Contraception Mandate Rolled Back for Employers

Updated February 2020

The Department of the Treasury (Treasury), Department of Labor (DOL), and Department of Health and Human Services (HHS) (collectively, the Departments) released two final rules on November 7, 2018, regarding contraceptive coverage exemptions. These rules finalize the Departments' interim final rules that were published on October 13, 2017. HHS also issued a press release and fact sheet on these final rules.

The final rules were published on November 15, 2018, to be effective on January 14, 2019.

On January 13, 2019, the U.S. District Court for the Northern District of California (California Court) granted a preliminary injunction that prohibits the final rules' implementation and enforcement against the following states: California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Vermont, Washington, the Commonwealth of Virginia, and the District of Columbia. These states will be subject to the contraception mandate exemption and accommodation rules that existed prior to the interim final rules, pending the final decision of this case.

On January 14, 2019, the U.S. District Court for the Eastern District of Pennsylvania (Pennsylvania Court) granted a nationwide preliminary injunction that prohibits the implementation of the two final rules.

On June 5, 2019, the U.S. District Court for the Northern District of Texas (Texas Court) issued a permanent injunction against the ACA's contraception mandate. The injunction prohibits the federal government from enforcing the contraception mandate against an employer, group health plan, or health insurer that objects, based on sincerely held religious beliefs, to establishing, maintaining, providing, offering, or arranging for coverage or payment for some or all contraceptive services. The injunction also exempts objecting entities from the accommodations process. The permanent injunction also prohibits enforcement of the contraception mandate for individuals who object to coverage or payments for some or all contraceptive services based on sincerely held religious beliefs and who are willing to obtain health insurance that excludes coverage for payments for some or all contraceptive services.

On July 12, 2019, the U.S. Court of Appeals for the 3rd Circuit affirmed the Pennsylvania Court's preliminary injunction that prohibits the two final rules' enforcement nationwide. The appeals court found that, until the final rules' legality is decided, the injunction will allow states to avoid the imminent financial burden of subsidizing contraceptive services, providing funds for medical care associated with unintended

pregnancies, and absorbing medical expenses that arise from decreased use of contraceptive medications for other health conditions.

The appellate court's decision means that the Departments are prohibited from implementing and enforcing both final rules nationwide.

On October 22, 2019, the U.S. Court of Appeals for the 9th Circuit affirmed the California Court's preliminary injunction that prohibits the two final rules' implementation and enforcement against the thirteen plaintiff states and the District of Columbia.

The plaintiff in the Pennsylvania Court case and the federal government asked the U.S. Supreme Court (Supreme Court) to hear an appeal of the 3rd Circuit decision. On January 17, 2020, the Supreme Court granted review of the 3rd Circuit decision and consolidated this case with a similar case decided by the 3rd Circuit, affirming a nationwide preliminary injunction prohibiting implementation of the two final rules.

The Final Religious Exemption and Moral Exemption Rules

The first final rule provides an exemption from the contraceptive coverage mandate to entities (including certain employers) and individuals that object to services covered by the mandate on the basis of sincerely held religious beliefs.

The second final rule provides an exemption from the contraceptive coverage mandate to non-profit organizations, small businesses, and individuals that object to services covered by the mandate on the basis of sincerely held moral convictions.

The Departments estimate that the exemptions should affect no more than approximately 200 employers with religious and moral objections.

Exemption for Religious Beliefs

These rules expand exemptions to protect religious beliefs for certain entities (such as employers) and individuals whose health plans are subject to a contraceptive coverage mandate under the Patient Protection and Affordable Care Act (ACA).

