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On October 6, 2017, the U.S. Departments of Health and Human Services, Labor, and the Treasury (the Departments) released final, interim regulations allowing non-governmental employers, institutions of higher education, and individuals with religious or moral objections to cease coverage for some, or all, contraceptive services.

## Background

All non-grandfathered health plans must cover certain preventive items and services without cost-sharing, including contraceptive services.

Religious employers and grandfathered medical plans are exempt from the contraceptive services mandate.

An accommodation (which is different from the blanket exemption) is available for certain non-profits with religious objections to providing contraceptive services and a certain closely held for-profit entities.

For this purpose, contraceptive services are defined to include contraception and contraceptive counseling, including all FDA-approved contraceptive methods, sterilization procedures and patient education and counseling.

## New Regulations

As described below, the new regulations, effective October 6, 2017, largely expand exemptions to include more employers and extend to individuals. The regulations also revise the existing accommodations process making it optional, but still available.

### Expanded exemptions – Employers

Non-governmental employers sponsoring a group health plan and objecting to providing some (or all) of the mandated contraceptive services based on seriously held religious beliefs or moral convictions may claim an exemption. The rules do not specifically define what constitutes a “sincerely held religious belief” or “moral convictions.” Instead, the Departments will look to such beliefs, principles or views that would have been adopted and documented in accordance with the laws of the state in which they are incorporated or organized.

The regulations provide the following non-exhaustive list of employers who may claim an exemption because they object to the provision of some, or all, contraceptive services based on **sincerely held religious beliefs**:

- A church, an integrated auxiliary of a church, a convention or association of churches or a religious order.
- A nonprofit organization.
- A closely-held for profit entity.
- A for-profit entity that is not closely held (this may include a publicly traded company).
- Any other non-governmental employer.
- An institution of higher education in its arrangement of student health insurance coverage.

With respect to the **moral convictions** exemption, the following are permissible objecting entities:

- A nonprofit organization.
- A for-profit entity that has no publicly traded ownership interest.
- An institution of higher education in its arrangement of student health insurance coverage.
- A health insurance issuer offering group or individual insurance coverage.

Exempt entities:

- May object to covering some, or all, mandated contraceptives services. For example, an entity may object to sterilization but not contraceptives. In that case the entity is exempt with respect to the items to which they object (sterilization), but not exempt with respect to the items for which there is no objection (contraceptives).

- Are not required to comply with the self-certification process (e.g., do not need to file notices or certifications of their exemption). Plan documents will need to be updated to reflect changes in coverage or design.
- May have previously claimed an accommodation and are now eligible for an exemption under these new rules.
- May, instead, choose to certify as an eligible organization which would remove the employer and the plan from responsibility and cost of contraceptive services while still providing participants and beneficiaries access to these services at no cost.

## Expanded exemptions – Individuals

The individual exemption permits (but does not require) plan sponsors that do not specifically object to contraceptive coverage to offer coverage to their participants or beneficiaries who do object based on religious belief or moral conviction, while offering coverage that includes contraception to participants or subscribers who do not object. This exemption can apply with respect to individuals with coverage through a private employer or government sponsored group health plan.

The individual exemption cannot be used to force a plan (or its sponsor) or a carrier to provide coverage omitting contraception, or, with respect to health insurance coverage, to prevent the application of state law that requires coverage of such contraceptives or sterilization.

## Practical Application

- **Effect on participants.** As exempt entities will exclude contraceptive services from their group health plan, female participants and beneficiaries will not be able to access these services from the group health plan and will either need to pay out-of-pocket or seek access through other resources.
- **Accommodations remain available.** The regulations leave intact the accommodations process for certain objecting employers to claim an accommodation versus an exemption. Under this process, the objecting employer can self-certify eligible employer status

which documents their objection to providing some, or all, contraceptive services. The eligible organization provides this certification to the applicable carrier or TPA who then arranges access to the contraceptive services for participants and beneficiaries without cost sharing and at no additional cost to the employer or plan.

- **Plan documentation.** While entities claiming an exemption are not required to provide a special notice or certification, general ERISA rules apply with respect to material changes to coverage. This is further discussed in “Employer Action”.
- **Moral conviction of health insurance carriers.** While expected to be unusual, an insurance carrier providing group health insurance coverage may be exempt due to the carrier’s moral conviction. The plan remains subject to any requirement to provide coverage for contraceptive services unless the plan is otherwise exempt (due to religious belief or moral conviction). This can create coordination and compliance issues for non-exempt employer plan sponsors if group health plan coverage is purchased from an exempt insurer.

## Employer Action

Employers wanting to avail themselves of this exception will need to:

- Amend their summary plan descriptions and any other plan documents, as necessary, for a prospective effective date:
  - A best practice would be to make a plan amendment in connection with annual enrollment (and not mid-year).
  - Immediate plan changes must be approved by carriers and likely will only be available to self-funded plans.
  - For insured plans:
    - Insurers may offer an exclusion of contraception to requesting employers.
    - Insurers can also claim exemption and not offer contraception to any employer in which case employers purchasing their plans will be out of compliance unless they too claim exemption.
    - State insurance law requiring coverage for certain contraceptive services are not preempted by this guidance and remain enforceable.

- Provide proper notice under existing rules. Under ERISA:
  - For health plans, a summary of material reduction should be distributed automatically to participants within 60 days of adoption of material reduction in services or benefits or at regular intervals of not more than 90 days. Although somewhat of a gray area, this should mean that employees hear about the change at least 60 days in advance. Although inadequate notice can result in penalties, it will rarely invalidate the change.
  - Review your SBC to determine if information on this document changes as a result of the exemption. If so, and if implemented mid-year 60-day prior notice is required and will satisfy the other requirements under ERISA.
  - For any ERISA-covered plan, it may be advisable to give written notice early under regular fiduciary duty principles.
  - Any description of exceptions, limitations, reductions, and other restrictions of plan benefits must be apparent in the SPD.
- Consider HR and PR challenges when revoking a benefit that has been available to female employees for free for a number of years. A thoughtful communication strategy will be important when making this type of change.
- Non-exempt entities should consider whether to make alternative coverage without contraceptive services available to participants and beneficiaries who qualify for an individual exemption. This will be administratively burdensome and may not necessarily be an available option from the carrier.

These rules are subject to change following the comment period which closes on December 5, 2017 but any significant changes appear to be unlikely.

Already, several states and interest groups have, or have expressed their intent to, initiated a lawsuit against the government challenging these rules. Employers claiming these exemptions should watch the legal developments as they may affect coverage.