

To: Our Clients and Friends

August 28, 2013

THE CONTRACEPTIVE MANDATE: STRATEGIC PLANNING FOR RELIGIOUS ORGANIZATIONS

Under the Patient Protection and Affordable Care Act (“ACA”), employers with group health plans must provide preventive health services without charging a co-pay, coinsurance payment, or a deductible. On August 1, 2011, the Department of Health & Human Services (HHS) adopted guidelines outlining the required preventive health care for women. That guidance requires coverage for all FDA-approved contraceptive services, including the “morning after” pill and the “week after” pill. These pills are considered by some to be abortifacients because they interrupt normal reproductive function after the egg has been fertilized.

Church Employer Exemption

When this HHS guidance was initially issued, many religious organizations objected to the contraceptive coverage requirement on the ground that this coverage was in direct conflict with their religious beliefs. HHS subsequently amended the regulations to exempt entirely organizations described in Internal Revenue Code sections 6033(a)(1) and 6033(a)(3)(A)(i) or (iii). These sections include organizations that may be classified for tax code purposes as churches, conventions or associations of churches, integrated auxiliaries or religious orders.

Religious Organization “Accommodation”

For those objecting nonprofit religious organizations that do not qualify for the church employer exemption, HHS has recently finalized the rules for an “accommodation.” In order to claim the “accommodation,” the organization must certify to its plan insurer or third party administrator that it is a nonprofit that holds itself out as religious and objects to coverage of some or all contraceptives. The third party administrator or insurer is then responsible for providing the required contraceptive

coverage to the plan participants. For self-insured plans, the third party administrator may decide either to arrange for the coverage or to terminate its contract with the employer.

The third party administrator or insurer must provide a separate notice to all plan participants of this coverage. This notice must be provided at roughly the same time as notice of the employer's plan coverage.

Any cost associated with this coverage cannot be passed directly along to the employer. Certain costs can be recovered by insurers and third party administrators in the form of credits for payments otherwise required to be made by such parties for participating in federal health insurance exchanges.

Litigation Status

As you may know, numerous employers have filed lawsuits challenging the contraceptive mandate. In very broad terms, these lawsuits address two questions relevant to religious organizations:¹

1. Does the contraceptive mandate or "accommodation" substantially burden their religious exercise?
2. Is the contraceptive mandate or "accommodation" narrowly tailored to further a compelling governmental interest?

If the courts determine that the answer to first question is "yes" and the answer to the second question is "no," then they will conclude that the contraceptive mandate or "accommodation" violates the law.

All of the current lawsuits except one are challenges to the contraceptive mandate and not the "accommodation." But nonprofit religious organizations eligible for the "accommodation" still have an interest in these cases. Specifically, if the courts uphold the full mandate, then they are very unlikely to strike down the "accommodation."

At this point, the courts evaluating the contraceptive mandate have reached conflicting conclusions, with some holding that the mandate does impose a substantial burden on religious exercise and some affirming the mandate on separate grounds. Because of the split in the federal courts, this issue may be addressed by the U.S. Supreme Court.

In the event of a successful challenge to the full contraceptive mandate, HHS could still assert that although the contraceptive mandate substantially burdens religious exercise, the "accommodation" does not. Therefore, we expect that there will be additional lawsuits challenging the "accommodation." Indeed, one such lawsuit has recently been filed (by Colorado Christian University).

¹ Many of the lawsuits also address a third important question: can commercial employers challenge the contraceptive mandate on religious liberty grounds? Although this question raises a very important religious liberty issue, it does not directly affect the rights of nonprofit religious organizations. The lawsuits also raise a myriad of other claims involving issues of both religious liberty and administrative law that may be determinative in particular cases.

Strategic Planning

Unless a religious organization with a group health plan qualifies for the church employer or grandfathered plan exemption,² the organization is required to comply with the contraceptive mandate or the “accommodation” for its plan years beginning on or after January 1, 2014. Because some steps may need to be taken prior to the applicable effective date, religious organizations need to plan now for how they will respond to this contraceptive coverage mandate. In this regard, we have been advising various religious organizations on the following issues:

1. Religious Beliefs and Conduct Policies. Has the organization adopted policies stating its religious beliefs and associated faith-based conduct standards for employees? If so, do these policies expressly include religious objections to the use of certain types of contraceptives?
2. Religious Exercise Burden. Does the mandate or the “accommodation” burden the organization’s particular religious exercise? And if so, precisely how?

When the “accommodation” rules were proposed, we submitted comments to HHS on behalf of 12 national religious organizations explaining a variety of ways in which the “accommodation” could burden religious exercise (see [Comments](#)). But each organization should determine for itself, based on its particular religious convictions, whether the “accommodation” burdens its religious exercise.

Possible burdens include: (i) the requirement to participate in an overall scheme that uses their employer plans as a means of providing contraceptive coverage to the plan participants; (ii) the continuing coordination requirements to support the contraceptive coverage (e.g., for notices); (iii) the requirement for organizations with self-insured plans to contract with a third-party administrator willing to arrange individual coverage; and (iv) the very complexity of the “accommodation,” with a myriad of requirements all directed solely toward providing contraceptive coverage.

3. Exempt Status. Does the organization qualify (and will it continue to qualify) for the “grandfathered plan” exemption or the “church employer” exemption?
4. Potential Noncompliance Penalties. If an organization does not qualify for an exemption, what are the total penalties the organization could incur from either refusing to comply with the mandate/“accommodation” or discontinuing health care benefits for its employees? What other financial and nonfinancial impacts would there be on the organization and its employees?

² In addition to the “church” employer exemption, the mandate is subject to a “grandfathered plan” exemption. Generally, this exemption applies to plans that both (i) were in existence on March 23, 2010, and (ii) have not changed their plans to eliminate benefits, increase percentage cost sharing, increase copayments or fixed dollar cost-sharing beyond certain amounts, decrease the employer contribution rate more than 5%, or decrease the annual limit on benefits (or add such a limit). The employer must also provide notice to plan participants that the plan is a “grandfathered” plan. It is important to note that grandfathered plans only remain grandfathered until one of the changes noted above is made.

5. Litigation Involvement. What are the pros and cons of participating in legal challenges to the mandate or the “accommodation” (i.e., to obtain an injunction or a ruling that the “accommodation” violates the law)? What would be the best strategy and timing for such action?

Even if an organization decides not to participate directly in a lawsuit, it may choose to support other lawsuits through participation in amicus briefs. We think that one of the most important issues in all of the legal challenges will be whether and how both the mandate and the “accommodation” burden religious exercise. We expect there will be opportunities in amicus briefs to restate the substantial burden arguments raised in our comments to HHS.

6. Other Issues. Finally, we have advised organizations on many other ACA compliance issues unrelated to the contraceptive coverage mandate.

Please feel free to contact any one of us if you would like to discuss these issues in more detail.

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