Interim Final Rules Update

By Krista Maschinot

With the calendar year coming to a close, plan sponsors and plan administrators had been breathing a sigh of relief that renewal season will go smoothly as Congress failed to pass any major legislation affecting the Affordable Care Act this year. As with years past, however, a last-minute curveball was thrown at them that proves this year will be no different than previous years.

On October 6, 2017, the Trump Administration issued two Interim Final Rules (IFR) related to the Affordable Care Act's (ACA) contraceptive mandate. These rules apply to all employers and create additional considerations for employers sponsoring self-funded plans and their third-party administrators (TPAs).

These new Department of Health and Human Services (HHS) regulations, the "Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act" and the "Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act," allow for an exemption to the contraceptive mandate for a broader spectrum of companies and organizations.

Specifically, the rule expands the types of entities that can claim an exemption or an accommodation from the contraceptive mandate on the grounds of religious beliefs or for moral reasons.

Background

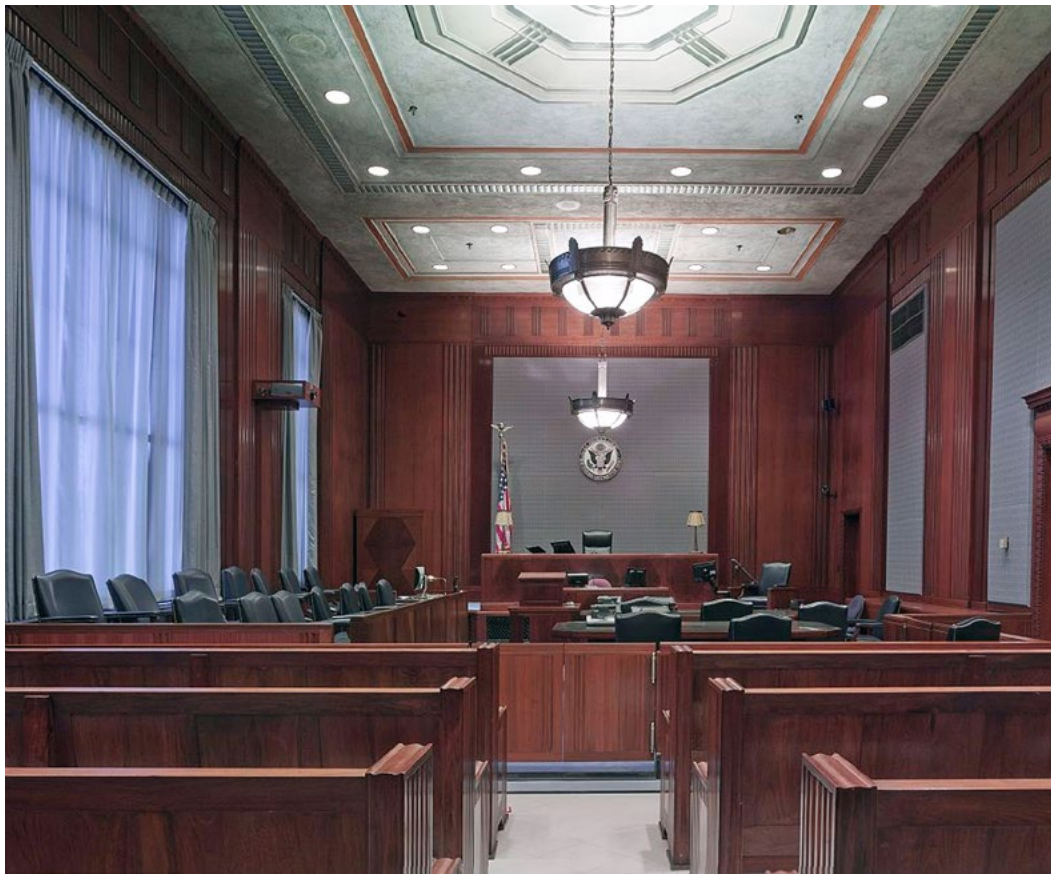
This is not a new discussion. In 2012, the contraceptive mandate in the ACA required all employers to provide contraceptive coverage to participants on a no cost-sharing basis, in-network. Religious employers, such as churches, were exempt from the mandate and were not required to file any documentation with the government.

There was also an accommodation process put into place for religious organizations that opposed covering contraceptive services for their employees and students. In 2013, a self-certification form, EBSA Form 700, was created and required for self-funded health plans claiming a religious accommodation from the mandate. Multiple lawsuits were filed during this time resulting in a split among the circuits as to which entities could claim exemption from the mandate.

In 2014, the Supreme Court weighed in and, in *Burwell v. Hobby Lobby*, held that requiring closely-held corporations to abide by the HHS regulations requiring no-cost access to contraceptives being made available to female employees violated the Religious Freedom Restoration Act (RFRA) in situations where the owners' religious beliefs were contrary to the regulations.[1]

In addition to *Hobby Lobby*, there was another Supreme Court case, *Zubik v. Burwell*, regarding the accommodation process. The Supreme Court decided not to issue a decision in the consolidated cases challenging the accommodation process for the contraceptive mandate for employers with religious objections to contraceptives.