Although these rules do not alter the HHS' Health Resources and Services Administration's discretion to maintain guidelines requiring contraceptive coverage where no legally recognized objection exists, the contraception mandate will not apply to group health plans maintained or established by the following organizations (or health insurance coverage offered or arranged by the following organizations):

- non-governmental plan sponsors, including but not limited to: a church, an integrated auxiliary of a church, a convention or association of churches, a religious order, a non-profit organization, a closely held for-profit entity, a for-profit entity that is not closely held; and other non-governmental employers, including publicly traded for-profit corporations;
- non-governmental higher education institutions;
- health insurance issuers;

to the extent that the plan sponsor or higher education institution objects, based on its sincerely held religious beliefs, to either:

- establishing, maintaining, providing, offering, or arranging for coverage or payments for some or all contraceptive services; or

- establishing, maintaining, providing, offering, or arranging for a plan, issuer, or third-party administrator that provides contraceptive coverage.

The exemption that applies to non-governmental plan sponsors above applies to each employer, organization, or plan sponsor that adopts the plan. Issuers that hold their own objections based on sincerely held religious beliefs could issue policies that omit contraception to plan sponsors or individuals that are exempt based on their religious beliefs.

Contraceptive services are defined to include contraceptive or sterilization items, procedures, or services, or related patient education and counseling.

These rules also leave in place an accommodation process as an optional process for the exempt entities above to use voluntarily. This means that objecting employers can either use the exemption above, or the optional accommodation process that is already in place.

There are two available accommodation methods for eligible organizations to choose from to object to contraceptive services coverage:

- The eligible organization may file EBSA Form 700.
- The eligible organization may go through the "alternative process."

The alternative process requires the eligible organization to notify HHS in writing of its objection to covering all or a subset of contraceptive services. The notice must include:

- The name of the eligible organization and the basis on which it qualifies for an accommodation
- A statement that its objection is based on a sincerely held religious belief to covering some or all contraceptive services (if objecting to a subset of services, they must be identified)
- The plan name (and type if it is a student health insurance plan or a church plan)
- The name and contact information for the plan's third-party administrator (TPA) and health insurance issuers

There is a model notice available for eligible organizations to review. The content required is considered the minimum information necessary for federal agencies to determine if an entity is covered by the accommodation and to administer the accommodation.

For self-insured plans subject to ERISA, once the plan provides proper notice to HHS, the DOL (working with HHS) will send a notification to the TPA of the ERISA plan notifying the TPA of the eligible organization's objection. The government notice will list the contraceptive services that are objected to and will provide the TPA with its obligations. If the TPA is willing to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the TPA will be designated as plan administrator under ERISA for the contraceptive benefits the TPA would otherwise manage.

For fully insured plans (or a student health plan), HHS will send notification to each health insurance issuer of the plan. The notification will inform the issuer or carrier of the eligible organization's objection and will list the contraceptive services that are objected to. Unless the issuer has its own objection to providing contraceptive services, the issuer will be responsible for compliance with statutes and regulations to provide coverage for contraceptive services without cost sharing to participants notwithstanding that the policyholder is objecting.

Participants (employees and their covered spouses and dependents) will still have seamless access to contraceptive services at no cost, but the accommodations will shift the cost burden of the contraceptive services away from an employer that is an eligible organization.

Because the final rule has expanded the types of organization that are eligible for the exemption, an employer who is currently using the accommodation process described above may decide to revoke its use of the accommodation and use the exemption when this final rule takes effect.

When an employer revokes its accommodation, the group health plan, issuer, or TPA must promptly notify plan participants and beneficiaries of the employer's change of status (from using the accommodation process to using the exemption) to alert plan participants and beneficiaries that their contraceptive coverage is changing.

The final rules provide a transition rule for providing notice to plan participants and beneficiaries in cases where contraceptive benefits will no longer be provided:

- A plan may give 60 days' notice for revoking an accommodation when the plan is using the accommodation at the time that this final rule is published; or
- A plan may revoke its use of the accommodation process effective on the first day of the first plan year that begins on or after 30 days after the revocation date.

However, for plans that use the accommodation in future years (plan years that begin after this final rule's effective date) and want to change to exempt status, a plan's accommodation revocation effective date will be effective on the first day of the next plan year that begins on or after 30 days after the accommodation revocation date. Under the final rule, for employers who choose to revoke their accommodation status and make use of the expanded exemption for the next plan year, these employers will generally be able to avoid sending supplementary notices to plan participants and beneficiaries beyond what would normally be sent prior to the start of a new plan year.

