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compliance ALERT

Agencies Issue Final Regulation on ACA Contraceptive Coverage Mandate

November 15, 2018

On November 7, the U.S. Departments of Labor (DOL), Health and Human Services (HHS) and Treasury ("the Agencies") jointly issued two sets of final regulations on religious and moral exemptions to the Affordable Care Act's (ACA) contraceptive coverage mandate ("the Final Regulations").

While the Final Regulations respond to comments that were filed in response to the interim final regulations released on October 6, 2017, (discussed in our earlier eAlert here, they largely maintain the rules contained in those interim final regulations.

Background on ACA's Contraceptive Coverage Mandate and the Interim Final Rules

Under the ACA's preventive services mandate, group health plans and insurers must provide certain preventive services without imposing any cost-sharing (sometimes referred to as providing "first-dollar coverage"). As a result, deductibles, copays, coinsurance, or other cost-sharing cannot be imposed on such preventive services.

Since the enactment of the ACA, one of the most controversial of the preventive services requirements has been the requirement to cover contraceptives and contraceptive services. These items and services must be provided in a manner consistent with guidelines issued by the Health Resources and Services Administration (HRSA), with certain limited exemptions and a special accommodation process.

The interim final regulations issued last year were designed to expand the exemptions to the ACA's contraceptive coverage requirement, and to accept comments from the public on these new rules. Under these interim final rules, employers are permitted to exclude coverage for contraceptives and contraceptive services from their plans based on moral or religious objections.

Notably, these rules not only increased the scope of exemptions already available under the ACA for closely-held for-profit corporations, religious non-profit organizations and religious employers (for example, churches), but they also provided that the HRSA guidelines on contraceptives do not apply to these entities at all.

Additionally, under these interim final regulations, employers with religious or moral objections were no longer required to go through the normal accommodation process for the waiver to the contraceptive coverage mandate. The waiver required them to submit a self-certification of their objections to their insurance carrier, or file a notice with HHS – a process that enabled cost-sharing responsibility to be passed to the plan's issuer or third-party administrator (TPA).

How Do the Exemptions Work and Which Entities Can Take Advantage of Them under the Interim Final Rules?

The first type of new exemption, the "religious beliefs" exemption, provides an exemption to the contraceptive coverage mandate to entities and individuals that

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Religious Beliefs Exemption
Provides an exemption to the contraceptive coverage mandate to entities and individuals that object to covered contraceptive services on the basis of sincerely held religious beliefs.

Moral Convictions Exemption
Provides an exemption to the contraceptive coverage mandate to entities and individuals that have non-religious moral convictions opposing services covered by the contraceptive mandate.

object to services covered by the mandate on the basis of "sincerely held religious beliefs." This exemption applies to covered churches, nonprofit entities and for-profit entities, whether or not closely held, including publicly-traded entities.

The second type, the "moral convictions" exemption, provides an exemption to the contraceptive coverage mandate to entities and individuals that have non-religious moral convictions opposing services covered by the contraceptive mandate. This exemption is available to the same entities as the first exemption, but not to publicly-traded entities.

How Did the Final Regulations Change the Interim Final Regulations?

The Final Regulations include the following changes to the interim final regulations issued by the Agencies last year:

- Adding both a new transitional rule, and a new general rule, that help to clarify when and how objecting entities can opt to revoke the accommodation process, and operate under the exemption;
- Allowing health insurers to rely, in good faith, on a representation made by an objecting entity that they qualify to use the accommodation process;
- Confirming that employers, plan sponsors and other entities participating in the same exempt health insurance plans are also exempt from the contraceptive coverage mandate (*i.e.*, the Agencies will determine the scope of the exemption on a "plan by plan" basis rather than an "employer by employer" basis);
- Clarifying that the exemption applies only to the contraceptive items or services that an entity objects to (*i.e.*, an entity that objects to some contraceptives must still cover those it does not object to); and
- Clarifying that a group health plan and insurer can offer a separate health insurance policy, certificate or contract of insurance, or a separate group health plan or benefit package option, without contraceptive coverage even if an individual only objects to some, but not all, coverage of contraceptives.

How Will the Final Regulations Impact Employers' Health Insurance Plans?

The Final Regulations do not make major changes to the interim final regulations that are currently in effect, and mainly provide clarifications about the existing rules. Accordingly, there is not expected to be a major impact on employers' plans. However, the fact that these new rules, which are quite controversial and have been challenged in the courts, are now "final," adds considerable certainty and stability to them, and makes them less susceptible to future challenges in the courts.

The Regulations go into effect January 14, 2019.

From an economic perspective, although the Agencies note in the Final Regulations that continued uncertainty about the cost and impact of the rules remains, they estimate that there will be approximately $68.9 million in transfer costs for women who will no longer receive contraceptive coverage from their employer because of the rules' expanded exemptions.

When Do the Final Regulations Go Into Effect?

The Final Regulations go into effect on January 14, 2019 (60 days after their publication date on November 15, 2018).

What Should Employers Do Next?

Entities eligible for an exemption to the contraceptive coverage mandate are not subject to any new requirements that they didn't have to comply with before, so there are no new requirements that employers must comply with as a result of these rules becoming final.

However, it is important for religious employers, religiously-affiliated employers, or other employers with strong religious or moral objections to this mandate, to understand that qualifying for this exemption does not exempt their plans from the many other requirements of the ACA. There is no broad "religious employer" or "church plan" exemption under the ACA.

Additionally, unless qualifying for the "church plan" exemption under ERISA, group health plans of such organizations must take into consideration existing ERISA plan documentation and disclosure rules, including the requirements to specify coverage details in the plan document and summary plan description, and to disclose reductions in covered services.

If you have any questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.

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