Under the Trump Administration's new rules, the pool of employers that will be able to opt out of the contraceptive mandate is greatly expanded as the rules allow for employers that have a sincerely-held religious or moral objection to the provision of all or a subset of contraceptives or sterilization items, procedures, or services, or related patient education and counseling, to opt out of the women's preventive care mandate. The expanded group of entities with religious objections includes:



- Churches, integrated auxiliaries, and religious orders;
- Nonprofit organizations;
- For-profit entities;
- Non-governmental employers;
- Institutions of higher education;
- Individuals with employer sponsored or individual market coverage; and
- Issuers that provide coverage to plan sponsors or individuals that are exempt.[2]

As you can see from the list, this change will permit a much larger pool of companies to carve-out certain women's preventive care benefits under their health plans.

While these interim final rules allow a much broader group of employers and insurers to exempt themselves from covering contraceptives such as birth control pills on religious or moral grounds, they do not alter the rules regarding the TPA's/insurer's role once the employer has opted out of providing the contraceptive coverage. In other words, the regulations still require TPAs who administer the self-funded medical plan for those entities who opt out of the mandate to otherwise arrange for these women's preventive benefits.

While the interim final regulations do maintain the existing accommodations process, the process is now optional. Employers could choose not to request an accommodation, or choose to revoke their current accommodation, which would mean that the TPA would no longer be responsible for providing contraceptive coverage. The rules outline the process if an employer now chooses to revoke its current accommodation (which includes notifying the TPA and plan participants).

Process

Under *Burwell,* closely-held corporations that chose to opt out of contraceptive coverage could send a letter to HHS stating that they objected to offering contraceptive coverage in their health plans or they could complete EBSA Form 700, if they preferred. Under the new rules, the accommodation is now an optional process and employers can choose whether or not to provide any sort of notice or self-certification in order to inform the government of their intent to no longer provide coverage under the mandate. Employers are still responsible for notifying plan participants of any changes in coverage.

Pending Action

Upon issuance, the rules were questioned. For example, Maura Healey, the Attorney General for the Commonwealth of Massachusetts, filed a lawsuit in federal court on Friday, October 6th, in an attempt to block the new rules from taking effect. According to the Complaint, the IFR will result in thousands of women in Massachusetts being substantially harmed should the contraception mandate of the ACA be nullified by allowing employers to block contraceptive care and services based upon the employers' religious and moral objections to contraception.[3]

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The Complaint further states that implementation of the IFR will "jeopardize the health care of women in Massachusetts and nationwide, promote the religious freedom of corporations over the autonomy of women, and leave the [s]tates to bear additional health care costs both with regard to contraceptive and prenatal care as well as other services associated with unintended pregnancies and related negative health outcomes for both women and their children."[4] As of the date of this article, an Answer has not been issued by HHS. This creates questions and confusion for how to apply to the IFR.

Next Steps

With plan renewal season just around the corner, the applicability of this rule for self-funded plans and their TPAs needs immediate clarification. Under Burwell, the regulations required TPAs who administered the self-funded medical plan for those entities who could opt out of the mandate (via an exemption or accommodation, etc.) to otherwise arrange for these women's preventive benefits.

According to the interim final regulations, the accommodations process is still applicable but is now optional. TPAs will want to be on the look-out to ensure they have processes and procedures in place to address this accommodation process, or a revocation of a current accommodation, internally.

Should a plan decide to no longer offer contraceptives, the plan must still abide by the reporting and disclosure rules of the Employee Retirement Income Security Act (ERISA). As this would be a reduction of benefits, the Summary of Material Reduction (SMR) rules would apply. A plan has to disclose a material reduction sixty (60) days after the adoption of the change.

However, this post-change notification may not necessarily align with fiduciary duties and it is best to give as much warning about a change as possible. The Summary of Benefits and Coverage (SBC) rules also include distribution requirements and, in short, if a change to the plan creates the need to change or update the SBC and the change is made mid-plan year, the plan must give sixty (60) days' advance notice. When changes are made at plan renewal, the SBC distribution requirement for open enrollment is generally thirty (30) days' notice before the start of the plan year.

These requirements may create a significant amount of administrative work and potentially be costly for the plan. Plans will need to consider the administrative burdens that will arise if coverage is no longer available, the notification requirements, and how changes could possibly affect their stop loss coverage.

As a result of this regulation, there are many questions that we hope to have resolved with future guidance. Employers considering the exemption and/or accommodation will need to take into consideration the lack of guidance provided and the potential effect these unanswered questions may have on the plan and the plan participants. Employers and interested parties can submit their comments to HHS regarding the new rules throughout the comment period, which closes on December 5, 2017. ■

Krista joined the Phia Group as a consulting attorney in 2017. Prior to working at the Phia Group, Krista worked as an associate counsel for the annuity division of a large insurance group. Krista focuses on health plan document design and the regulatory issues affecting the administration of employee benefit plans. Krista received her Juris Doctor from The Catholic University of America and her BS in Accounting from the University of Kentucky. She is admitted to the Bar of the Commonwealth of Kentucky and the State of Ohio.

References

1 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 22 (2014).

2 Departments of Health and Human Services, Fact Sheet: Religious and Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act (2017), https://www.hhs.gov/sites/default/files/fact-sheet-religious-exemptions-and-accommodations-for-coverage.pdf.

3 Commonwealth v. U.S Dep't of Health and Human Services et al., No. 1:2017cv11930 (D. Mass. Filed Oct. 6, 2017).

4 Id.