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The Affordable Care Act's Contraceptive Coverage Requirement: History of Regulations for Religious Objections

The Affordable Care Act (ACA; P.L. 111-148) requires that group health plans and health insurance issuers provide coverage for certain preventive health services without imposing any cost-sharing requirements. 42 U.S.C. §300gg-13(a)(4). The preventive services covered include Food and Drug Administration (FDA)-approved contraceptive methods, which generated controversy among employers who oppose the use of contraception based on their religious beliefs. This requirement has been implemented through a series of administrative regulations since 2010, when ACA was enacted. *See* U.S. Dep't of Health and Human Services, Health Resources and Services Adm., *Women's Preventive Services Guidelines, available at* http://www.hrsa.gov/womensguidelines/.

July 2010 Interim Final Rules, August 2011 Interim Final Rules, and February 2012 Final Rules

In July 2010, the Obama Administration issued interim final rules to address the coverage of preventive health services. 75 Fed. Reg. 41,726 (July 19, 2010). In August 2011, in response to comments received about these regulations, an interim final rule amending the July 2010 regulations was published, under which the Health Resources and Services Administration could exempt religious employers from the contraceptive coverage requirement. 76 Fed. Reg. 46,621 (August 3, 2011). Under that iteration of the rule, religious employers would qualify for exemption if

> (1) the inculcation of religious values is the purpose of the organization;
>
> (2) the organization primarily employs persons who share the religious tenets of the organization;
>
> (3) the organization serves primarily persons who share the religious tenets of the organization; and
>
> (4) the organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) [of the tax code].

Although this definition was criticized for excluding many religious organizations that provide health, education, or charitable services, the Obama Administration adopted it in final rules published in February 2012. 77 Fed. Reg. 8,725 (February 15, 2012). While the definition of religious employers for the purposes of exemption was finalized by these rules, a number of entities that would not qualify under the definition of religious employer continued to voice concerns about interference with their religious exercise.

As a result, the Administration indicated in the February 2012 rules that the ACA rules would be amended further to accommodate these nonprofit organizations by requiring issuers serving those organizations to offer contraceptive coverage to employees directly without cost to the employer. In March 2012, the Administration formally announced in an Advanced Notice of Proposed Rulemaking that it would be proposing amendments to the February 2012 final rules to provide alternatives for compliance with the coverage requirements by organizations that did not qualify for the exemption. 77 Fed. Reg. 16,501 (March 21, 2012).

In the meantime, the February 2012 rules provided a temporary enforcement safe harbor for nonexempt nonprofit organizations with religious objections to contraceptive coverage. The safe harbor was in effect until the first plan year which began on or after August 1, 2013. For protection under the safe harbor, an organization had to meet four criteria, including be organized as a nonprofit entity; not offer contraceptive coverage since promulgation of the final rules; provide notice to participants of noncoverage; and self-certify compliance with safe harbor criteria. The safe harbor means that any organization that met these criteria would not be subject to penalties for noncompliance prior to the safe harbor's termination.

February 2013 Proposed Amendments to February 2012 Final Rules

The Obama Administration issued proposed amendments in February 2013 to the February 2012 rules. 78 Fed. Reg. 8,456 (February 6, 2013). The February 2013 proposed rules addressed concerns of religious entities in two ways: expanding the *exemption* adopted by the February 2012 rules and offering an *accommodation* to organizations that do not qualify for the exemption. First, the proposed amendments eliminated the first three criteria originally required to qualify as a religious organization for purposes of exemption, and also limited the applicable subsections of the tax code to only 26 U.S.C. §6033(a)(3)(A)(i) or (iii). Thus, to qualify for exemption, a religious employer must be covered under the given tax code provisions, which generally encompass churches, church auxiliaries, church associations, or other religious orders. Under the exemption, employees of religious employers would not receive contraceptive coverage either from their employer or from the issuer directly. Second, the proposed amendments included an accommodation for other organizations with religious objections to contraceptive coverage that would not qualify for the exemption. To accommodate these other eligible organizations, the proposed amendments shifted responsibility for providing

contraceptive coverage for such organizations' employees to the issuer instead of the employer. To qualify for the accommodation, organizations were required to

(1) object to coverage of at least some of the contraceptive services based on religious beliefs;

(2) be a nonprofit entity;

(3) hold itself out as a religious organization; and

(4) comply with the self-certification requirements of the rule.

