The Trump administration has finalized rules allowing employers with religious or moral objections to providing contraceptives to female employees and dependents to opt out of the Affordable Care Act provision otherwise requiring non-grandfathered health plans to provide such coverage without cost sharing.

The newly issued final rules follow the interim final rules issued in 2017 (see our 2017 Alert) with only minor modifications.

Lockton comment: As was the case with the interim final rules, we expect the newly final regulations will also be subject to court challenge.

The contraceptive mandate and the exemptions to it have a long, contentious history, which we detailed in our prior Alert summarizing the interim final rules. These final rules are the next chapter in the story and closely track the religious and moral exemptions first expressed in those interim final rules.

Religious exemption: Like the interim final regulations, the final regulations exempt all nongovernmental entities that object to providing coverage of some or all contraceptives based on sincerely held religious beliefs. This exemption applies to churches, nonprofits, and both closely held and publicly traded for-profit entities.

Moral exemption: The final rules also adopt the exemption for employers who, while not opposed to the contraception mandate on religious grounds, are morally opposed to some or all required contraceptives. This exemption applies to all nonprofit organizations and for-profit entities that are not publicly traded.

The final rules make it clear that both objections are available with respect to student health insurance provided by an objecting institution of higher learning.

The final rules also clarify that an entity objecting to some but not all types of contraceptives must still offer to female enrollees the contraceptives to which the entity does not have an objection.
Lockton comment: Employers wishing to avail themselves of either the religious or moral exemption will want to ensure their objections are documented. Employers should update plan documents and notify enrollees of any changes in coverage, as described in our prior Alert.

Objecting employers whose plans are subject to state insurance laws (e.g., insured plans and, in some states, self-funded plans not subject to ERISA) will also need to consider state contraceptive mandates and exemption procedures that may limit the employers' ability to avail themselves of the federal exemption.

Voluntary accommodation results in coverage of contraceptives for female enrollees

A prior rule required most objecting employers to notify the federal government or the plan's insurer or third-party administrator (TPA) of the objection. This notice was designed to trigger an independent obligation on the part of the insurer or TPA to provide female enrollees with contraceptive benefits through a policy or program separate from the objecting employer's plan. The final rules eliminate this notification and third-party coverage requirement, but they do allow employers to voluntarily provide the notice. Where an employer does so, the notice triggers the same obligation on the part of the insurer or TPA to provide the independent contraceptive benefit for female enrollees.

Litigation likely to block enforcement of the newly final rules

The interim final rules were challenged in court almost immediately after they were issued months ago. Those challenges continue to work their way toward the Supreme Court. In the meantime, lower courts have blocked the Trump administration’s ability to enforce the interim final rules. We suspect the newly final rules, which are nearly identical to the interim final rules, will soon be subject to the same lawsuits and enforcement prohibitions.

Lockton comment: Employers wishing to take advantage of the exemption in the new rules despite the court rulings prohibiting their enforcement will want to discuss their plans with legal counsel, as they might trigger a challenge from female plan enrollees.

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