DOL Releases FAQ Regarding Contraceptive Services Coverage Objection Accommodation

On January 9, 2017, the Departments of Labor (DOL), Health and Human Services (HHS), and the Treasury (collectively, the Departments) released FAQs About Affordable Care Act Implementation Part 36 to address information received from the Departments' request for information (RFI) regarding whether modifications to the existing accommodation procedure could resolve the objections asserted by the plaintiffs in pending Religious Freedom Restoration Act (RFRA) cases, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage. The plaintiffs in this case were employers who objected that the accommodation process was a burden on their freedom of religion. The FAQ provides significant information; however, employers should be aware that none of the existing accommodation procedures are changing.

Background

As background, the Patient Protection and Affordable Care Act (ACA) requires that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide coverage of certain specified preventive services without cost sharing.

In 2011, the Departments issued regulations requiring coverage of women's preventive services provided for in the Health Resources and Services Administration (HRSA) guidelines. The HRSA guidelines include all FDA-approved contraceptives, sterilization procedures, and patient education and counseling for women with reproductive capacity, as prescribed by the health care provider (collectively, contraceptive services).

Under the 2011 regulations, group health plans of "religious employers" (specifically defined in the law) are exempt from the requirement to provide contraceptive coverage.

In 2013, the Departments published regulations that provide an accommodation for eligible organizations that object on religious grounds to providing coverage for contraceptive services, but are not eligible for the exemption for religious employers. Under the accommodation, an eligible organization is not required to contract, arrange, pay for, or provide a referral for contraceptive coverage. The accommodation generally ensures that women enrolled in the health plan established by the eligible organization, like women enrolled in health plans maintained by other employers, receive contraceptive coverage seamlessly—that is, through

the same issuers or third party administrators that provide or administer the health coverage furnished by the eligible organization, and without financial, logistical, or administrative obstacles.

In 2014, the U.S. Supreme Court decided *Burwell v. Hobby Lobby*. The Court held that the contraceptive coverage requirement substantially burdened the religious exercise of closely held for-profit corporations that had religious objections to providing contraceptive coverage and that the accommodation was a less restrictive means of provision coverage to their employees. Because of *Burwell v. Hobby Lobby*, the Departments extended the accommodation to closely held for-profit entities.

Under the accommodation, an eligible organization that objects to providing contraceptive coverage for religious reasons may either:

1. Self-certify its objection to its health insurance issuer (to the extent it has an insured plan) or third party administrator (to the extent it has a self-insured plan) using a form provided by the Department of Labor (EBSA Form 700); or
2. Self-certify its objection and provide certain information to HHS without using any particular form.

In 2016, in *Zubik v. Burwell*, the U.S. Supreme Court considered claims by several employers that, even with the accommodation provided in the regulations, the contraceptive coverage requirement violates the RFRA. The Court heard oral arguments and ultimately remanded the case (and parallel RFRA cases) to the lower courts to give the parties "an opportunity to arrive at an approach going forward that accommodates [the objecting employers'] religious exercise while at the same time ensuring that women covered by [the employers'] health plans 'receive full and equal health coverage, including contraceptive coverage.'"

Departments' Request for Information (RFI) and Analysis of Public Comments

In July 2016, the Departments published an RFI and received more than 54,000 public comments during the comment period.

Based on the comments submitted, the Departments are not making changes to the accommodation for the following reasons:

- No feasible approach has been identified that would resolve the religious objectors' concerns, while still ensuring that the affected women receive full and equal health coverage, including contraceptive coverage.
- The process described in the Court's supplemental briefing order would not be acceptable to those with religious objections to the contraceptive coverage requirements.
- There are administrative and operational changes to a process like the one described in the Court's order that are more significant than the Departments had previously understood and that would potentially undermine women's access to full and equal coverage.

