Contraception Mandate Rolled Back for Employers

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Two tri-agency (Internal Revenue Service, Employee Benefits Security Administration, and Centers for Medicare and Medicaid Services) Interim Final Rules were released and became effective on October 6, 2017, and were published on October 13, 2017, allowing a greater number of employers to opt out of providing contraception to employees at no cost through their employer-sponsored health plan. The expanded exemption encompasses ***all*** non-governmental plan sponsors that object based on sincerely held religious beliefs, and institutions of higher education in their arrangement of student health plans. The exemption also now encompasses employers who object to providing contraception coverage on the basis of sincerely held moral objections and institutions of higher education in their arrangement of student health plans. Furthermore, if an issuer of health coverage (an insurance company) had sincere religious beliefs or moral objections, it would be exempt from having to sell coverage that provides contraception. The exemptions apply to both non-profit and for-profit entities.

The currently-in-place accommodation is also maintained as an optional process for exempt employers, and will provide contraceptive availability for persons covered by the plans of entities that use it (a legitimate program purpose). These rules leave in place the government's discretion to continue to require contraceptive and sterilization coverage where no such objection exists. These interim final rules also maintain the existence of an accommodation process, but consistent with expansion of the exemption, the process is optional for eligible organizations. Effectively this removes a prior requirement that an employer be a "closely held for-profit" employer to utilize the exemption.

On November 30, 2017, the Centers for Medicare and Medicaid Services (CMS) released guidance on accommodation revocation notices. Plan participants and beneficiaries must receive written notice if an objecting employer had previously used the accommodation and, under the new exemptions, no longer wishes to use the accommodation process. The Interim Final Rules required the issuer to provide written revocation notice to plan participants and beneficiaries. CMS' recent guidance clarifies that the employer, its group health plan, or its third-party administrator (TPA) may provide written revocation notice instead of the issuer.

CMS' guidance also clarifies the timing of the revocation notice. Under the Interim Final Rules, revocation is effective on the first day of the first plan year that begins on or after 30 days after the revocation date. Alternatively, if the plan or issuer listed the contraceptive benefit in its Summary of Benefits and Coverage (SBC), then the plan or issuer must give at least 60 days prior notice of the accommodation revocation

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(SBC notification process). CMS' guidance indicates that, even if the plan or issuer did not list the contraceptive benefit in its SBC, the employer is permitted to use the 60-days advance notice method to revoke the accommodation as long as the revocation is consistent with any other applicable laws and contract provisions regarding benefits modification.

Further, if the employer chooses not to use the SBC notification process to notify plan participants and beneficiaries of the accommodation revocation and if the employer instructs its issuer or TPA not to use the SBC notification process on the employer's behalf, then the employer, its plan, issuer, or TPA must send a separate written revocation notice to plan participants and beneficiaries no later than 30 days before the first day of the first plan year in which the revocation will be effective.

Unlike the SBC notification process which would allow mid-year benefit modification, if an employer uses the 30-day notification process, the modification can only be effective at the beginning of a plan year.

Employers that object to providing contraception on the basis of sincerely held religious beliefs or moral objections, who were previously required to offer contraceptive coverage at no cost, and that wish to remove the benefit from their medical plan are still subject (as applicable) to ERISA, its plan document and SPD requirements, notice requirements, and disclosure requirements relating to a reduction in covered services or benefits. These employers would be obligated to update their plan documents, SBCs, and other reference materials accordingly, and provide notice as required.

Employers are also now permitted to offer group or individual health coverage, separate from the current group health plans, that omits contraception coverage for employees who object to coverage or payment for contraceptive services, if that employee has sincerely held religious beliefs relating to contraception. All other requirements regarding coverage offered to employees would remain in place. Practically speaking, employers should be cautious in issuing individual policies until further guidance is issued, due to other regulations and prohibitions that exist.

Background

As background, the Patient Protection and Affordable Care Act (ACA) requires that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide coverage of certain specified preventive services without cost sharing.

In 2011, the Departments issued regulations requiring coverage of women's preventive services provided for in the Health Resources & Services Administration (HRSA) guidelines. The HRSA guidelines include all FDA-approved contraceptives, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by the health care provider (collectively, contraceptive services).

Under the 2011 regulations, group health plans of "religious employers" (specifically defined in the law) are exempt from the requirement to provide contraceptive coverage.

In 2013, the Departments published regulations that provide an accommodation for eligible organizations that object on religious grounds to providing coverage for contraceptive services, but are not eligible for the exemption for religious employers. Under the accommodation, an eligible organization is not required to contract, arrange, pay for, or provide a referral for contraceptive coverage. The accommodation generally ensures that women enrolled in the health plan established by the eligible organization, like women enrolled in health plans maintained by other employers, receive contraceptive coverage seamlessly—that is, through

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the same issuers or third-party administrators that provide or administer the health coverage furnished by the eligible organization, and without financial, logistical, or administrative obstacles.

In 2014, the U.S. Supreme Court decided *Burwell v. Hobby Lobby*. The Court held that the contraceptive coverage requirement substantially burdened the religious exercise of closely held for-profit corporations that had religious objections to providing contraceptive coverage and that the accommodation was a less restrictive means of provision coverage to their employees.

Because of *Burwell v. Hobby Lobby*, the Departments extended the accommodation to closely held for-profit entities. Under the accommodation, an eligible organization that objects to providing contraceptive coverage for religious reasons may either:

1. Self-certify its objection to its health insurance issuer (to the extent it has an insured plan) or third-party administrator (to the extent it has a self-insured plan) using a form provided by the Department of Labor (EBSA Form 700); or
2. Self-certify its objection and provide certain information to the Department of Health and Human Services (HHS) without using any particular form.

In 2016, in *Zubik v. Burwell*, the U.S. Supreme Court considered claims by several employers that, even with the accommodation provided in the regulations, the contraceptive coverage requirement violates the Religious Freedom Restoration Act of 1993 (RFRA). The Court heard oral arguments and ultimately remanded the case (and parallel RFRA cases) to the lower courts to give the parties "an opportunity to arrive at an approach going forward that accommodates [the objecting employers'] religious exercise while at the same time ensuring that women covered by [the employers'] health plans 'receive full and equal health coverage, including contraceptive coverage.'"

Previously, Who Could Object and How

As provided in the 2015 final regulations, only certain organizations could object to providing contraception coverage. The final regulations provide two accommodations for eligible organizations to provide notice of a religious objection to the coverage of contraceptive services. Employers that object to providing contraceptive services will need to determine if they meet the criteria of an eligible organization in order to use one of the two accommodations. An eligible organization is an organization that meets all of the following requirements.

1. Opposes providing coverage for some or all of any contraceptive items or services required to be covered on account of religious objections.
2. Either is organized and operates as a nonprofit entity and holds itself out as a religious organization, or is organized and operates as a closely held for-profit entity, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owner's sincerely held religious beliefs.
3. If both of the first two requirements are met, the organization must self-certify. The organization must make such self-certification or notice available for examination upon request by the first day of the first plan year to which the accommodation applies. The self-certification or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under Section 107 of ERISA.

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A "closely held for-profit entity" is defined in the regulations as an organization that:

- Is not a nonprofit entity;
- Has no publicly traded ownership interests (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and
- Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in the requirements of an "eligible organization."

To determine its ownership interest, the following rules apply:

- Ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.
- An individual is considered to own the ownership interests held, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.
- If a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests.

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