



White House Narrows ACA Contraception Mandate

Insights

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The Department of Health and Human Services (HHS) just issued new rules which will limit the contraception coverage mandate covering employers under the Affordable Care Act (ACA). The new rules, released Friday, expand the range of employers and insurers that can invoke religious or moral beliefs to avoid the ACA's requirement that birth control pills and other contraceptives be covered by insurance as part of preventive care.

Background: Contraception Mandate Leads To Controversy

When first enacted in 2010, the ACA including a requirement that employer-provided health insurance policies include coverage for preventive health care. Soon thereafter, the HHS published regulations implementing the law, one of which specified that FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity were to be included in those preventive services.

Religious organizations protested this requirement, pointing out that they should be able to refuse this coverage given that it violated their religious beliefs. Accordingly, the regulations implementing the contraception mandate were amended in 2011 to provide an exemption for religious employers with respect to coverage of contraceptive services. The regulations were again amended in 2013 to provide accommodations for nonprofit religious organizations that do not qualify for the religious exemption but have religious objections to contraceptives. The religious accommodation was extended to certain closely held, for-profit entities in 2015.

This controversy made national headlines in 2014 when the Supreme Court ruled on the *Burwell v. Hobby Lobby Stores, Inc.* case. In that decision, the Supreme Court held in favor of three for-profit employers that challenged the contraceptive coverage mandate because the business owners asserted religious objections to providing certain types of contraceptives. The Court held that the requirement to provide contraceptive coverage, as applied to "closely held" for-profit corporations, violates the Religious Freedom Restoration Act (RFRA) if the coverage would be contrary to the owners' religious beliefs, unless there is a compelling governmental interest that cannot be satisfied by any less restrictive means.

The Latest

On May 4, 2017, President Trump issued an executive order called "Promoting Free Speech and Religious Liberty," in which he directed his cabinet to address the concerns of those who had

conscience-based objections” to contraceptive coverage. In furtherance of this executive order, the Trump administration took the next step in the battle between religious freedom and reproductive rights on October 6 by expanding the types of organizations that are eligible for the religious exception to the ACA’s contraception mandate.

The exemption may now be claimed by nonprofit organizations, for-profit companies (even ones that are publicly traded), higher education institutions that arrange for insurance for their students, as well as individuals whose employers are willing to provide health plans consistent with their beliefs. A separate rule covers moral objections, allowing exemptions under similar circumstances (but not for publicly traded companies).

The release of the new HHS rules was synchronized with guidance by Attorney General Jeff Sessions on the Justice Department’s interpretation of religious liberties, which was also released to all executive departments and agencies on Friday.

What This Means For Employers

The new rules immediately carve broad exceptions to the Affordable Care Act’s promise of no-cost contraceptive coverage, which are certain to ignite new lawsuits and revive debate about the proper scope of religious liberty in the workplace. It is unclear at this point exactly what the scope of impact will be.

HHS officials have stated that, based on the groups that have already filed lawsuits over the provisions, the change will still leave “99.9 percent of women” with access to free birth control through their insurance. Meanwhile women’s rights and civil liberties groups are portraying the new rules as a massive discriminatory blow. Regardless, employers that utilize this broadened exemption can expect to be targeted by civil rights and medical rights groups, and should anticipate potential litigation. The rules may also spark argument about the role of religion in the workplace.

Employers planning to take action in response to the new rules need to discuss their plans with counsel to ensure that their actions will not expose them to liability under any of the numerous laws protecting equal rights and religious liberties. For more information, contact any member of our [Employee Benefits Practice Group](#) or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal executive action. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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