October 10, 2017

Trump Administration Rolls Back ACA’s Contraceptive Mandate

The Trump Administration issued two sets of regulations late last week, allowing more employers to opt out of the Affordable Care Act’s (ACA) mandate that requires non-grandfathered healthcare plans to offer all 18 FDA-approved contraception drugs and devices to women, at no out-of-pocket cost. While regulations make it easier for employers to opt out, they make it more difficult for females enrolled under healthcare plans sponsored by opting-out employers to obtain contraceptives.

Background to the Contraceptive Mandate and its Exemptions

The ACA requires non-grandfathered healthcare plans to supply a wide variety of preventive care at no out-of-pocket cost to enrollees. That preventive care includes, in the case of women, all 18 categories of FDA-approved contraceptive drugs and devices. When implemented, the contraceptives mandate triggered vigorous protests from a variety of faith-based employers.

A prior Obama Administration rule provided a blanket religious-based exemption for churches (including church auxiliaries, conventions and associations of churches, and religious orders), and also did not require them to provide notice of their objection. Where a church declined to provide contraceptives under its health plan, neither the insurer or (in the case of a self-insured plan) the third-party administrator (TPA) was required to step in and supply contraceptives to the plan’s female members.

The previous rule also contained a more cumbersome accommodation for non-profit church-related organizations (e.g., church-affiliated hospitals and schools) — an accommodation ultimately expanded to include even closely held for-profit employers with religious objections to providing contraceptives. The accommodation required the employer to certify its objection, either to the federal government or the plan’s insurer or TPA. The insurer or TPA was then required to separately provide the contraceptives, paying for the effort by offsetting the cost against certain taxes the insurer or TPA would otherwise remit to federal authorities.

The new regulations, which are effective immediately, expand the opt-out opportunity based not only on religious grounds, but also on moral grounds. One set of rules extends the
religious-based exemption to for-profit \textit{publicly traded} companies that have a sincerely held religious objection to contraception. The other set of rules creates a new \textit{morals-based} exemption for non-governmental non-profit and closely held for-profit organizations, but not publicly traded for-profit companies.

In both cases, objecting employers receive the same blanket exemption granted to churches. That is, there’s no requirement they notify the insurer or TPA of the objection, or that the insurer or TPA then supply the contraceptives to female enrollees, in lieu of the employer healthcare plan.

Here’s a little closer look at the new rules, and a few thoughts on how far they can really go.

**The Accommodation Based on Religious Objection**

The first of the new regulations permits churches, church auxiliaries, conventions and associations of churches, religious orders, non-profit organizations, \textit{any} for-profit organization, and “\textit{any other non-governmental employer}” to decline to provide, under their non-grandfathered healthcare plans, ACA-mandated contraceptive care. The exemption applies \textit{to the extent} the organization’s sincerely held religious beliefs oppose such contraception.

\textit{Lockton comment:} The “to the extent” language means that if the organization has a sincerely held religious objection to its healthcare plan supplying some but not \textit{all of} the 18 FDA-approved contraceptive drugs and devices, the plan must still provide the contraceptives to which the organization does not object, assuming the plan is non-grandfathered under the ACA.

Certain higher education organizations, presumably any \textit{non-public} institutes of higher education, providing student health insurance to students and their dependents may also avail themselves of the opt-out right, with respect to their student health insurance plans.

**The Accommodation Based on Moral Objection**

The second new regulation allows non-profit organizations, and for-profit entities that are not publicly traded, to object to providing contraceptives under their healthcare plans, based on sincerely held \textit{moral} convictions. The objection on moral grounds is not available to \textit{publicly traded} companies; however, it does apply to higher education organizations with respect to their student health insurance plans.

\textit{Lockton comment:} The opportunity to object to contraceptives based on moral convictions might, at least in part, be a step toward eventually allowing state and local governments to stop providing contraceptives under their employee healthcare plans if the governmental entity claims a moral objection to doing so.

**Notification Requirements**

As noted above, employers claiming the opt-out, whether on religious or moral grounds, are not required to file a notice with the federal government or with the healthcare plan’s insurer or TPA. The new rules also eliminate the requirement that an insurer or TPA independently provide, to female enrollees under the employer’s healthcare plan, the contraceptives to which the employer objects.
Employers that take advantage of the new rules and exclude coverage of contraceptives under their healthcare plans must still satisfy normal notice requirements. For ERISA employers, that means issuing participants a summary of material reduction in benefits, within 60 days after the change is adopted.

If contraceptive benefits are described in a healthcare plan’s eight-page summary of benefits and coverage, and the employer wishes to stop providing contraceptives prior to the first day of its healthcare plan’s next fiscal year, the employer must notify plan participants at least 60 days before the change takes effect.

**Is it Really That Easy?**

While the new rules eliminate the requirement to provide notice of the objection, organizations that do object to the provision of some or all contraceptives will need to honor corporate formalities to demonstrate the objection, such as documenting the objection in some form of resolution or other corporate action recognized under applicable state law.

But beyond that formality, is that all there is to it? Is there no danger, other than an employee relations challenge? Current [enforcement guidance](#) issued by the Equal Employment Opportunity Commission (EEOC) warns of the danger under the federal Pregnancy Discrimination Act, part of the employment nondiscrimination rules under Title VII of the Civil Rights Act:

Employers can violate Title VII by providing health insurance that excludes coverage of prescription contraceptives, whether the contraceptives are prescribed for birth control or for medical purposes. Because prescription contraceptives are available only for women, a health insurance plan facially discriminates against women on the basis of gender if it excludes prescription contraception but otherwise provides comprehensive coverage. To comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy. For example, if an employer's health insurance plan covers preventive care for medical conditions other than pregnancy, such as vaccinations, physical examinations, prescription drugs that prevent high blood pressure or to lower cholesterol levels, and/or preventive dental care, then prescription contraceptives also must be covered.

**Lockton comment:** The EEOC interpretation has not been thoroughly tested in the courts, so it remains unclear how Title VII of the Civil Rights Act and the new broad based opt-out fit together. We suspect the courts will soon undertake such an analysis. The composition of the EEOC’s board is set to change soon with a Republican-nominated chairman, so it is possible the EEOC’s view may also change; however, individuals might pursue lawsuits of their own.

**What Does it all Mean?**

The vast majority of employment-based healthcare plans supply the ACA-mandated
contraceptives without objection, and many of these plans provided contraceptives even prior to the ACA. For female employees and dependents enrolled under healthcare plans offered by these employers, the new rules will not affect their coverage.

For those employers that do hold sincerely held religious or moral objections to providing contraceptives under their healthcare plans, the new rules are intended to streamline the objection process and put an end to five years of litigation surrounding the existing hurdles they had to meet to claim an exemption.

But the new rules will trigger an entire new round of lawsuits. Indeed, at least two state attorneys general have already filed suits to block the new rules. How it all plays out, in the courts and at the polls, remains to be seen.

For employers with both religious or moral objections to contraceptives, and whose healthcare plans remain grandfathered under the ACA, perhaps the best defense is to maintain that grandfathered status. Even these employers, however, may have to wrestle one day with the EEOC.

Edward Fensholt, JD and Scott Behrens, JD
Lockton Compliance Services

© 2017 Lockton Companies