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CLIENT ALERT

ACA Contraception Coverage Exemption Expanded

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On October 6, 2017, the U.S. Departments of Labor, Health and Human Services, and the Treasury (the regulators) issued interim final rules with respect to the coverage of contraceptive products under the preventative services requirements of the Affordable Care Act (ACA). The controversial new rules expand the accommodations available under the ACA to employers who object, on the basis of "sincerely held religious beliefs" or moral grounds, to providing coverage for contraceptives under employer-sponsored group health plans.

The regulators had previously released final regulations on July 2, 2013, regarding coverage of certain women's preventive services. Under the ACA, Food and Drug Administration (FDA)-approved contraceptive products and services are included in the list of preventive services that must be covered without cost sharing for participants in non-grandfathered health plans. These final regulations, with the exception of the amendments to the religious employer exemption, applied to group health plans and health insurance issuers for plan years beginning on or after January 1, 2014. Religious employers were provided an exemption from the requirement.

Since the final regulations went into effect, several entities not meeting the definition of "religious employer" for purposes of the ACA have brought lawsuits challenging the ACA's mandate to provide coverage for contraceptive products. For instance, closely-held, for-profit corporations challenged the ACA's mandate and won. In response, the Obama Administration extended the religious accommodation to such companies. Other lawsuits involved entities that refused to comply with the steps necessary to seek the religious exemption under the ACA (the self-certification standard). Last May, in *Zubik v. Burwell*, 578 U.S. _____ (2016), in a four-to-four decision, the U.S. Supreme Court declined to rule on whether the ACA mandate challenged by religiously affiliated non-profit organizations applied. The Supreme Court remanded the lower court cases and directed the parties to resolve the issues surrounding the religious accommodation.

On October 6, 2017, the regulators issued interim final rules which provide that effective immediately, certain individuals ("individuals enrolled in plans where their employers or issuers (as applicable) are willing to offer them a religiously acceptable plan"), institutions of higher education and non-governmental employers (including for-profit companies, whether they are closely-held or not) with religious or moral objections are able to claim exemption from providing $0 cost-sharing contraceptive coverage under the ACA. The exemption based on moral objections is not available to for-profit companies that are publicly traded. The new interim final rule does not add any new notice requirements on plans that elect to claim the exemption, however, ERISA's general disclosure and those

surrounding a reduction in benefits rules applicable to group health plans would apply, thus an ERISA plan claiming the exemption and eliminating this coverage has to disclose those changes in benefits to plan participants. Although the regulators will consider comments from the public, the preamble to the interim final rules provided that "good cause exists to issue the rules on an interim final basis before the comments are submitted and reviewed."

So far, the Massachusetts and California attorneys general and the American Civil Liberties Union (ACLU) have challenged the interim final rules. The ACLU filed its lawsuit on behalf of its members and those of the Service Employee International Union-United Health Care Workers West (SEIU-UHW).

We do not believe that these interim final rules will result in all eligible employers eliminating approved contraceptive products without cost sharing for participants. There are many employers who offered contraceptive products prior to the ACA, however, these contraceptive products were subject to cost sharing. Surveys conducted, by entities such as Mercer and Kaiser, show that many employers, even if permitted to eliminate the coverage, will continue to cover contraceptive products without cost sharing.

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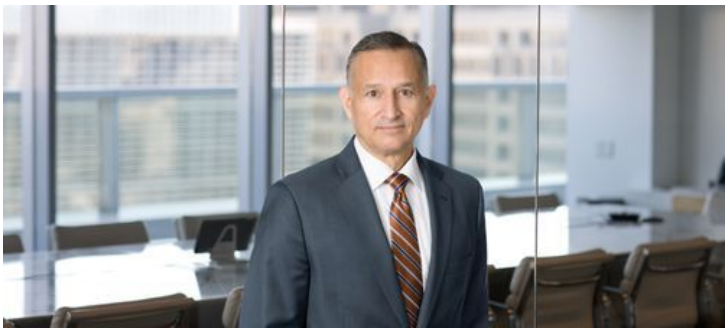

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