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The Affordable Care Act requires non-grandfathered group health plans to cover certain preventive services without cost-sharing. Effective for the first plan year that began on or after August 1, 2012, this requirement includes coverage of all FDA-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity, as prescribed by a health care provider. The Departments of Labor, Treasury and Health and Human Services issued a final rule addressing the contraceptives mandate for religious employers and nonprofit religious organizations, discussed briefly below. Generally speaking, the final rule follows the proposed rule, with a few modifications.

Religious Employers

Religious employers are exempt from the contraceptive coverage requirement. The final rule adopts the definition of a religious employer as an employer that is organized and operates as a nonprofit entity, which includes churches, their integrated auxiliaries and conventions or associations of churches, as well as the exclusively religious activities of any religious order. By making the definition simpler, the Departments clarified that an otherwise exempt plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer

hires or serves individuals of different religious faiths. For example, houses of worship that provide educational, charitable or social services to their communities may qualify as a religious employer. This definition is effective August 1, 2013.

Nonprofit Organizations

The one year temporary safe harbor for certain non-exempt, non-grandfathered group health plans of nonprofit organizations that do not cover some (or all) of the required contraceptive services for religious reasons is set to expire effective for the first plan year that begins on or after August 1, 2013. The final rule extends the temporary safe harbor for plan years that begin before January 1, 2014. Plans that begin on or after January 1, 2014 will need to qualify for an accommodation as an eligible organization (discussed below).

For-Profit Employers

For-profit employers are not eligible for relief despite requests to expand the definition of an eligible organization to include certain for-profit employers with religious objections to providing contraceptive coverage. Thus, no accommodation is available to a non-grandfathered plan of a for-profit employer.

There is currently litigation on this issue and two recent court decisions reflect a split in the Circuits as to whether a for-profit employer can be required by the government to provide these services when the ownership objects to such coverage for religious reasons. It is expected that this issue will come before the Supreme Court in the near future.

Accommodations

For plan years that begin on or after January 1, 2014, the final rule establishes an accommodation respecting the contraceptive coverage requirement for health coverage established, maintained or arranged by certain eligible organizations. Entities qualifying for the accommodation are not required to contract, arrange, pay or refer for contraceptive coverage. However, plan participants and beneficiaries may still benefit from separate payments for contraceptive services without cost-sharing or other charges. As discussed below, an eligible organization will need to certify its status and qualification for the accommodation. In a change from the prior rule, the eligible organization does not need to provide notice to participants and beneficiaries regarding the exclusion of some or all of the contraceptive services; instead, the carrier/third-party administrator is responsible for this notification.

Eligible Organizations

An eligible organization is an organization that:

- opposes providing coverage for some or all of the required contraceptive services on account of religious objections;
- is organized and operates as a nonprofit entity;
- holds itself out as a religious organization; and
- self-certifies that it satisfies the above criteria.

Self-Certification

Employers that seek an accommodation to avoid arranging, paying or referring for contraceptive services must self-certify that they meet the above definition of an eligible organization. This certification must be done prior to the beginning of the first plan year to which the accommodation is to apply. A plan under the safe harbor does not need to



execute a new certification if one has already been provided, but does need to provide another notice to plan participants and beneficiaries in connection with the applicable plan year to which the safe harbor applies. The certification only needs to be executed once and a copy of the certification must be provided to health insurance carriers and third-party administrators (including any subsequent change in carrier or TPA). It does not need to be submitted to the Departments. The executed certification should be maintained in a manner consistent with the record retention requirements under ERISA and made available for examination upon request. In a change from the prior rule, eligible organizations are not required to specify the contraceptive services not covered by the plan (in case the organization opts to cover some, but not all, contraceptive services) in the self-certification. For a copy of the certification form, visit <http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc>.

Insured Plans

Upon receipt of a self-certification from an eligible organization, insurance carriers must:

- expressly exclude contraceptive coverage from the eligible organization's group health plan. If the eligible organization's plan provides coverage for some, but not all, of the required contraceptive services (for example, it covers all required contraceptive services except sterilization), the carrier is only required to provide payments for those services the group health plan does not provide. However, the carrier may provide payments for all contraceptive services at its option.
- notify plan participants and beneficiaries that the carrier provides separate payments for contraceptive services at no cost to participants and beneficiaries. This notice must be separate from, but, to the extent possible, contemporaneous with any application materials distributed at enrollment or re-enrollment in group health plan coverage that is effective beginning on the first day of each plan year. Model language is available to satisfy this notification requirement.
- make payments for eligible contraceptive services used by plan participants and beneficiaries without imposing any premium, fee or other charge on the eligible organization, its plan or its plan participants and beneficiaries. The final rule does not require that the carrier issue separate insurance policies for this coverage.

Self-Insured Plans

An eligible organization that contracts with a TPA to provide group health plan benefits on a self-insured basis must provide a copy of the self-certification to the TPA, including that the organization does not act as the plan administrator with respect to claims for contraceptive services, or does not contribute to the funding of contraceptive services. The TPA must agree to enter into and remain in a contractual relationship with respect to the eligible organization or its plan to provide administrative services and provide for or arrange payments for contraceptive services on behalf of plan participants and beneficiaries at no cost to the individual, the eligible organization or the plan. The TPA can do this by either providing the payments directly (without imposing a cost on the organization, the group health plan or participants/beneficiaries) or arranging for an insurance carrier or other entity to provide payments for contraceptive services. The TPA, in coordination with the carrier, can recoup costs associated with these payments through an adjustment to the federally Facilitated Exchange user fee for a participating carrier. The TPA must provide notification to participants and beneficiaries in the same manner as carriers (outlined above).

Self-insured plans of eligible organizations without TPAs will be provided an enforcement safe harbor subject to specific HHS rules (in the preamble to the final rule, the Departments comment that it is their belief that no such arrangements exist).

Student Insurance

An accommodation applies to student health insurance arranged by an eligible organization that is an institution of higher education in a manner comparable to the rules that apply to group health insurance coverage provided by an eligible organization. For these purposes the terms "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.