U.S. Supreme Court Upholds Final Rules Allowing Employer-Sponsored Health Plans to Decline to Cover Contraceptives Due to Moral or Religious Objections

On July 8, 2020, the United States Supreme Court upheld the Final Rules issued by the Department of Health and Human Services (HHS) that exempt all employers with a religious objection to contraception, and all non-profit and non-publicly traded for-profit employers with a moral objection to contraception, from complying with the previous contraceptive coverage requirements adopted by HHS under President Obama.

Background on ACA's Contraceptive Coverage Mandate

The ACA was enacted in March 2010. The ACA requires covered employers to provide women with "preventive care and screenings" without cost sharing. "Preventive care and screenings" was not defined in the law; however, the law authorized guidelines, which did not exist at the time, to be developed by the Health Resources and Services Administration (HRSA) of the Department of Health and Human Services (HHS). The Departments promulgated rules to, among other things, provide guidelines for preventive care and screening, but did not use the traditional notice and comment rulemaking process, opting instead to utilize a "good cause exception" to the Administrative Procedures Act (APA), which allows rules to be effective immediately.

In 2011, regulations were released that contained the HRSA guidelines that included all Food and Drug Administration (FDA)-approved contraceptives, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by a health care provider. Once these rules took effect in 2012, women enrolled in most health plans and health insurance policies (non-grandfathered plans and policies) were guaranteed coverage for recommended preventive care, including all FDA-approved contraceptive services prescribed by a health care provider, without cost sharing.

In 2013, new rules were released with exemptions for certain religious employers (generally churches and houses of worship), as well as "accommodations" for non-profit religious organizations that "self-

certify" their objection to providing contraceptive coverage on religious grounds. Under the accommodation approach, an eligible employer did not have to arrange or pay for contraceptive coverage. Employers could provide their self-certification to their insurance carrier or third-party administrator (TPA), which will make contraceptive services available for women enrolled in the employer's plan, at no cost to the women or the employer.

In 2014, regulations were published to establish another option for an employer to avail itself of the religious accommodation. Under these rules, an eligible employer may notify HHS in writing of its religious objection to providing coverage for contraceptive services. HHS or the Department of Labor, as applicable, will notify the insurer or TPA that the employer objects to providing coverage for contraceptive services and that the insurer or TPA is responsible for providing enrollees in the health plan separate no-cost payments for contraceptive services.

In 2015, in response to the Supreme Court's decision in *Burwell v. Hobby Lobby Stores*, Inc., regulations were released that expanded the availability of the accommodation to include a closely held for-profit entity that has a religious objection to providing coverage for some or all contraceptive services.

In 2017, President Trump issued an Executive Order that directed the Departments to consider amending the contraceptive coverage regulations in order to promote religious liberty. Specifically, the Executive Order instructed the Departments to "consider issuing amended regulations . . . to address conscience-based objections to the preventative-care mandate."

Consistent with the executive order, in 2018, the Departments issued "Interim Final Rules with Request for Comment" and provided 60 days for comments before issuing the final regulations in November 2018. The final regulations were effective on January 14, 2019.

Overview of the Moral & Religious Objection Regulations

The Regulations expand existing exemptions to the ACA's contraceptive care requirement. The Religious Exemption automatically exempts all employers—non-profit and for-profit organizations alike—with a religious objection to contraception from complying with the contraceptive care requirement.

The Moral Exemption exempts all non-profit employers and non-publicly traded for-profit employers with a moral objection to contraception from complying with the contraceptive care requirement. The rules also give exempted employers the authority to decide whether their employees receive independent contraceptive care coverage through the accommodation process. In other words, by making the accommodation process voluntary for employers, employees would no longer be guaranteed the seamless coverage for contraceptive care that currently exists under the accommodation process.

Entities that qualify for the exemptions include churches and their integrated auxiliaries, nonprofit organizations, closely-held for-profit entities, for-profit entities that are not closely held, any non-governmental employer, as well as institutions of higher education and health insurers offering group or individual insurance coverage. Publicly traded companies, however, are not eligible for the Moral Exemption.

Challenge to the Interim and Final Regulations

Pennsylvania and New Jersey challenged the final regulations, claiming the regulations were both procedurally defective and substantively unlawful. Specifically, they argued the Departments lacked authority under the law (both the ACA and the Religious Freedom Restoration Act (RFRA)) to allow such moral or religious exemptions and that the Departments failed to comply with the APAs notice and comment requirements. The rules were enjoined in federal district court, and the decision was upheld by the Third District Court of Appeals. The 3rd District Court of Appeals decision was appealed to the United States Supreme Court.

In a 7-2 decision, with only Justices Sotomayor and Ginsburg dissenting, the Court reversed and remanded the decision, holding that the Departments had the authority under the ACA to promulgate religious and moral exemptions because the ACA granted the Departments full authority to define "preventive care and screenings" in its guidelines, which also includes full authority to establish any exemptions to the guidelines. Furthermore, the Court recognized that the Departments were compelled to, and not prevented from, consider the RFRA in promulgating their guidelines. Finally, the Court determined the Departments fully complied with the APA by providing adequate notice, allowing 60 days for comments, and publishing the final regulations more than 30 days before they were effective.

Impact on Employers

Employers may avail themselves of the Moral and Religious Exemptions, but should consult with qualified ERISA counsel before making plan changes to ensure they do so appropriately and in compliance with any applicable state law, where contraceptive coverage may be a state-mandated benefit. Practically speaking, this means that employers sponsoring fully insured non-grandfathered group health plans may be precluded from exercising either exemption because insurance carriers in those states would be required to write policies that provide such coverage. While the regulations allow employers to exclude contraception from coverage under certain conditions, it's possible an employer availing itself under either exemption could potentially face private lawsuits from participants and beneficiaries under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex, depending on the facts and circumstances.

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