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Departments Finalize Expanded Exemption from Contraceptive Coverage Mandate

The departments finalized regulations expanding the types of entities that can opt not to provide contraceptive coverage to their employees based on religious or moral objections.

While these rules likely will not affect the majority of employer plans subject to the ACA's contraceptive coverage mandate, employers with religious or moral objections to providing some or all types of contraceptive coverage may wish to consider their options in light of this guidance. ERISA-governed plans seeking to eliminate coverage for some or all contraceptive services should be mindful that ERISA's disclosure rules apply to these coverage changes.

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Authors

Julia Zuckerman, JD

Richard Stover, FSA, MAAA

Background

Affordable Care Act (ACA) and implementing regulations require non-grandfathered group health plans to provide in-network coverage, without cost-sharing, for FDA-approved contraceptive services – a requirement known as the “contraceptive coverage mandate.” The Obama administration exempted “churches” or “conventions of churches” under the Internal Revenue Code from this mandate and established two forms of accommodation – self-certification or notification to HHS – for non-profits 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 U.S. Supreme Court later determined that closely held, for-profit employers can also 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](#).)

In 2017, the Trump administration reversed course and issued two interim final rules expanding 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 and made the accommodation process optional for exempt employers. It also exempted employers asserting an objection to the mandate based on sincerely held moral convictions. The rules also created an optional process that allows – but does not

require – employers and issuers to carve out contraceptives for an individual who objects on religious or moral objections to a policy that includes this coverage. Under this guidance, most types of non-governmental employers with sincerely held religious or moral objections to making contraceptive services available through a group health plan could do so without having to first file a request with, or provide notice to, the federal government. However, employers with insured plans need to consider any state contraceptive mandates that apply to insured plans. (See our [October 24, 2017 For Your Information](#).)

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Final rules

On November 15, 2018, the Departments of Treasury, Labor, and Health & Human Services (the departments) issued final rules on the religious and moral objections exemptions that largely track the final interim rules but include some points of clarification in response to comments. The final regulations become effective on January 14, 2019.

The departments clarified that the religious and moral exemptions apply only to the extent of an entity's objections – meaning that an entity that objects to some, but not all, contraceptive coverage must cover the contraceptives to which it does not object. They also clarified that the exemptions apply to student health insurance provided by institutes of higher education.

The guidance sets forth a transitional rule whereby entities currently using the accommodation can revoke it and use the exemption following a 60-day notice to participants and beneficiaries. For plan years that begin after January 14, 2019, an entity can revoke its use of the accommodation process effective following the first day of the first plan year that begins on or after 30 days following the date of the revocation.

The final rule also provides that “any willing insurer or employer” can offer an individual with religious or moral objections to all or some contraceptive coverage participation in a group health policy or benefit option that excludes the coverage. However, this approach is voluntary and insurers and employers need not adopt it in the case of an objecting employee.

What about governmental employers?

The religious and moral beliefs exemptions do not apply to plans sponsored by governmental entities. However, a governmental entity could (but is not required to) provide an individual with health coverage that does not include the contraceptive coverage to which the individual objects.

ERISA disclosure rules apply

While entities newly exempt under these rules do not have to self-certify or provide notice to the federal government, those subject to ERISA must still abide by ERISA's disclosure rules. This means that employers seeking 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. (See our [Reporting and Disclosure Guide](#) for information on SMM and other disclosure requirements.)

Meanwhile, in the courts

Earlier this year, two federal district courts (in [Pennsylvania](#) and [California](#), respectively) issued nationwide preliminary injunctions blocking the interim final rules from becoming effective in lawsuits challenging the rollback of the contraceptive coverage requirements for affected employers. These decisions are pending on appeal. Following issuance of final rules, the administration has argued that the courts should lift these injunctions. Given the state of flux of this litigation, employers should consider consulting with counsel before to adopting any changes.

In closing

These 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. ERISA-governed plans seeking to eliminate coverage for some or all contraceptive services should be mindful that ERISA's disclosure rules apply to these coverage changes.

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