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## Agencies Respond to *Hobby Lobby* Decision and Offer New Accommodations for Employers with Religious Objections to Contraception

Late last week, federal agencies wrote the latest chapter in the fight over mandated contraceptive coverage under employer health plans. The agencies' new guidance provides an accommodation for certain employers that have religious objections to their health plans covering some or all of the mandated contraceptives.

In June, a divided U.S. Supreme Court ruled in *Burwell v. Hobby Lobby Stores, Inc.* that the PPACA cannot compel for-profit, closely held corporations to offer certain contraceptive coverage through their health plans, if the coverage conflicts with a sincerely held religious belief of the corporation's owners. (See our [Alert](#).) In a related case, *Wheaton College v. Burwell*, the Court issued an injunction staying enforcement of the mandate against a non-profit organization that could have exempted itself from the mandate by notifying its insurer or the third party administrator (TPA) of its self-funded plan of its religious objections. The Court held that the requirement to provide the notice was, itself, an infringement of the organization's rights.

### PPACA and Birth Control

The PPACA requires nongrandfathered health plans to provide to enrollees a wide variety of preventive care services with no cost sharing; that is, no deductibles, coinsurance or copayments. One of the mandated preventive care categories is well-woman care. Federal authorities have said the PPACA mandate requires nongrandfathered health plans to provide, as part of the well-woman care benefit, any FDA-approved contraceptive method. There are 20 FDA-approved contraceptive methods, four of which may have the effect of preventing an already fertilized egg from developing further by inhibiting its attachment to the uterus.

Prior to *Hobby Lobby*, the federal agencies exempted churches, associations or conventions of churches, or religious orders, from the mandate entirely. The federal agencies provided an "accommodation" to plans sponsored by certain non-profit religious organizations. "Eligible organizations," which were defined as non-profit employers with religious objections to contraception, were required to self-certify the objection by notifying the plan's insurer or TPA. Under the accommodation, the mandated contraceptive coverage is then carved out of the employer's plan and provided by the insurer or third-party administrator, which offsets the cost of the mandate against other tax liabilities owed to the federal government. (See our [Alert](#).)

The agencies developed a form that was used for this purpose, EBSA Form 700. Some religious employers argued that filling out Form 700 and sending it to their insurer or TPA was tantamount to facilitating contraceptive coverage. In *Wheaton College*, the Supreme Court seemed to agree and stayed enforcement of the contraceptive coverage mandate against non-profits that did not comply with that rule.

### **So, where are we now?**

The agencies have issued two sets of regulations. First, proposed regulations seek comment on potential changes to the definition of “eligible organization” to include closely held, for-profit employers that do not have publicly traded stock (per *Hobby Lobby*). In other words, closely held employers with sincere objections to contraception could use the same accommodation that currently applies to non-profit employers with religious objections to contraception. (See our [Alert](#).) The agencies will accept comments on the proposed rules through Oct. 2, 2014.

While the agencies did not propose a definition of closely held, private employers, it floated some possible alternatives:

- An entity that has less than a specified number of shareholders or owners, such as ten or fewer, or
- An entity where a specified fraction of the ownership interest is concentrated in a limited and specified number of owners, such as 50 percent ownership by five or fewer shareholders.

To establish that a for-profit employer has sincere religious objections to contraception, the agencies propose to look to corporate actions (or similar actions by businesses that are not corporations), stating the owners’ religious objection to providing some or all contraceptive coverage. A corporate action would include a board of directors resolution. For other entities, the agencies would look for an official action taken by the entity’s governing body in accordance with state law.

In conjunction with the proposed rules, the agencies issued interim final regulations excusing an “eligible organization” from notifying its insurer or TPA of its objections to contraceptive coverage (per *Wheaton College*). Instead, the employer could notify HHS. HHS and the U.S. Department of Labor would then relay the information to the plan’s TPA or insurer and, from there, the accommodation would function as before. The agencies issued a model form for providing this notice to HHS in conjunction with the interim regulations.

The interim final rules are effective immediately after publication in the Federal Register. The agencies will accept comments for 60 days after publication in the Federal Register.

### **Not the End of the Story**

Despite the Supreme Court decisions and the “accommodations” from the agencies, litigation will continue with respect to mandated contraceptive coverage. While the President called on Congress to address these issues through new legislation, that is very unlikely to occur anytime soon.

As we've previously noted, most employers sponsoring group health plans have complied with the contraception mandate, so this issue has little significance except for closely held employers siding with *Hobby Lobby*. In fact, HHS estimates that only 71 for-profit employers will seek a *Hobby Lobby*-type accommodation.

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