Under the accommodation, employees of eligible organizations would not receive contraceptive coverage from their employer, but would have coverage provided directly through the health plan issuer at no cost to the employee or employer.

July 2013 Final Rules

In July 2013, the Administration issued final rules regarding requirements for contraceptive coverage. 78 Fed. Reg. 39,870 (July 2, 2013). The final rules included no significant changes to the February 2013 proposed rules defining religious employers and providing for accommodations of other eligible organizations. Under the final rules, the definition of religious employer included only those nonprofit employers qualifying under subsections 6033(a)(3)(A)(i) or 6033(a)(3)(A)(iii) of the tax code. 26 U.S.C. §6033. Additionally, the final rules adopted the proposed definition of eligible organizations for purposes of the accommodation discussed in the preceding paragraph. Under the final rules issued in July 2013, organizations claiming eligibility for the accommodation were required to submit a self-certification form, known as EBSA Form 700. The religious employer exemption provided by the final rules applies to plan years that began on or after August 1, 2013, and the remaining provisions of the final rules apply to group health plans and issuers for plan years that began on or after January 1, 2014. In other words, the safe harbor from enforcement was extended to allow health plan issuers and administrators time to implement the accommodations provided by the final rules.

August 2014 Interim Final and Proposed Rules

In the summer of 2014, the Supreme Court issued two decisions that led to further changes to the regulations with respect to religious objections. In *Burwell v. Hobby Lobby Stores, Inc.*, the Court held that religious objections of closely held, for-profit corporations to the contraceptive coverage requirement must be accommodated under the Religious Freedom Restoration Act (P.L. 103-141). 134 S.Ct. 2751 (2014). In *Wheaton College v. Burwell,* the Court issued temporary relief to a nonprofit employer with objections to the self-certification process required under the July 2013 regulations. 134 S.Ct. 2806 (2014). The Court's order in *Wheaton* allowed the school to notify the U.S. Department of Health and Human Services (HHS) in writing that it met the eligibility requirements rather than submit EBSA Form 700, pending its appeal in the case.

Subsequently, the Obama Administration announced new regulatory actions to address both the *Hobby Lobby* decision and the *Wheaton College* order in August 2014. First, new interim final rules established an alternative process for eligible employers to provide notice of religious objections and request accommodation. 79 Fed. Reg. 51,092 (August 27, 2014). Under the August 2014 interim final rules, such employers may use the self-certification form *or* may notify HHS in writing. If an employer opts to submit written notice, the employer must include its name; the basis of its qualification for accommodation; its religiously based objection to contraceptive coverage; a list of the particular contraceptive services to which it objects; the plan name and type; and the contact information for its plan's third-party administrators and health insurance issuers. These rules went into effect upon publication to ensure that similarly situated employers had the same option provided under the Supreme Court's order.

Additionally, the Administration issued notice of proposed rulemaking to address the scope of organizations eligible for accommodation, particularly with respect to the status of for-profit entities with religious objections, following *Hobby Lobby*. 79 Fed. Reg. 51,118 (August 27, 2014). Under the August 2014 proposed rules, the definition of eligible organization for the accommodation would be amended to include certain closely held for-profit entities.

Thus, to qualify for accommodation under the proposed rules and interim final rules issued in August 2014, organizations must

(1) object to coverage of at least some of the contraceptive services based on religious beliefs;

(2) be organized as either (a) a nonprofit entity holding itself out as a religious organization, or (b) a closely held for-profit entity with objections based on the owners' religious beliefs, as determined under its rules of governance; and

(3) comply with self-certification requirements or provide the prescribed written notice to HHS.

Citing examples in federal law, the proposed regulations offered two options for comments to determine which closely held entities should qualify for accommodation, depending either on (1) a threshold number of owners or (2) a threshold concentration of ownership. *See* 79 Fed. Reg. 51,122 (August 27, 2014). The Administration has not indicated a timeline for future actions regarding these rules.

For a comprehensive legal analysis of the contraceptive coverage litigation, see CRS Report R43654, *Free Exercise of Religion by Closely Held Corporations: Implications of Burwell v. Hobby Lobby Stores, Inc.*, by Cynthia Brown.

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