CONTRACEPTIVE COVERAGE REQUIREMENTS FOR RELIGIOUS EMPLOYERS

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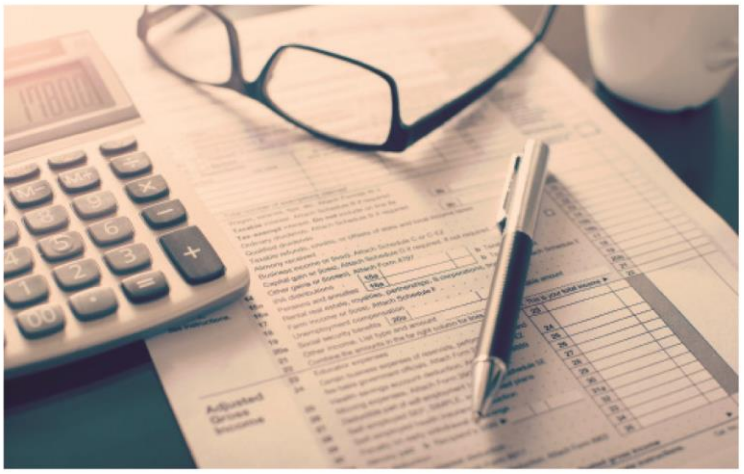

Provided by Lawley

Contraceptive Coverage Requirements for Religious Employers

For plan years beginning on or after Aug. 1, 2012, the Affordable Care Act (ACA) requires non-grandfathered group health plans and health insurance issuers to provide benefits for certain women's preventive health services without imposing cost-sharing requirements.

Special contraceptive coverage rules apply for nonprofit religious employers and organizations. These special rules exempt churches and other houses of worship from the ACA's requirement to cover contraceptives, and establish an accommodations approach for other church-affiliated institutions that object to contraceptive coverage, such as schools, charities, hospitals and universities.

An accommodations approach also applies to closely held for-profit companies with religious objections to providing contraceptive coverage.

LINKS AND RESOURCES

- Guidelines regarding the women's preventive care requirements
- Model notice for eligible organizations to notify HHS of their religious objection to providing contraceptive coverage
- Executive order requesting amended regulations to address conscience-based objections to providing contraceptive coverage
- Interim final rule expanding availability of the accommodations approach; second interim final rule providing an additional exemption for moral objections

CONTRACEPTIVE COVERAGE

- The services required to be covered include preventive care and screenings for women described in guidelines issued by the Departments.
- One of these guidelines requires coverage for **all FDA-approved contraceptive methods** for women without cost sharing.

RELIGIOUS EMPLOYERS

- Certain nonprofit religious employers are **exempt** from the contraceptive coverage requirement.
- An **accommodations approach** applies to eligible nonprofit religious organizations that do not qualify for the church exemption.
- The U.S. Supreme Court created a **narrow exception** for closely held for-profit businesses that object to providing contraceptive coverage based on their religious beliefs.

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EXEMPTION FOR CHURCHES

Group health plans of certain **nonprofit religious employers** (such as churches and other houses of worship) are **exempt** from the ACA's contraceptive coverage requirement. Under this exemption, eligible employers offering health coverage may decide whether or not to cover contraceptive services, consistent with their beliefs.

A "religious employer" is defined as a nonprofit entity that is referred to in Internal Revenue Code (Code) Section 6033(a)(3)(A)(i) or (iii). This definition primarily includes churches, other houses of worship and their affiliated organizations.

ACCOMMODATIONS FOR NONPROFIT RELIGIOUS ORGANIZATIONS

An **accommodations approach** applies to eligible nonprofit religious organizations that object to providing contraceptive coverage on religious grounds, but do not qualify for the church exemption. The accommodations became effective for **plan years beginning on or after Jan. 1, 2014.** A temporary enforcement delay applied until then.

Key point

Under the accommodations, eligible organizations do not have to contract, arrange, pay or refer for any contraceptive coverage to which they object on religious grounds. However, separate payments for contraceptive services will be provided to females in the health plan by an independent third party, such as an insurance company or third-party administrator (TPA), directly and free of charge.

An eligible organization is one that:

- Opposes providing coverage for some or all of any contraceptive services which are required to be covered on account of religious objections;
- Is organized and operates as a nonprofit entity; and
- Holds itself out as a religious organization.