The final rule retains the exemption that allows an individual to assert an objection to some or all contraceptives. The final rule provides the following example of the way the individual exemption may apply in the context of employer-sponsored health coverage.

> An employee is enrolled in group health coverage through her employer. The plan is fully insured. If the employee has sincerely held religious beliefs objecting to her plan including coverage for contraceptives, she could raise this with her employer. If the employer is willing to offer her a plan that omits contraceptives, the employer could discuss this with the insurance agent or issuer. If the issuer is also willing to offer the employer, with respect to this employee, a group health insurance policy that omits contraceptive coverage, the individual exemption would make it legal for the group health insurance issuer to omit contraceptives for her and her beneficiaries under a policy, for her employer to sponsor that plan for her, and for the issuer to issue such a plan to the employer, to cover that employee. This would not affect other employees' plans—those plans would still be subject to the Mandate and would continue to cover contraceptives. But if either the employer, or the issuer, is not willing (for whatever reason) to offer a plan or a policy for that employee that omits contraceptive coverage, these rules do not require them to. The employee would have the choice of staying enrolled in a plan with its coverage of contraceptives, not enrolling in that plan, seeking coverage elsewhere, or seeking employment elsewhere.

Finally, the final rule applies to the federal contraceptive mandate only. It does not regulate state contraceptive mandates or state religious exemptions. This means that if an employer's plan is exempt from the federal contraceptive mandate under this final rule, the federal exemption doesn't necessarily mean that the employer's plan is exempt from state law that may apply to it.

Exemption for Moral Convictions

These rules expand exemptions to protect moral beliefs for certain entities (such as employers) and individuals whose health plans are subject to a contraceptive coverage mandate under the ACA.

Although these rules do not alter the HHS' Health Resources and Services Administration's discretion to maintain guidelines requiring contraceptive coverage where no legally recognized objection exists, the contraception mandate will not apply to group health plans maintained or established by the following organizations (or health insurance coverage offered or arranged by the following organizations):

- Non-governmental plan sponsors that are either non-profit organizations or closely held for-profit entities that have no publicly traded ownership interests;
- Non-governmental higher education institutions;
- Health insurance issuers;

to the extent that the plan sponsor or higher education institution objects, based on its sincerely held moral convictions, to either:

- establishing, maintaining, providing, offering, or arranging for coverage or payments for some or all contraceptive services; or
- establishing, maintaining, providing, offering, or arranging for a plan, issuer, or third-party administrator that provides contraceptive coverage.

The exemption that applies to non-governmental plan sponsors above applies to each employer, organization, or plan sponsor that adopts the plan. Issuers that hold their own objections based on sincerely held moral convictions could issue policies that omit contraception to plan sponsors or individuals that are exempt based on their moral convictions.

Contraceptive services are defined to include contraceptive or sterilization items, procedures, or services, or related patient education and counseling.

These rules also make the accommodation process (described earlier and which was previously established for religious organizations that objected to the contraceptive mandate) available as an optional process for the exempt organizations above to use voluntarily. This means that objecting employers can either use the exemption above, or the optional accommodation process that is already in place.

The final rule retains the exemption that allows an individual to assert an objection to some or all contraceptives. The final rule provides the following example of how the individual exemption may apply in the context of employer-sponsored health coverage.

> An employee is enrolled in group health coverage through her employer. The plan is fully insured. If the employee has sincerely held moral convictions objecting to her plan including coverage for contraceptives, she could raise this with her employer. If the employer is willing to offer her a plan that omits contraceptives, the employer could discuss this with the insurance agent or issuer. If the issuer is also willing to offer the employer, with respect to the employee, a group health

insurance policy that omits contraceptive coverage, the individual exemption would make it legal for the group health insurance issuer to omit contraceptives for her and her beneficiaries under her policy, for her employer to sponsor that plan for her, and for the issuer to issue such a plan to the employer, to cover that employee. This would not affect other employees' plans—those plans would still be subject to the Mandate and would continue to cover contraceptives. But if either the employer, or the issuer, is not willing (for whatever reason) to offer a plan or a policy for that employee that omits contraceptive coverage, these rules do not require them to do so. The employee would have the choice of staying enrolled in a plan with its coverage of contraceptives, not enrolling in that plan, seeking coverage elsewhere, or seeking employment elsewhere.

