

Health Care Reform Management Alert Series



Proposed Regulations Change Contraceptive Coverage Rules for Religious Employers Issue 51

This is the fifty-first issue in our health care reform series of alerts for employers on selected topics in health care reform. (Our general summary of health care reform and other issues in this series can be accessed by clicking [here](#).) This series of Health Care Reform Management Alerts is designed to provide a more in-depth analysis of certain aspects of health care reform and how it will impact your employer-sponsored plans.

The Affordable Care Act (ACA) requires that non-grandfathered group health plans offer certain preventive health services to women, including contraceptive services, with no cost-sharing. This issue supplements Issues 10 and 25 of our Health Care Reform Management Alert Series, which addressed IRS, DOL and HHS (the “Agencies”) previous guidance on preventative care coverage requirements and the contraceptive coverage exemption for religious employers.

Religious Employer Exemption

In 2011, pursuant to authority granted to the Health Resources Services Administration (HRSA) by interim final rules, the HRSA issued Guidelines exempting certain religious employers from the requirement to cover contraceptive services. “Religious employers” include certain non-profit employers whose purpose is the “inculcation of religious values”, and who primarily employ and serve persons with the same religious tenets.

Applies to grandfathered plans

Applies to new health plans

Temporary Enforcement Safe Harbor

Following objection from religious organizations that this exemption was too narrow, HHS issued a one-year enforcement safe harbor and agreed not to take enforcement action, until the first plan year that begins on or after August 1, 2013, against an employer, group health plan or issuer for failing to cover contraceptive services if the plan is maintained by an organization that:

- Operates as a non-profit entity;
- Has not covered contraceptive services under any plan maintained since February 10, 2012, due to religious beliefs;
- Provides a notice to participants indicating that contraceptive services will not be covered for the first plan year beginning on or after August 1, 2012; and
- Self-certifies that it satisfies these requirements.

Proposed Changes

On January 30, 2013, the Agencies released proposed regulations which would amend the criteria for the religious employer exemption and allow “eligible organizations” to opt out of paying for some or all of the contraceptive services required to be covered. The regulations provide an accommodation for these eligible organizations, meaning an arrangement under which contraceptive coverage is provided (without cost sharing) to participants, independent of the coverage provided by the eligible organization.

Broadened Definition of “Religious Employer”

In response to concerns expressed by faith-based employers over the exclusion of religious employers that serve the wider community (such as churches providing social services) or regularly employ individuals of other faiths (such as parochial schools), the proposed regulations would broaden the definition of who qualifies as a “religious employer”, expanding the number of employers who qualify for the exemption. Under the new proposed regulations, “religious employers” would include all non-profit churches, church-integrated auxiliaries, conventions/associations of churches, and exclusive religious activities of any religious order regardless of who they employ, who they serve, or the employer’s primary purpose.

Accommodations for “Eligible Organizations” with Religious Objections

A non-profit faith-based organization (such as a hospital, educational institution, or charity) that objects to covering contraceptives under their group health plans due to religious reasons, but does not otherwise qualify for the religious employer exemption, may opt out of paying for coverage. In order to opt out, the organization must annually self-certify that it is eligible to opt out. The self-certification would list the contraceptive services that the organization will not cover. For employers with insured plans, upon presenting a copy of the self-certification to the insurance company, the insurer must provide a separate individual health policy covering contraceptives at no cost to plan participants and beneficiaries. Insurers would have to provide notice to plan participants regarding the availability of the separate coverage, and the proposed regulations provide model notice language. The Agencies intend to provide guidance for self-insured plans in the future. (The discussion in the preamble to the proposed regulations anticipates that self-insured plans would have to arrange for separate individual health insurance policies for contraceptive coverage.)

Although for-profit, secular employers have filed lawsuits objecting to covering contraceptives for moral or religious reasons, The proposed regulations would not permit for-profit entities to opt out of paying for contraceptive services. Where there are several affiliated employers, the exemption for religious employers and the accommodation of eligible organizations would apply on an employer by employer basis.

The Agencies are seeking comments on the scope of the religious employer exemption, on the proposed accommodations for eligible organizations, on alternative approaches for self-insured plans, and on which provisions of federal law should apply if the individual health insurance policies providing contraceptive services are considered “excepted benefits”.

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