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Legal Sidebar

New Interim Final Rules Expand Options for Employers with Religious or Moral Objections to Contraceptive Coverage

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The Departments of the Treasury, Labor, and Health and Human Services (HHS) have jointly issued new regulations to address certain employers' religious and moral objections to providing contraceptive coverage without cost in their group health plans, likely ending long-standing litigation, but prompting court challenges over the new rules. The new regulations interpret a statutory requirement from the Affordable Care Act (ACA) that group coverage plans and health insurance issuers provide coverage for "preventive care" with no-cost sharing requirement for employees. The Obama Administration interpreted this requirement to necessitate the inclusion of contraceptive services as covered preventive care, and the new rules do not eliminate this inclusion. In comments about the scope of the new regulations, however, the agencies indicated their belief that, as long as federal guidelines continue to require contraceptive coverage, the alternatives available to employers with objections to the required coverage must be expanded. Specifically, the Trump Administration explained that the expansion aims "to better balance the Government's interest in ensuring coverage for contraceptive and sterilization services in relation to the Government's interests ... to provide conscience protections for individuals and entities with sincerely held religious beliefs." While the interim final rules took effect upon publication, the three agencies have invited comments by December 5, 2017.

As background, the previous iteration of the religious objection rules provided first for an *exemption* to the contraceptive coverage requirement for certain religious institutions (e.g., churches, church auxiliaries, church associations, or other religious orders) based on their status under the tax code. Second, for certain employers with religious objections that were ineligible for the exemption, the religious objection rules allowed for an *accommodation* that generally allowed for the employer's health insurance issuer or third-party administrator, rather than the employer itself, to directly provide cost-free contraceptive coverage.

The new rules expand the availability of the exemption. First, the exemption can now be based on both religious and moral grounds. Second, the exemption covers a broader range of employers than before, such as, but not limited to:

- churches, church auxiliaries, church associations, or religious orders;

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- nonprofit organizations;
- closely held and not closely held for-profit entities;
- institutions of higher education; and
- "any other non-governmental employer."

The agencies also amended the accommodation, describing it as an "optional accommodation" available to entities that qualify for the exemption. Under the new accommodation, covered entities can "voluntarily elect" to have a third party provide coverage by self-certifying (or otherwise notifying) their religious or moral objections to HHS.

The interim final rule on religious objections may be seen as a response to litigation of the previous rules adopted under the Obama Administration. Employers that did not qualify for the exemption or the accommodation under the previous version of the rules challenged them under the Religious Freedom Restoration Act (RFRA). RFRA prohibits the government from substantially burdening a person's religious exercise without demonstrating that the burden was justified by a compelling interest and is achieved by the least restrictive means of furthering that interest. The Court considered questions related to religious objections in *Burwell v. Hobby Lobby Stores, Inc.* in 2014 and *Zubik v. Burwell* in 2016.

Hobby Lobby involved a closely held corporation that successfully challenged the exclusion of for profit employers from the previous rule's exemption or accommodation. (For more on *Hobby Lobby,* see this CRS Report). The decision resulted in the agencies expanding the availability of a previous version of the accommodation to include closely held for-profit entities. The new rules go beyond the previous ones by specifically extending the exemption to both closely held for profit employers as well as those that are not closely held.

Zubik concerned a group of seven consolidated challenges to the self-certification requirement of the accommodation brought by nonprofit employers that believed that the accommodation effectively made them complicit in the provision of services to which they objected. The Court in *Zubik* vacated and remanded the cases to the respective appellate courts for reconsideration after giving the parties an opportunity to "arrive at an approach going forward that accommodates" both parties' interests. Since the Court's order in May 2016, the issues raised in those cases have not been resolved, and the Obama Administration's final rules remained in effect. With the Trump Administration's issuance of the most recent interim final rules, however, the issues raised by nonprofit organizations in *Zubik* appear moot. Those organizations—excluded by definition from the previous rule's exemption—are now eligible for the exemption, allowing them to not offer contraceptive coverage without penalty or self-certification for alternative coverage directly through other providers. Moreover, because the new rules make the accommodation optional for any employers that otherwise qualify for the exemption, employers who have religious or moral objections to providing coverage themselves, but do not object to the provision of coverage through a third party, can voluntarily avail themselves of the accommodation process.

Notably, the Trump Administration's new regulations also provide an exemption for employers with objections based on "sincerely held moral convictions." The rules do not include a definition or standard for what beliefs would qualify as sincerely held moral convictions, though. Previous iterations of the religious objection rules issued under the Obama Administration did not include such protection, and federal district courts have reached different conclusions about whether such protections were legally required.

The Trump Administration's rules appear to address the longstanding objections of employers who object on religious or moral grounds to providing contraceptive coverage. Some litigants have reached settlements in their cases following the issuance of the rules, although others have announced that they will continue litigating their claims. The new rules have already been challenged in newly filed litigation, however, illustrating that the debate over the proper scope of the regulations will continue. A number of

lawsuits have been filed to challenge the interim final rule, including complaints in California, the District of Columbia, and Washington. The new lawsuits allege several constitutional claims, including that the rules violate the Establishment Clause of the First Amendment and equal protection principles guaranteed by the Fifth Amendment, arguing that the interim final rule "endorses and promotes certain religious beliefs at the expense of third parties." In addition to these claims, the lawsuits also allege violations of the Administrative Procedure Act (APA), raising both procedural challenges (i.e., arguing the government failed to provide the opportunity for notice and comment prior to the rules taking effect) and substantive challenges (i.e., arguing the government's actions were arbitrary and capricious or otherwise not in conformity with the law) under that statute. Legal scholars highlighted some of the questions under this theory, particularly with regard to the new rules for moral objections, which apply to a different range of entities than the new rules for religious objections discussed above.

Of note to Congress, the preventive health services requirement is a statutory requirement under the ACA that has been interpreted by federal agencies to require inclusion of contraceptive services through agency guidelines. Additionally, federal agencies—not Congress—have thus far determined the scope of the related exceptions (i.e., the exemption and accommodation) through implementing regulations associated with the statutory requirement. Importantly, however, these decisions could be defined by statute, meaning that Congress could set the scope of coverage of preventive health services or the scope of related exceptions, rather than delegating to the agencies. Legislation has been introduced in the 115th Congress that would codify the Obama era contraceptive coverage requirements (see S. 1045), while other examples of legislation from previous Congresses have proposed providing more robust protections for religious entities concerned with the contraceptive coverage requirement (see H.R. 940 and S. 1919 in the 114th Congress)

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