In addition, to be eligible for the accommodations, an organization must **self-certify** that it meets the criteria and provide the self-certification to the plan's issuer or TPA. HHS provided a self-certification form for this purpose (EBSA Form 700).

Alternative to Self-Certification: In response to legal challenges to the self-certifications approach, the Departments published an interim final rule on Aug. 27, 2014, which provides an **alternative way** for eligible organizations to provide notification of their objections to covering contraceptives.

Under the interim final rule, an eligible organization may **notify HHS in writing** of its religious objection to providing contraceptive coverage, instead of providing the self-certification to the plan's issuer or TPA. This approach was finalized in July 2015.

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When an organization notifies HHS of its religious objection to providing contraceptive coverage, the notice must, at a minimum, include:

- The name of the eligible organization and the basis on which it qualifies for an accommodation;
- Its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable);
- The plan name and type (for example, a student health insurance plan or a church plan); and
- The name and contact information for any of the plan's TPAs and health insurance issuers.

A model notice to HHS has been provided that eligible organizations may, but are not required to, use. If any of the information required to be included in the notice changes, the organization must provide updated information to HHS.

HHS will then notify the insurer for an insured health plan (or the DOL will notify the TPA for a self-insured plan) that:

- The organization objects to providing contraception coverage; and
- The insurer or TPA is responsible for providing enrollees separate no-cost payments for contraceptive services for as long as they remain enrolled in the plan.

Regardless of whether the eligible organization self-certifies or provides notice to HHS, the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same.

In addition, for each plan year to which the accommodation applies, a TPA that is required to provide or arrange payments for contraceptive services and a health insurance issuer required to provide payment for these services, must provide to plan participants and beneficiaries **written notice** of the availability of separate payments for these services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment or re-enrollment in health coverage.

ACCOMMODATIONS FOR CLOSELY HELD FOR-PROFIT COMPANIES

On June 30, 2014, in *Burwell v. Hobby Lobby Stores, Inc. et al*., the U.S. Supreme Court created a narrow exception to the contraceptive mandate for closely held for-profit businesses that object to providing coverage for certain types of contraceptives based on their sincerely held religious beliefs.

In light of the Supreme Court's decision in the *Hobby Lobby* case, the Departments issued a final rule on Aug. 14, 2015, to amend the definition of an "eligible organization" for purposes of the accommodations approach described above to include a closely held for-profit entity that has a religious objection to providing coverage for some or all of the contraceptive services otherwise required to be covered.

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Under the final rule, a qualifying closely held for-profit entity is not required to contract, arrange, pay or refer for contraceptive coverage. Instead, payments for contraceptive services provided to participants and beneficiaries in the eligible organization's plan would be provided or arranged separately by an issuer or a TPA.

> ***Definition of Closely Held For-profit Entity:*** The final rule defines a qualifying closely held for-profit entity based on an existing definition in the Code. For this purpose, a "closely held for-profit entity" is an entity that:
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> - Is not a nonprofit entity;
> - Has no publicly traded ownership interests; and
> - Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals.

For purposes of this definition, all of the ownership interests held by members of a family are treated as being owned by a single individual. In addition, the rule provides that entities whose ownership structure is substantially similar to this definition can also qualify for the accommodation. An organization that is unsure about whether its ownership structure qualifies as "substantially similar" can seek guidance from HHS.

To be eligible for the accommodation, the for-profit entity's highest governing body (such as its board of directors, board of trustees or owners, if managed directly by its owners) must adopt a resolution or similar action, under the organization's applicable rules of governance and consistent with applicable state law, establishing that it objects to covering some or all of the contraceptive services on account of the owners' sincerely held religious beliefs.

A qualifying closely held for-profit entity seeking the accommodation may use either of the two notification options available to qualifying nonprofit entities that seek the accommodation—the self-certification approach or the HHS notification approach.

LEGAL CHALLENGES TO ACCOMMODATIONS APPROACH

The legal challenges to the accommodations approach have focused on whether the requirement to self-certify (or notify HHS) of an organization's objections to contraceptive coverage **infringes on religious liberty**. According to the challengers, the accommodations approach infringes on religious liberty because the self-certification requirement (or HHS notification requirement) makes the organization complicit in the provision of contraceptive.

