

LEGAL UPDATES

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Trump Administration Narrows ACA Contraceptive Mandate

KEY POINTS

The Trump administration issued new rules that expand exemptions to the contraceptive mandate under the Affordable Care Act for religious and non-religious employers that object to providing contraceptive coverage.

Objecting employers do not need to take any action to utilize the exemption.

Objecting employers may use an optional “accommodation” process to cede the administration of contraceptive coverage to a third party.

New Rules Allow More Employers to Claim Exemption

The Trump administration has issued new interim final rules that limit the contraceptive mandate under the Affordable Care Act (ACA) and expand the exemptions for religious and non-religious employers that object to providing contraceptive coverage. The rules also change the accommodation process for third-party administrators to provide contraceptive coverage to the employees of an objecting employer.

The Background

Generally, the ACA requires that health plans provide preventive care, including contraceptive coverage, at no cost to individuals. In prior guidance, the Department of Health and Human Services (HHS) provided a blanket exemption for religious employers.

Eligible non-religious objecting employers were allowed to deliver a notice to HHS as an alternative to submitting the EBSA Form 700 to the Department of Labor (DOL), but regulations specified that such notice must include the eligible organization's name and an expression of its religious objection, along with the plan name, plan type, and name and contact information for any of the plan's third-party administrators or health insurance issuers. Where an eligible organization maintains a self-insured plan under the Employee Retirement Income Security Act (ERISA) and provides the alternative notice, the regulations provide that DOL will work with HHS to send a separate notification to the self-insured plan's third-party administrator. Where an eligible organization maintains an insured plan, HHS will inform the health insurance issuer of its obligation to cover contraceptive services.

Interim Final Rules

Generally, the new rules, issued October 6, 2017, expand the exemptions to protect religious beliefs for certain entities and individuals whose health plans are subject to a mandate of contraceptive coverage. The rules state that the government's interest in the application of contraceptive coverage requirements does not outweigh the sincerely held religious objections of those entities and individuals.

The expanded exemption encompasses private employers that object to contraceptive coverage based on sincerely held religious beliefs or moral convictions that are not religious-based and institutions of higher education in their arrangement of student health plans.

The rules also leave the "accommodation" process in place as an optional process for certain exempt entities that wish to use it voluntarily. The rules expand the kinds of entities that may use the optional accommodation. Consequently, objecting employers may make use of the exemption without any additional notification requirement or may choose to pursue the optional accommodation process. If an eligible organization uses the optional accommodation process through the EBSA Form 700 or other specified notice to HHS, it voluntarily shifts an obligation to provide separate contraceptive coverage to the issuer or third-party administrator.

Under these rules, the plan sponsor, issuer and plan covered in the exemption would face no penalty as a result of omitting contraceptive coverage from the benefits of the plan participants and beneficiaries. Further, exempt entities will not be required to comply with a self-certification process.

HHS is inviting public comments on the expanded exemption and the accommodation process. Comments must be received by December 5, 2017. Already, the attorneys general of the states of Washington and California have filed lawsuits challenging the rules.

What This Means to You

Religious employers that are exempt from the contraceptive mandate should not need to take any action. However, religious employers that previously effectively ceded the contraceptive mandate issue to their third-party administrator or insurer may face new challenges.

Non-religious employers that have a religious or moral objection to providing contraceptives may utilize the outright exemption or the accommodation process. If the objecting employer uses the accommodation process, the third-party administrator or insurance issuer would pay for and provide contraceptive coverage.

Note that if an employer removes contraceptive coverage from its plans, otherwise applicable ERISA disclosures must reflect the omission of coverage. These existing disclosure requirements obligate employers to inform participants and beneficiaries of what ERISA plans do and do not cover.

Further, if any individuals object to receiving a health plan that covers contraceptives, a plan and the insurer may provide for a separate benefit package option that omits some or all contraceptive services to which the individual objects.

Employers may also consider submitting comments to HHS or DOL on the exemptions or the accommodation.

Contact Us

For more information on how the new rules may affect your organization, contact Bruce G. Arnold, Jordan T. Ault or David W. Eckhardt of Husch Blackwell's Nonprofit Organizations & Religious Institutions team.