

WS&Co. Briefing

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Contraceptive Exemption Expansion

On October 6, the Department of Health & Human Services (HHS) released two separate interim final rules, with immediate effective dates, broadening the religious or moral exceptions to the general ACA rule requiring that group health plans offer contraceptive coverage with no cost-sharing. The rules were provided in response to President Trump's executive order issued last May. The exemption is now available to most non-governmental organizations that claim either a religious or a moral objection to providing such coverage.

Background—Contraceptive Coverage Generally Required under ACA as Preventive Care

Under the Affordable Care Act (ACA), all non-grandfathered individual and group health plans are required to provide preventive services coverage with no cost-sharing. The list of preventive services required to be covered at 100% includes:

- Evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the [United States Preventive Services Task Force \(USPSTF\)](#);
- Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention (CDC);
- Evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) for infants, children, and adolescents; and

- Evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the [HRSA](#) (updated to recognize the exemption for objecting entities).

This list is updated by the appropriate departments/agencies over time. The requirements are summarized on [Healthcare.gov](#). It is necessary to also watch agency recommendations and FAQs in regard to coverage requirement interpretations.

The **HRSA guidelines include contraceptives in the list of preventive services** and have clarified that this means coverage must be provided without cost-sharing for at least one form of contraception in each method that is identified for women by the FDA in its current Birth Control Guide.

Earlier Exemptions to the General Rule

Through a series of rules issued between 2012 and 2015, HHS provided:

1. A complete exemption from the requirement to provide contraceptive coverage with no cost-sharing for "religious employers" as described in 6033(a)(3)(A)(i) or (iii); and
2. An accommodation (see more below) for "eligible organizations" – non-profit entities and closely held for-profit entities – with religious exemptions to providing contraceptive coverage.

The accommodation allows eligible organizations to avoid having to contract, arrange, pay, or refer for insurance coverage for contraceptive coverage so long as certain requirements

are met. For fully-insured plans, the insurer assumes sole responsibility for providing coverage for contraceptive services at no cost to plan participants or beneficiaries or to the eligible organization. For self-funded plans, the TPA assumes such responsibility.

To obtain the accommodation, eligible organizations must either (i) self-certify to their insurer/TPA that they meet the definition of an eligible organization using EBSA Form 700; or (ii) provide notice of their religious objection to contraceptive coverage directly to the DOL or HHS using a model notice, which then prompts the DOL or HHS to notify the insurer/TPA. In addition, closely held for-profit entities 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.

New Exemptions Under Interim Final Rules

The interim final rules greatly expand the exemption for non-grandfathered group health plans offered by employers who would prefer not to provide contraceptive coverage based on either a religious or a moral objection. Such employers are exempt from the requirement to provide cost-sharing-free contraceptive coverage without having to provide any particular certification or going through any accommodation process. Although the accommodation process described above is still available, providing such accommodation to plan participants is now optional.

The exemption applies to the following entities:

- All non-governmental employers *who have a religious objection* to providing some or all contraceptive coverage; and
- Non-governmental employers, who are not publicly traded, *who have a moral objection* to providing some or all contraceptive coverage.

The rules do not provide a specific definition of a religious or moral objection and instead indicate that “the mechanisms for determining whether a company has adopted and holds such principles or views is a matter of well-established state law with respect to corporate decision-making.”

Even insurers are eligible for the exemption if the insurer has a religious or moral objection to providing some or all contraceptive coverage. However, if the insurer chooses

to offer coverage that does not provide contraceptive coverage, then such plans may be purchased only by those employers who also have a religious or moral objection to providing such coverage, or who provide contraceptive coverage through some other means.

Finally, the rules also provide some flexibility for individuals who have a religious or moral objection to the use of contraceptives. Such individuals may ask their employer or insurer for group health plan coverage excluding coverage for some or all contraceptive services, and if the employer/insurer is willing, the employer/insurer may offer a separate group health plan to the individual excluding such coverage.

Immediate Effective Date

The interim final rules are effective as of the date of publication: October 6, 2017. Those eligible organizations currently taking advantage of the accommodation process described above may discontinue the accommodation the sooner of (i) the first day of the plan year at least 30 days after revocation, or (ii) upon 60 days' notice to plan participants. Those entities who have a religious or moral objection to providing some or all contraceptive coverage who are not currently taking advantage of the accommodation process and want to discontinue providing contraceptive coverage going forward will likely need to wait until plan renewal or provide at least 60 days' advance notice regarding material changes to content in the summary of benefits and coverage (SBC).

Communication—Be Aware of Deadlines

Plans subject to ERISA must provide a Summary Plan Description (SPD) containing information relevant to coverage of preventive services, including contraceptive coverage. The SPD must also describe the extent of any limitation or exclusion of coverage (e.g. limited or no contraceptive coverage). In addition, ERISA requires that a summary of modification (SMM) be distributed not later than 60 days after the date of adoption of a material reduction in covered services or benefits.

Separately, under the ACA, all group health plans are required to provide an SBC, which should also contain information about the extent of any limitation or exclusion of coverage. When a material change is made to content provided in the SBC, a notice of modification (or updated SBC) is required 60 days in advance of the effective date of such change, unless the change occurs upon renewal.

With these two sets of requirements in mind, employers who currently offer contraceptive coverage and are choosing to reduce or eliminate coverage of contraceptive services under their group health plans going forward will need to update SPD and SBC language accordingly. If the employer makes the change mid-plan year, 60 days' advance notice will be required. If the employer makes the change upon plan renewal, advance notice is not required, but an updated SBC and SPD (or SMM describing the change) should be provided.

Controversy

It is uncommon for an agency to make rules effective immediately without allowing for at least a 60-day comment period, followed by release of final rules after considering such comments. While the agency argues that it is in the best interest of the public for these rules to be effective immediately, there may be some pushback suggesting that the agency's actions violate the Administrative Procedures Act (APA).

There is also a possibility of litigation challenging the agency's conclusion that providing contraceptive coverage as required under the ACA is not a compelling governmental interest, and therefore allowing exceptions for religious or moral objections is okay.

EEOC's previous guidance indicates that failing to make contraceptive coverage available violates the Pregnancy Discrimination Act (PDA). Although there is recognition of an exemption for religious objections, the interpretation of how broadly to apply such exemption is not clear.

Summary

The expanded exemption will be welcomed by employers with religious or moral objections to providing contraceptive coverage. The religious objection is available to all non-governmental entities, whereas a moral objection is available to all but publicly traded non-governmental entities. For those non-profit and closely held for-profit entities currently using the accommodation process, a complete exemption is now allowed. For those entities holding on to grandfathered status solely to avoid having to provide such coverage, the exemption will allow consideration of non-grandfathered plans going forward. With the accommodation process optional, it seems unlikely that it will be used.

For now, employers with a religious or a moral objection to contraceptive coverage are free to move forward with excluding coverage for some or all contraceptive coverage either upon plan renewal or upon 60 days' advance notice; but we recommend that employers who would like to exclude such coverage watch for any changes as the final rules are released and various litigation plays out.

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