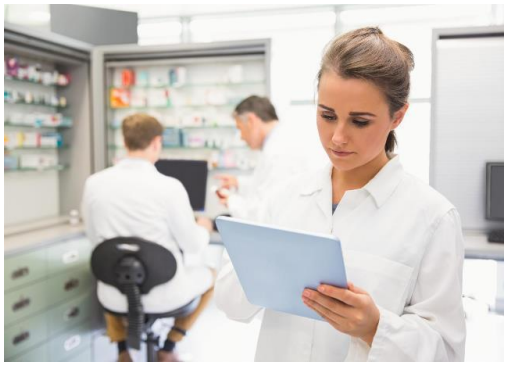
Administration Expands Contraceptive Coverage Mandate Exemption

The Trump administration has greatly expanded the types of entities that can opt not to provide contraceptive coverage to their employees. The interim final rules, which are effective immediately, likely will not affect the majority of employer plans subject to the ACA's contraceptive coverage mandate. However, this topic has garnered a lot of media attention and is of interest to employers with religious or moral objections to providing contraceptive coverage that were not previously covered by the exemption.

Background

The Affordable Care Act (ACA) and implementing regulations require 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." The Obama administration exempted entities considered "churches" or "conventions of churches" under the Internal Revenue Code from this mandate. Additionally, the Departments of Treasury, Labor, and Health and Human Services (the departments) established two forms of accommodation – self-certification or notification to HHS – for nonprofits that do not meet the Code definition for the exemption but hold themselves out as religious organizations and object on religious grounds to covering contraceptive services. (See our November 16, 2015 and September 9, 2014 issues of *For Your Information*.)

The departments did not offer for-profit employers relief from the mandate, but the U.S. Supreme Court later determined that closely held, for-profit employers can refuse to offer coverage through their group health plans for contraceptive methods that conflict with the sincerely held religious beliefs of the companies' owners. (See our June 30, 2014 *FYI Alert.*)



Meanwhile, several religious nonprofit organizations pursued litigation objecting to the departments' accommodation – arguing that the act of self-certifying or providing notice triggers the chain of events that ultimately leads to providing contraceptive services and violates their

faith principles. On January 9, 2017, after the departments solicited comments on a mutually acceptable solution, the Obama administration concluded that "no feasible approach had been identified to resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage" and left the accommodations intact. (See our January 19, 2017 *For Your Information*.)

On May 4, 2017, President Trump issued the Executive Order Promoting Free Speech and Religious Liberty that directed the departments to consider amending regulations "to address conscience-based objections to the preventive-care mandate."

Expanded Exemption

On October 6, 2017, the departments issued two interim final rules that greatly expand the earlier exemption from the mandate. These rules, which are effective immediately, address religious and moral objections to the coverage of contraceptive services. Comments on the interim final rules are due by December 5, 2017.

Religious Objections

The departments expanded the exemption to any non-governmental employer with a sincerely held religious objection to providing all or a subset of the contraceptive coverage required under the ACA. This means that any nonprofit or for-profit employer with a sincerely held religious objection to providing coverage for contraceptive services – regardless of the entity's size or status as a public or privately held entity – is exempt from offering the coverage. There is no specific process for verifying the sincerity of a religious objection, but the preamble states that the "mechanisms for determining whether a company has adopted and holds such principles or reviews is a matter of well-established state law with respect to corporate decision-making."

> **Comment.** The departments point out that publicly traded companies are unlikely to be affected by the expanded exemption. To date, no publicly traded entity has challenged the mandate.

In changing course from the Obama administration's stance, the departments determined that the mandate imposes a substantial burden on religious objectors within the meaning of the Religious Freedom Restoration Act (RFRA), and that the government does not have the requisite compelling interest to impose the contraceptive coverage mandate on the objecting employers. While the interim final rules leave the accommodation process intact, they make it optional for exempt employers – meaning that any employer with a sincerely held religious objection to making contraceptive services available through its group health plan may now do so without having to first file a request with, or provide notice to, the federal government.

Focus on Other Coverage Sources

As part of the rationale for the expanded exemption, the departments stated that "contraceptives are readily accessible and, for many low income persons, are available at reduced cost or for free through various governmental programs, and contraceptive coverage may be available through state sources or family plans obtained through non-objecting employers."

Moral Objections, Optional Accommodation for Individual Enrollees

The departments similarly expand the exemption to include employers asserting an objection to the mandate based on sincerely held moral convictions. This interim rule applies only to nonprofit organizations, privately held for-profit entities, and institutions of higher education, and the departments request comments on whether to extend it to all for-profit entities.

The interim final rules also create an optional process that allows – but does not require – employers and issuers to carve out contraceptives for an individual who objects to a policy that includes this coverage. The departments designed this individual exemption "to reduce the incidence of certain individuals choosing to forego health coverage because the only coverage available would violate their sincerely held religious beliefs."

Don't Forget ERISA Disclosures

While entities exempt under the new rules do not have to self-certify or provide notice to the federal government pursuant to the accommodation process, those subject to ERISA must still abide by ERISA's disclosure rules. This means that employers seeking to use the expanded exemption to eliminate coverage for contraceptive services must update plan documents and SPDs according to ERISA rules – including providing a timely summary of material modifications (SMM) to notify participants and beneficiaries of the change in benefits. (See our Reporting and Disclosure Guide for information on SMM and other disclosure requirements.)

Shift In – Not End to – Litigation

The departments point to the unresolved RFRA litigation concerning the mandate as part of their rationale for re-examining the accommodations process, and they designed the interim final rules to address the concerns of the plaintiffs in those cases. (See our May 17, 2016 *For Your Information* on this litigation.) However, the new rules are expected to trigger another series of lawsuits challenging the rollback of contraceptive coverage requirements for affected employers. The American Civil Liberties Union (ACLU) has already sued, arguing that the interim final rules violate the Establishment and the Equal Protection Clause of the U.S. Constitution "by authorizing and promoting religiously motivated and other discrimination against women seeking reproductive health care."

In Closing

The interim final rules will not affect the majority of employer plans subject to the contraceptive coverage mandate. However, they will be of interest to employers with religious or moral objections to providing contraceptive coverage that were not previously covered by the exemption.

Authors
Julia Zuckerman, JD
Sharon Cohen, JD

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