



## **Contraceptive Rights: Not UnProtected!**

### **Background**

The Affordable Care Act (“ACA”) included a requirement for non-grandfathered, employer-provided health insurance plans to cover certain preventative services for women. Guidance issued during the Obama Administration interpreted this requirement, known as the Women’s Health Amendment, to include all contraception methods approved by the Food and Drug Administration (“FDA”). Subsequent regulations allowed for religious employers (defined by law) to request exemptions from providing birth control, although the implementation of these exemptions proved difficult and became the subject of vigorous litigation prior to the 2016 Presidential election.

In 2017, the Trump Administration issued temporary regulations in an effort to expand and clarify the religious exemptions already established under the Obama administration. Once released, the 2017 regulations were immediately challenged in court, resulting in a preliminary injunction prohibiting their application. The Trump administration made a second attempt in late 2018 to issue regulations to provide religious and moral exemptions to the contraceptive mandate.

On November 15, 2018, the Departments of Health and Human Services, Treasury, and Labor released two final rules to provide certain employers with a religious or moral objection to health insurance that covers contraception methods. The final rules are titled the Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,536 (“Final Religious Exemption Rule”) and Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592 (“Final Moral Exemption Rule”).



The first rule provides an exemption from the contraceptive coverage mandate to entities that object to services covered by the mandate on the basis of sincerely held religious beliefs. The second rule provides protections to nonprofit organizations and small businesses that have non-religious moral convictions opposing services covered by the mandate. The religious and moral exemptions provided by these rules also apply to institutions of education, health insurance issuers serving exempt entities, and individuals. The Final Moral Exemption Rule is not extended to publicly traded businesses, or to government entities.

### **Final Religious Exemption Rule**

The first of two final rules provides an exemption from the contraceptive coverage mandate to entities and individuals that object to services covered by the mandate on the basis of sincerely held religious beliefs. Entities that have sincerely held religious beliefs against providing contraceptive services (or services which they consider to be abortifacients) would be exempt from the mandate and no longer be required to provide such coverage.

The rules maintain the availability of the accommodation, in which the entity's insurer or third party administrator is responsible for providing contraceptive services to the entity's plan participants and beneficiaries, but they make it voluntary, at the option of the entity. That is, an otherwise exempt entity may elect to take advantage of the accommodation, to provide contraceptive coverage to its employees and their dependents. Entities that object to covering some, but not all, contraceptive items would be exempt with respect to only those methods to which they object.

The exemption is also applicable to institutions of higher education, insurance issuers to the extent they provide a plan to otherwise exempt entities, and individuals whose employers and issuers are willing to provide them a plan compliant with the individual's beliefs.

### **Final Moral Exemption Rule**

This rule gives nonprofit organizations, small businesses, and individuals that have non-religious moral convictions opposing services covered by the contraceptive mandate exemption similar to the Final Religious Exemption that applies only for religious organizations and businesses.

The exemption applies to nonprofit organizations and to closely held businesses, as well as to institutions of education, health insurance issuers serving exempt entities, and individuals. The voluntary accommodation is also available to entities with moral convictions against providing contraceptive services (or services which they consider to be abortifacient) in their health plans.

### **What Are Protected Moral Convictions?**

The preamble to the Final Rule explains that moral convictions are protected in ways similar to religious beliefs, when the convictions are those:

(1) that a person “deeply and sincerely holds;” (2) “that are purely ethical or moral in source and content; (3) “but that nevertheless impose ... a duty;” (4) and that “certainly occupy ... a place parallel to that filled by ... God in traditionally religious persons,” such that one could say the “beliefs function as a religion.”

### **Summary of Exemptions**

The Final Rules exempt entities only from providing an otherwise mandated contraceptive item to which they object on the basis of their religious beliefs or moral conviction. The Final Rules apply to the following entities:

- Churches, integrated auxiliaries, and religious orders with religious objections;
- Nonprofit organizations with religious or moral objections;
- For-profit entities that are not publicly traded, with religious or moral objections;
- For-profit entities that are publicly traded, with religious objections;
- Other non-governmental employers with religious objections;
- Non-governmental institutions of higher education with religious or moral objections;
- Individuals with religious or moral objections, with employer sponsored or individual market coverage, where the plan sponsor and/or issuer (as applicable) are willing to offer them a plan omitting contraceptive coverage to which they object; and
- Issuers with religious or moral objections, to the extent they provide coverage to a plan sponsor or individual that is also exempt.

### **Litigation Involving the Application of the Final Rules**

The Final Rules were scheduled to take effect on January 14, 2019. However, two federal courts have recently issued injunctions against the Final Rules. In *State of California, et al v. Health and Human Services, et al.* and *Commonwealth of Pennsylvania and State of New Jersey v. Donald J. Trump, et al.*, federal judges issued preliminary injunctions prohibiting enforcement of the Final Rules.

On January 13, 2019, a federal judge in the Northern District of California issued a ruling that blocked the Final Rules from taking effect in California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New York, North Carolina, Rhode Island, Vermont, Virginia, Washington and the District of Columbia. On January 14, 2019, a federal judge in the Eastern District of Pennsylvania stated that the agencies who issued the Final Rules overstepped their authority in an attempt to override the preventative care mandate of the Women's Health provisions of the ACA. The court indicated in its reasoning that states would be harmed by the Trump administration's policy because women who lost contraceptive coverage would seek state-funded services.

The ruling from the Eastern District of Pennsylvania issued a preliminary injunction in all 50 states and Washington DC, which is broader than the ruling issued in California one day earlier.

### **Bottom Line**

While the status of the Final Rules for Religious and Moral Exemptions is being settled in federal court, employers and providers should not make changes to their coverage of preventive services provided to women under the requirements of the ACA without consulting their legal counsel. Congress created an exemption from the ACA's statutory mandate to cover women's preventive care, for grandfathered health plans – those that were in place prior to the ACA's adoption. Any grandfathered plans are still considered exempt from the ACA's requirement to provide birth control to covered women. The federal injunction issued yesterday will otherwise prohibit application of the Religious and Moral Exemptions while the legality of the provisions is being determined. This promises to be an interesting development for the ACA in 2019.

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