

FEDERAL MANDATE FOR NO-COST WOMEN'S CONTRACEPTIVE SERVICES CONTINUES TO RECEIVE SCRUTINY

This installment of Hall Render's Health Law Broadcast series on health care reform is designed to provide you with the insight, analysis and practical suggestions with respect to the various reform initiatives that will affect your organization.

On February 10, 2012, President Obama announced that his Administration will continue with its plan to mandate that employers provide contraceptive services to female health plan participants without cost sharing (such as a copayment, coinsurance or a deductible). However, in an effort to address the concerns of religious-affiliated employers whose religious tenets conflict with the mandate, the President also announced that his Administration will provide an accommodation for such religious-affiliated employers who are not otherwise exempt from the rule. This most recent announcement is the latest in a series of developments over the past several months regarding the provision of women's preventive health services and the implications for religious-affiliated employers, as summarized below.

BACKGROUND

Included among the provisions of the Patient Protection and Affordable Care Act ("ACA") is a requirement for non-grandfathered group health plans and health insurance issuers offering group or individual health insurance coverage to provide certain preventive health services to participants without the imposition of cost sharing. The ACA delegated to various federal agencies the task of identifying which preventive health services would be covered by the rule. The Health Resources and Services Administration ("HRSA"), an agency of the U.S. Department of Health and Human Services ("HHS"), was charged with the task of developing guidelines for the provision of women's preventive health services.

WOMEN'S PREVENTIVE HEALTH SERVICES - CONTRACEPTIVE SERVICES

On August 1, 2011, HRSA issued its guidelines for women's preventive health services ("HRSA Guidelines") based on the recommendations of the Institute of Medicine ("IOM"). In addition to well-women visits, gestational diabetes screenings, counseling and testing for sexually transmitted infections, breastfeeding support and domestic violence counseling and screening, the HRSA Guidelines included the provision of contraceptive methods and counseling, which is defined as all Food and Drug Administration approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity ("Contraceptive Services"). In support of its decision to include Contraceptive Services in the HRSA Guidelines, HRSA relied upon a report issued by IOM titled "Clinical Preventive Services for Women: Closing the Gaps." Except as described herein, health plans and health insurance issuers are generally required to provide coverage consistent with the HRSA Guidelines, without cost sharing, in plan years beginning on or after August 1, 2012.

It should be noted that the HRSA Guidelines do not preclude employers or others from expressing opposition, if any, to the use of contraceptives, nor do the HRSA Guidelines require any party to use contraceptives or require any health care provider to prescribe contraceptives if doing so is against such party's or health care provider's religious beliefs. More information on provider conscience rules can be found here: <http://www.hallrender.com/library/articles/783/032911HLN.html>.

EXEMPTION FOR RELIGIOUS EMPLOYERS

On August 3, 2011, the Internal Revenue Service, Department of the Treasury; Employee Benefits Security Administration, Department of Labor; and Centers for Medicare and Medicaid Services, Department of Health and Human Services (the "Departments") amended their respective interim final regulations regarding preventive health services, which were originally issued on July 19, 2010, to allow an exemption from providing Contraceptive Services for "religious employers," in light of the inclusion of Contraceptive Services in the HRSA Guidelines. As drafted, a religious employer is an employer that:

- Has religious values as its purpose;
- Primarily employs persons who share its religious tenets;
- Primarily serves persons who share its religious tenets; and

- Is a nonprofit organization under Internal Revenue Code section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) (i.e., churches, integrated church auxiliaries, conventions or associations of churches and religious orders).

This definition of "religious employer" essentially limits the types of entities that can qualify for the exemption to churches and religious orders, while excluding employers such as religious-affiliated hospitals, health systems, universities, self-insured trusts and other entities (both nonprofit and for-profit). The Departments solicited comments regarding the exemption and the definition of a religious employer, with comments due by September 30, 2011.

JANUARY 20, 2012 ANNOUNCEMENT

On January 20, 2012, HHS announced its intent to go forward with the inclusion of Contraceptive Services in the HRSA Guidelines and not alter the definition of religious employer for purposes of the exemption. However, recognizing the concerns of religious-affiliated employers, HHS provided that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law."

FEBRUARY 10, 2012 ANNOUNCEMENT

The January 20th announcement triggered wide-ranging responses from the public. In particular, religious-affiliated employers and other interested parties expressed concern over the implications for religious liberty and conscience protections. In an effort to address such concerns, on February 10, 2012, the Administration announced several developments. First, the Administration reiterated that a temporary enforcement safe harbor period of one year (delaying enforcement until plan years beginning on or after August 1, 2013) would be provided for nonprofit employers with religious objections to the provision of Contraceptive Services ("Enforcement Safe Harbor"). According to guidance issued the same day by HHS, a religious-affiliated employer, group health plan or group health insurance issuer will qualify for the Enforcement Safe Harbor if it satisfies four criteria:

- The organization is organized and operates as a nonprofit entity;
- From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan established or maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization;
- The group health plan established or maintained by the organization (or another entity on behalf of the plan, such as a health insurance issuer or third-party administrator) must provide to participants a notice, which states that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012; and
- The organization must self-certify that it satisfies criteria 1-3 above and document its self-certification pursuant to procedures established by HHS.

The Administration also announced that during the period of the Enforcement Safe Harbor, the Departments plan to develop additional regulations that will accommodate non-exempted, nonprofit employers' religious objections to covering Contraceptive Services but still provide for the provision of Contraceptive Services in some manner. For example, the Administration has indicated that non-exempted, religious-affiliated employers with insured health plans will not be required to subsidize the cost of Contraceptive Services. Instead, the insurance companies of such employers will be required to offer coverage for Contraceptive Services directly to covered persons, with no role for the religious-affiliated employer. Further, the Administration intends for the Departments to develop policies to achieve the same goals for self-insured group health plans sponsored by non-exempted, religious-affiliated employers with religious objections to coverage of Contraceptive Services. Details of these announcements were subsequently published on February 15th in the Federal Register.

THE HORIZON

Several uncertainties still remain following the February 10th announcement. For instance, the Administration and the Departments have indicated that religious-affiliated self-insured group health plans will be addressed in subsequent regulations, but no indication has been provided for how such self-insured group health plans might be handled. Furthermore, the Enforcement Safe Harbor explained above appears to only apply to nonprofit, religious-affiliated employers, so it is unclear whether relief will be available to related for-profit organizations. Meanwhile, legislation has been introduced in Congress to address some of these concerns, and religious organizations such as the United States Conference of Catholic Bishops have expressed their displeasure with the approach unveiled by the Administration. Given these uncertainties and pending actions, it is difficult to predict the ultimate fate of the HRSA Guidelines. Nonetheless, all employers should be aware of their duties concerning the coverage of preventive health services, and religious-affiliated employers should closely

monitor developments with respect to the HRSA Guidelines and Contraceptive Services.

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