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Court Halts Expansion of Contraceptive Coverage Mandate Exemption

A Pennsylvania federal court has temporarily blocked a new CMS rule that expanded the types of entities that could opt not to provide contraceptive coverage to their employees because of religious or moral beliefs. The ruling also blocks guidance that would permit these entities to avoid a government filing. At least for now, the ruling requires objecting employer plans that are subject to the contraceptive coverage mandate to follow the Obama-era accommodation's process. The Trump administration is expected to appeal this decision.

Background

In early October 2017, the Trump administration greatly expanded the types of entities that can opt not to provide contraceptive coverage to their employees on religious or moral grounds. This change eliminated the need for objecting entities to follow an accommodations process established by the Obama administration – self-certification or notification to HHS – for nonprofits that do not meet the Internal Revenue Code definition of a church or convention of churches but hold themselves out as religious organizations and object on religious grounds to covering contraceptive services. The new rule triggered a series of lawsuits challenging the rollback of contraceptive coverage requirements for affected employers. (See our October 24, 2017 *For Your Information.*)

CMS Guidance on Revoking the Accommodation

On November 30, 2017, the Centers for Medicare & Medicaid Services (CMS) provided notice requirements for an objecting entity, or an insurer or third-party administrator (TPA) on its behalf, to send to participants and beneficiaries advising that the entity will no longer provide contraceptive benefits.

Under this guidance, notice should be sent no later than 30 days before the first day of the first plan year in which coverage is not provided. Alternatively, notice of revocation can be provided under the Summary of Benefits and Coverage (SBC) rules. In that case, the plan can use the 60-days advanced notice method, even if it did not list the contraceptive benefit in a previous SBC – as long as doing so is

consistent with state law and the relevant policy provisions. (See our February 14, 2017 *For Your Information* for more background on SBC requirements.)

> **Comment.** The 60-day notice allows a plan to reduce or eliminate the contraceptive benefit midyear while the 30-day notice allows it to reduce or eliminate the benefits only at the beginning the next plan year.

Court Puts Breaks on Expanded Rule

On December 15, 2017, U.S. District Judge Wendy Beetlestone in the Eastern District of Pennsylvania temporarily blocked the expanded exemption on a nationwide basis. In doing so, she ruled that Pennsylvania's attorney general, who had sued to block the expansion, was likely to succeed in showing that CMS failed to follow proper procedures in bypassing the "notice and comment" process that agencies generally use for rulemaking.

The court determined that the language of the ACA does not allow agencies to create what the court referred to as "sweeping exemptions" to the contraceptive coverage mandate. It also stressed what it described as Pennsylvania's "clear interest in securing the health and well-being of its women residents and containing its costs for contraceptive services" in deciding to freeze applicability of the CMS guidance.

The Justice Department is expected to appeal this ruling and defend the new rules in subsequent stages of the litigation. For now, however, employer plans with objections to the contraceptive coverage mandate must follow the Obama-era accommodation's process.

In Closing

Given this ruling, employers with religious or moral objections to providing contraceptive coverage should confer with counsel about the risks involved if they stop using the accommodation's process.

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