Trump Administration Releases Guidance on ACA's Contraceptive Coverage Mandate

On October 6, 2017, The U.S. Departments of Health and Human Services (HHS), Treasury, and Labor (the "Departments") released interim final regulations allowing employers and insurance companies to decline to cover contraceptives under their health plans based on a religious or moral objection. The new rules – which are ***effective immediately*** – scale back Obama-era regulations under the Affordable Care Act (ACA) that require non-grandfathered group health plans to cover women's contraceptives with no cost-sharing, with limited exceptions for non-profit religious organizations or closely-held for-profit entities.

The new regulations were released in two parts, one covering employers with moral objections (the "Moral Exemption"), the other for those with religious objections (the "Religious Exemption"). The regulations are scheduled to be published in the October 13, 2017 Federal Register. Within hours of their release, the Departments were sued by the Attorney Generals of California and Massachusetts, and the American Civil Liberties Union (ACLU), alleging that the regulations violate the Administrative Procedure Act, the Establishment Clause of the First Amendment to the Constitution, and the Equal Protection guarantee implicit in the Fifth Amendment to the Constitution. The lawsuits seek to stop implementation of, and invalidate, the regulations. Other states, including Virginia and Oregon, are exploring legal options to challenge the exemptions.

Background on ACA's Contraceptive Coverage Mandate

Originally, the bill that became the ACA did not cover certain women's preventive services that many women's health advocates and medical professionals believed were "critically important" to meeting women's unique health needs. To address that concern, the Senate adopted a "Women's Health Amendment," to the ACA, which added a new category of preventive services specific to women's health based on guidelines supported by the Health Resources and Services Administration (HRSA). Supporters of the amendment emphasized that it would reduce unintended pregnancies by ensuring that women receive coverage for "contraceptive services" without cost-sharing.

The ACA was enacted in March 2010. In 2011, the Departments issued regulations requiring coverage of women's preventive services provided for in the HRSA guidelines, which include all Food and Drug Administration (FDA)-approved contraceptives, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider.

When these rules took effect in 2012, women enrolled in most health plans and health insurance policies (non-grandfathered plans and policies) have been guaranteed coverage for recommended preventive care, including all FDA-approved contraceptive services prescribed by a health care provider, without cost sharing. Under rules released in 2013, exemptions were introduced for certain religious employers (generally churches and houses of worship), as well as "accommodations" for non-profit religious organizations that "self-certify" their objection to providing contraceptive coverage on religious grounds. Under the accommodation approach, an eligible employer does not have to arrange or pay for contraceptive coverage. Employers may provide their self-certification to their insurance carrier or third-party administrator (TPA), which will make contraceptive services available for women enrolled in the employer's plan, at no cost to the women or the employer.

In 2014, regulations were published to establish another option for an employer to avail itself of the accommodation. Under these rules, an eligible employer may notify HHS in writing of its religious objection to providing coverage for contraceptive services. HHS or the Department of Labor, as applicable, will notify the insurer or TPA that the employer objects to providing coverage for contraceptive services and that the insurer or TPA is responsible for providing enrollees in the health plan separate no-cost payments for contraceptive services.

In 2015, in response to the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, regulations were released that expanded the availability of the accommodation to include a closely held for-profit entity that has a religious objection to providing coverage for some or all contraceptive services.

In May 2017, President Trump issued an Executive Order that directed the Departments to consider amending the contraceptive coverage regulations in order to promote religious liberty. Specifically, the Executive Order instructed the Departments to "consider issuing amended regulations . . . to address conscience-based objections to the preventative-care mandate." These latest regulations are consistent with the Executive Order.

Overview of the Moral & Religious Objection Regulations

The Regulations expand existing exemptions to the ACA's contraceptive care requirement. The Religious Exemption automatically exempts all employers—non-profit and for-profit organizations alike—with a religious objection to contraception from complying with the contraceptive care requirement.

The Moral Exemption exempts all non-profit employers and non-publicly traded for-profit employers with a moral objection to contraception from complying with the contraceptive care requirement. The rules also give exempted employers the authority to decide whether their employees receive independent contraceptive care coverage through the accommodation process. In other words, by making the accommodation process voluntary for employers, employees would no longer be guaranteed the seamless coverage for contraceptive care that currently exists under the accommodation process.

Entities that qualify for the exemptions include churches and their integrated auxiliaries, nonprofit organizations, closely-held for-profit entities, for-profit entities that are not closely held, any non-governmental employer, as well as institutions of higher education and health insurers offering group or individual insurance coverage. Publicly-traded companies, however, are not eligible for the Moral Exemption. The rules also appear to have been drafted separately to ensure that one remains if the other is struck down.

Employers currently operating under the religious accommodation (or that operate under the voluntary accommodation in the future) who wish to revoke that status may do so and rely on the exemptions in the new regulations. As part of any revocation, the insurer or TPA must notify participants and beneficiaries in writing. If contraceptive coverage is being offered by an insurer or TPA through the religious accommodation process, the revocation will be effective on the first day of the first plan year that begins on or after 30 days after the date of the revocation. Alternatively, an eligible organization may give 60 days' advance notice under the ACA's Summary of Benefits and Coverage rules, if applicable.

Next Steps and Impact on Employers

Although the Moral and Religious Exemptions are effective immediately, employers that plan to avail themselves of either exemption should exercise caution and consult with qualified ERISA counsel before making plan changes. The regulations are already under challenge, regarding both their substance and their accelerated effective dates. Also, in many states, contraceptive coverage is a state-mandated benefit. Practically, this means that employers sponsoring fully-insured non-grandfathered group health plans may be precluded from exercising either exemption because insurance carriers in those states would be required to write policies that provide such coverage. Moreover, an employer availing itself under either exemption may face private lawsuits from participants and beneficiaries under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex.

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