

# REFORM UPDATE

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## EXPANSION OF EXEMPTIONS FOR PROVIDING CONTRACEPTIVE COVERAGE

The Departments of Health and Human Services and Treasury (the Departments) recently released interim rules to expand exemptions from the requirement of non-grandfathered plans to cover contraceptives.

The Affordable Care Act (ACA) includes a provision requiring non-grandfathered health plans to cover specific preventive services with no cost-sharing. The preventive service coverage requirements look to the recommendations of the Health Resources and Services Administration (HRSA) to determine the appropriate preventive services for women. Contraceptive services coverage was recommended to be covered with no cost-sharing.

The HRSA included a very narrow exemption for church organizations that did not want to cover contraceptive services. Almost immediately, religious-affiliated organizations filed suit to exclude their plans from the requirement as well. In response, the Obama administration established an accommodation process for eligible organizations. This process was detailed in our *Reform Update* at [http://www.mcgrawwentworth.com/Reform\\_Update/2013/Reform\\_Update\\_71.pdf](http://www.mcgrawwentworth.com/Reform_Update/2013/Reform_Update_71.pdf).

Eligible organizations were religious-affiliated organizations that met specific requirements. These organizations were required to complete a self-certification regarding the specific forms of contraceptive services to which they were opposed. They were not required to offer coverage for such contraceptive services. The insurance carrier or the third-party administrator (TPA) would instead offer direct coverage to employees for the contraceptive services to which the employer objected. In general, employees would have access to contraceptive services with no cost-sharing provided directly by the insurance carrier or the TPA.

The requirement to cover contraceptive services resulted in multitude of court cases. One noted case, *Burwell v. Hobby Lobby Stores, Inc.*, went all the way to the Supreme Court. The Supreme Court found in favor of Hobby Lobby. This case is explained in our *Reform Update* at [http://www.mcgrawwentworth.com/Reform\\_Update/2014/Reform\\_Update\\_90.pdf](http://www.mcgrawwentworth.com/Reform_Update/2014/Reform_Update_90.pdf). As a result of this case, closely-held organizations that are opposed to covering specific birth control medications or methods, because they violate the owners' religious beliefs, are not required to provide that coverage under their health plan. Further, the federal government did not require these organizations to offer employees the alternative accommodation.

Employers are opposed to providing specific contraception coverage for various reasons. In light of this opposition, the Departments released two separate interim rules that expand the coverage exemption to organizations that have:

- Religious objections
- Moral objections

Each set of rules spells out the history of the required coverage and the numerous court cases surrounding the coverage requirement. These rules allow an expanded number of employers to discontinue coverage for specific contraceptive services due to their objections.

## RELIGIOUS OBJECTIONS

Previously, only non-profit “religious-affiliated employers” were eligible for an exemption from covering specific contraceptive services. They had to meet the requirements of an eligible organization. The Supreme Court’s Hobby Lobby decision allowed an exemption for closely-held organizations that are opposed to covering specific birth control medications or methods because they violate the owners’ religious beliefs.

The new rules expand the exemption to a number of employers that may have religious objections. The following organizations can now claim a religious exemption for covering specific contraceptive services:

- For-profit corporations (regardless of size, or whether they are publically traded or privately held)
- Churches, integrated church auxiliaries, church conventions or associations and religious orders
- Non-profit organizations
- Higher education institutions, including student health insurance plans

These organizations can eliminate coverage for specific contraceptive services if they have sincerely-held religious objections to covering them under their employer health plans.

The Departments’ view is that a broader exemption is a more direct, effective means of satisfying all bona fide religious objectors.

## MORAL OBJECTIONS

The interim rules created a new exemption for certain non-governmental employers with sincerely-held moral convictions against the contraceptive mandate. The list of eligible entities is narrower than the entities that may claim a religious objection. The following are now eligible to claim a moral exemption:

- Non-profit organizations

- Privately held for-profit employers (no publically-traded ownership interest)
- Insurers
- Higher education institutions, including student health insurance plans

The sincerely-held moral convictions are not tied to any particular religious doctrine. The interim rules indicate that some individuals are morally opposed to abortion, and consider certain types of birth control to be forms of abortion. This new exemption will allow these specific employers not to cover specific contraceptives services which they consider abortifacients (such as RU 486).