Finally, the final rule applies to the federal contraceptive mandate only. It does not regulate state contraceptive mandates or state exemptions. This means that if an employer's plan is exempt from the federal contraceptive mandate under this final rule, the federal exemption doesn't necessarily mean that the employer's plan is exempt from state law that may apply to it.

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 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.'"

To address the Court's statement, the Departments published their request for information (RFI) regarding the Court's statement and received more than 54,000 public comments. Based on the comments submitted, the Departments released FAQs About Affordable Care Act Implementation Part 36 to indicate that they not making changes to the accommodation for the following reasons:

- No feasible approach has been identified that would resolve the religious objectors' concerns, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage.
- The process described in the Court's supplemental briefing order would not be acceptable to those with religious objections to the contraceptive coverage requirements.
- There are administrative and operational changes to a process like the one described in the Court's order that are more significant than the Departments had previously understood and that would potentially undermine women's access to full and equal coverage.

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 (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 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.

On December 15, 2017, the U.S. District Court for the Eastern District of Pennsylvania (Pennsylvania Court) granted a preliminary injunction that prohibited the enforcement of the 2017 Interim Final Rules.

On December 21, 2017, the U.S. District Court for the Northern District of California (California Court) granted a nationwide preliminary injunction that prohibited the enforcement of the 2017 Interim Final Rules. By prohibiting the enforcement of the Interim Final Rules, the California Court held that the contraception mandate exemption and accommodation rules that existed following the *Zubik* case prior to the Interim Final Rules would remain in effect. This order was largely affirmed by the U.S. Court of Appeals for the Ninth Circuit, however the scope of the injunction was limited to the plaintiff states seeking the injunction.

Conclusion

The final rules expand the religious belief exemption and moral conviction exemption to allow 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 non-governmental higher education institutions in their arrangement of student health plans. The exemption also encompasses employers who object to providing contraception coverage on the basis of sincerely held moral convictions, and non-governmental higher education institutions in their arrangement of student health plans. Further, if a health insurance issuer has sincerely held religious beliefs or sincerely held moral convictions, it would be exempt from having to sell coverage that provides contraception. The exemptions apply to both non-profit and for-profit entities.

Practically speaking, although exempt employers do not need to file notices or certifications of their exemption, if a plan is subject to ERISA, then the plan document must include a comprehensive summary of covered benefits and a statement of the conditions for eligibility to receive benefits. Under ERISA, the plan document identifies what benefits are provided to participants and beneficiaries under the plan. If an employer excludes some or all contraceptive services, the plan document must include the exclusion. Similarly, if there is a reduction in a covered service or benefit, the plan must disclose that change to plan participants.

Due to the nationwide injunction against the enforcement of the final religious exemption and moral exemption rules, employers were to comply with the contraception mandate exemption and accommodation final rules that existed prior to the 2017 interim final rules. Under the final rules issued in 2015, only group health plans of religious employers may qualify for an exemption from the contraception mandate and only eligible organizations may qualify for an accommodation. However, with the permanent injunction issued by the Texas Court on June 5, 2019, all employers who object to contraceptive coverage based on sincerely held religious beliefs are no longer required to comply with the ACA's contraception mandate for those contraceptives to which they object. Further, these employers are exempt from using the accommodations process. Employers that do not object to complying with the contraception mandate due to sincerely held religious beliefs should continue to provide coverage for contraceptives.

10/6/2017
Updated 12/1/2017
Updated 11/12/2018
Updated 1/16/2019
Updated 6/11/2019
Updated 7/17/2019
Updated 10/25/2019
Updated 2/4/2020