Who May Object and How

As provided in the 2015 final regulations, only certain organizations can object to providing contraception coverage. The final regulations provide two accommodations for eligible organizations to provide notice of a religious objection to the coverage of contraceptive services. Employers that object to providing contraceptive services will need to determine if they meet the criteria of an eligible organization in order to

use one of the two accommodations. An eligible organization is an organization that meets all of the following requirements:

1. Opposes providing coverage for some or all of any contraceptive items or services required to be covered on account of religious objections.
2. Either is organized and operates as a nonprofit entity and holds itself out as a religious organization, or is organized and operates as a closely held for-profit entity, and the organization's highest governing body (such as its board of directors, board of trustees, or owners, if managed directly by its owners) has adopted a resolution or similar action, under the organization's applicable rules of governance and consistent with state law, establishing that it objects to covering some or all of the contraceptive services on account of the owner's sincerely held religious beliefs.
3. If both of the first two requirements are met, the organization must self-certify. The organization must make such self-certification or notice available for examination upon request by the first day of the first plan year to which the accommodation applies. The self-certification or notice must be executed by a person authorized to make the certification or notice on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under Section 107 of ERISA.

A "closely held for-profit entity" is defined in the regulations as an organization that:

- Is not a nonprofit entity;
- Has no publicly traded ownership interests, (for this purpose, a publicly traded ownership interest is any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934); and
- Has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals, or has an ownership structure that is substantially similar thereto, as of the date of the entity's self-certification or notice described in the requirements of an "eligible organization."

To determine its ownership interest, the following rules apply:

- Ownership interests owned by a corporation, partnership, estate, or trust are considered owned proportionately by such entity's shareholders, partners, or beneficiaries. Ownership interests owned by a nonprofit entity are considered owned by a single owner.
- An individual is considered to own the ownership interests held, directly or indirectly, by or for his or her family. Family includes only brothers and sisters (including half-brothers and half-sisters), a spouse, ancestors, and lineal descendants.
- If a person holds an option to purchase ownership interests, he or she is considered to be the owner of those ownership interests.

If an employer is unsure if it meets the requirements as a for-profit entity, it may send a letter describing its ownership structure to HHS. An entity must submit the letter in the manner described by HHS. If the entity does not receive a response from HHS to a properly submitted letter describing the entity's current ownership structure within 60 calendar days, as long as the entity maintains that structure it will be considered to meet the requirements of being a "closely held for-profit entity."

Accommodations

As discussed, there are two available accommodations or methods for eligible organizations to choose between in order object to the coverage of contraceptive services:

- The eligible organization may file EBSA Form 700.
- The eligible organization may go through the "alternative process."

The alternative process requires the eligible organization to notify HHS in writing of its objection to covering all or a subset of contraceptive services. The notice must include:

- The name of the eligible organization and the basis on which it qualifies for an accommodation
- A statement that its objection is based on a sincerely held religious belief to covering some or all contraceptive services (if objecting to a subset of services, they must be identified)
- The plan name (and type if it is a student health insurance plan or a church plan)
- The name and contact information for the plan's third party administrator (TPA) and health insurance issuers

There is a model notice available for eligible organizations to review. The content required is considered the minimum information necessary for federal agencies to determine if an entity is covered by the accommodation and to administer the accommodation. Nothing in the process provides for government assessment of the sincerity of religious beliefs.

For self-insured plans subject to ERISA, once the plan provides proper notice to HHS, the DOL and HHS will send a notification to the TPA of the ERISA plan notifying the TPA of the eligible organization's objection. The government notice will list the contraceptive services that are objected to, and will provide the TPA with its obligations and designate the relevant TPA as plan administrator under ERISA for the contraceptive benefits the TPA would otherwise manage.

For fully insured plans (or a student health plan), HHS will send notification to each health insurance issuer of the plan. The notification will inform the issuer or carrier of the eligible organization's objection, and will list the contraceptive services that are objected to. Issuers will be responsible for compliance with statutes and regulations to provide coverage for contraceptive services without cost sharing to participants notwithstanding that the policyholder is objecting.

Participants (employees and their covered spouses and dependents) will still have seamless access to contraceptive services at no cost, but the accommodations will shift the cost burden of the contraceptive services away from an employer that is an eligible organization.

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