There are numerous legal challenges to the accommodations approach still making their way through the court system. Most of the lower courts that reviewed this issue determined that the accommodations approach does not infringe on an organization's religious liberty. However, on Sept. 19, 2015, the 8th Circuit Court of Appeals held that four nonprofit religious organizations are not

required to comply with the contraceptive mandate because the accommodations approach imposes a "substantial burden" on their religious rights.

This holding conflicts with decisions from other federal appeals courts. For example:

- On Nov. 14, 2014, the D.C. Circuit Court of Appeals ruled against a group of nonprofit religious employers, holding that the accommodations provide sufficient protection of religious freedom.
- On July 14, 2015, the 10th Circuit Court of Appeals ruled against a group of religious nonprofit organizations, concluding that the accommodations approach does not substantially burden their religious exercise or infringe on their constitutional rights.

A number of these cases were **consolidated and reviewed** by the U.S. Supreme Court in *Zubik v. Burwell*. On May 16, 2016, the Court vacated the judgments of the lower courts and remanded the cases to be re-reviewed, in an attempt to allow the parties "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.'"

On Jan. 9, 2017, the Departments issued an FAQ stating that they are **not making any changes to the accommodations approach at this time**. According to the Departments, there is no feasible approach that would resolve the concerns of religious objectors, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage.

EXECUTIVE ORDER

On May 4, 2017, President Trump issued an executive order aimed at promoting free speech and religious liberty. The executive order directs the Departments to consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the ACA's preventive care mandate. HHS issued a press release in response to the executive order stating their intent to take action as a result. According to President Trump and HHS, these actions are intended to safeguard the deeply held religious beliefs of employers who provide health insurance to their employees.

INTERIM FINAL REGULATIONS

On Oct. 6, 2017, the Departments issued the following two interim final rules expanding certain exemptions from the ACA's contraceptive coverage mandate:

- The first interim final rule expands the availability of the exemption for employers that object to providing contraceptive coverage based on their religious beliefs.
- The second interim final rule provides an additional exemption for certain employers that object to providing contraceptive coverage based on their moral convictions (but not religious beliefs).

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This guidance, which became effective immediately, significantly expands the number of employers that are eligible for an exemption from the contraceptive coverage mandate. These regulations are intended to end long-running litigation challenging the contraceptive mandate by:

- Extending the accommodations approach to include nongovernmental employers, issuers and individuals that have sincerely-held religious or moral beliefs objecting to contraceptive or sterilization coverage; and
- Making the accommodations approach optional for eligible organizations.

As a result, objecting employers are no longer required to choose between direct compliance and compliance through the accommodation. **A plan sponsor, issuer and plan covered by these exemptions will not be penalized for failing to include contraceptive coverage in the plan's benefits**.

Eligible Organizations

Exemption Based on Religious Objections

This exemption may apply to all types of nongovernmental employers, including:

- Churches, integrated church auxiliaries, conventions or associations of churches, or religious orders;
- Nonprofit organizations;
- For-profit entities, **regardless of whether they are closely held**;
- Institutions of higher education; and
- Any other nongovernmental employers.

This exemption also applies to health insurance issuers offering group or individual insurance coverage that have sincerely-held religious or moral beliefs objecting to contraceptive or sterilization coverage.

Exemption Based on Moral Objections

This exemption is narrower in scope than the exemption based on religious objections. It may only apply to the following types of nongovernmental employers:

- Nonprofit organizations;
- Privately held for-profit entities; and
- Institutions of higher education.

Health insurance issuers offering group or individual insurance coverage that have sincerely-held moral objections to providing contraceptive or sterilization coverage may also qualify for this exemption. The Departments are requesting comment on whether this moral objection exemption should also be extended to all for-profit entities (regardless of whether they are closely held or publicly traded) and nonfederal governmental employers, such as local government hospitals.

No Self-certification Requirement

Under these new rules, employers who claim an exemption **may voluntarily, but are not required to, provide any self-certification or notice to the government**. The legal challenges to the accommodations approach have focused on whether the requirement to self-certify (or notify HHS) of an organization's objections infringes on religious liberty by making the organization complicit in the provision of contraceptives. The new rules are intended to end this litigation by making the self-certification requirement optional.

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