### ACTION STEPS

Eligible employers that object to providing coverage for specific contraceptive services on moral or religious grounds are not required to cover those services under their health plan. Under the interim rules, the employer is not required to provide any kind of self-certification or notice to the government to claim the exemption. However, if the employer wants to offer employees the accommodation process, a self-certification will be required.

The accommodation process becomes optional under the interim rules. If an employer previously qualified as an eligible employer and had to implement the accommodation process, then the employer now can revoke the use of this process by contacting the insurance carrier or TPA. The revocation will be effective as of the first day of the first plan year that begins 30 days after revocation. The insurance carrier or TPA is then required to notify plan participants that the accommodation has been revoked.

However, employers may still request the accommodation to offer coverage for the excluded contraceptive services outside the health plan.

For a self-funded employer to request the accommodation:

1. The plan must contract with one or more TPAs.
2. The organization must provide the self-certification to all TPAs, or provide notice to the Secretary of Health and Human Services that it is an eligible organization that objects to providing coverage for specific contraceptive services.

The next steps will depend on who is provided with the self-certification. The TPA will take steps to provide the accommodation. If the Secretary of Health and Human Services is instead provided with the self-certification, they will work to notify the TPA of the obligation to provide the accommodation.

For insured plans, to invoke the optional accommodation:

1. The plan must contract with a health insurance carrier.
2. The plan must provide the insurance carrier or the Secretary of Health and Human Services with a self-certification that it is an eligible organization that objects to providing coverage for specific contraceptive services.

The insurance carrier will provide the accommodation coverage directly. If the Department of Health and Human Services is provided with the self-certification, they will work with the carrier to set up the accommodation process.

Employers with religious or moral objections **are not** required to offer the accommodation process to their employees. The section of the interim rule addressing the accommodation process expires on October 6, 2020.

ERISA plans may need to be amended to indicate that specific contraceptive services are excluded from coverage. ERISA plans should follow the employee notice procedures for changes made to covered benefits. The change in benefits can be announced by a Summary of Material Modification (SMM).

The Summary of Benefits and Coverage (SBC) may also need to be amended. It may need to reflect any coverage exclusions for specific contraceptive services. Please note, if the changes are made off the plan's anniversary date, the law requires 60 days' notice of any changes to an SBC. The change in benefits will be effective 60 days after the revised SBC is distributed.

The plan sponsor, the insurance carrier and the plan would face no penalty as the result of omitting specific contraceptive coverage due to a religious or moral objection.

The interim rules also imply that individuals can object to having contraceptive services covered by their individual or group health plan. Employers and health insurance carriers only need to recognize the objection if they are willing to offer a policy without coverage for the contraceptive services.

The administration hopes the availability of this broad exemption will resolve many of the open court cases challenging the requirement to provide coverage for contraceptive services.

The interim rules request comments and suggestions around multiple aspects of the law, including:

- Should the definition of eligible parties be expanded?
- Should a formal procedure to claim the exemption be developed?
- How will the Departments determine if a religious or moral objection is "sincerely-held?"
- How will this expanded exemption affect various types of corporate entities?

To complicate matters, several lawsuits may halt the interim rules. The California Attorney General and the American Civil Liberties Union (ACLU) already filed suit, with others expected to follow. It will take time for these court cases to move through the system.

In the meantime, these interim rules are in effect. Employers with sincerely-held religious or moral objections:

- Can discontinue coverage for specific contraceptive services, provided the employer is considered an eligible organization that has sincerely-held religious or moral objections to providing this coverage.

- Need to decide if they want to offer the optional accommodation. With the accommodation, the carrier or TPA will provide direct coverage for the contraceptive services opposed by the employer.
- Must complete the self-certification and submit it to the carrier, TPA or the Department of Health and Human Services if they want to offer the accommodation.
- Need to review all plan documents and communications related to the coverage for the specific contraceptive services. If this level of detail is included in the SBC and the change is made off the plan anniversary, a 60-day notice must be provided. The SPD must also be updated to reflect which contraceptive services are no longer covered by the plan.

Because of the ongoing court cases and requests for comments, we may see these rules modified in the future.

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