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New Rules on Contraceptive Coverage for Religious Employers

New [proposed regulations](#) were recently issued for public comment spelling out how non-profit religious organizations can satisfy the preventive health services requirements under healthcare reform (including no-cost coverage of sterilization and the full range of contraceptive methods, including emergency “day after” contraceptive pills). The new proposed rules provide women with coverage for these preventive care services with no co-pays, and also attempt to address the concerns of some religious organizations. A [fact sheet](#) is also available.

Background: Effective for plan years beginning on or after September 23, 2010, insurers and non-grandfathered group health plans must provide certain preventive services delivered by in-network providers without imposing any cost-sharing (this is sometimes referred to as providing “first-dollar coverage”). As a result, no deductibles, co-pays, co-insurance, or other cost-sharing may be imposed on these services. Also, a broad range of women's preventive services must be covered. In August 2011, the Obama administration said these “preventive” services would include contraception such as birth control pills, implants, and sterilization procedures. Coverage without cost-sharing for these items and services was required to be provided for plan years beginning on or after August 1, 2012 (i.e., January 1, 2013 for calendar-year plans).

Under the original rule, only those religious groups which primarily employ and serve people of their own faith — such as churches — were exempt. But other religiously affiliated groups, such as church-affiliated universities, hospitals and charities, were told they had to comply. Religious leaders lobbied for an exception to the requirement. The Catholic Church prohibits the use of artificial contraception, and even evangelicals who generally permit the use of birth control, object to specific methods such as the morning-after contraceptive pill, which they argue is tantamount to abortion. After much criticism, the Obama administration agreed to a one-year delay until plan years beginning on or after August 1, 2013 to allow the groups to comply, while promising further compromise. The administration promised to change the birth control requirement so insurance companies — and not faith-affiliated employers — would pay for the coverage, but religious leaders said more changes were needed to make the plan work. Since then, more than 40 lawsuits have been filed by religious nonprofits and secular for-profit businesses claiming the mandate violates their religious beliefs. Several for-profit businesses have instituted lawsuits over the regulation, taking the position that the requirement violates a 1993 law on religious freedom because for-profit companies don't get the exemption. So far, about 10 businesses have obtained temporary injunctions against the regulation while their cases move through the courts.

The new proposed rule: The new rule broadens the types of organizations eligible for an exemption from the birth-control mandate. In the latest version of the rule, houses of worship remain exempt. The exemption is now also available to certain affiliated nonprofit religious groups that certify, in writing, that they have religious objections to such coverage. The rule provides that female employees could get free contraceptive coverage through a separate plan that would be provided by a health insurer. Institutions objecting to the coverage would not pay for the contraceptives. Insurance companies would bear the cost of providing the separate coverage, with the possibility of recouping the costs through lower healthcare expenses resulting in part from fewer births. But many religious groups are dissatisfied with the new proposal and want a broader, more explicit exemption for religious organizations and protection for secular businesses owned by people with religious objections to contraceptive coverage. As expected, this latest regulation does not provide any accommodation for individual business owners who have religious objections to the rule.

Accommodation for nonprofit religious organizations: The proposed rule lays out how religious organizations that certify in writing that they object to contraception on religious grounds can receive an accommodation. For a nonprofit with private insurance that identifies itself as religious (such as non-profit religious hospitals or institutions of higher education), the private insurer will be required to work directly with female employees to provide coverage for contraception. Many religious nonprofits, however, are self-insured. In those cases, a third party, not the religious employer, would handle the coverage. Here is how this is intended to work:

- With respect to insured plans, including student health plans, non-profit religious organizations would provide notice to their insurer. The insurer would then notify enrollees that it is providing them with no-cost contraceptive coverage through separate individual health insurance policies.
- With respect to self-insured plans, as well as student health plans, these religious organizations would provide notice to their third party administrator (TPA). In turn, the TPA would work with an insurer to arrange no-cost contraceptive coverage through separate individual health insurance policies.

How the cost will be covered: The rules lay out how the costs of both the insurer and the TPA are intended to be covered, without any charge to either the religious organization or the enrollees. Insurers said they were studying the proposal, but had questions about how it would work. Many insurers asked where they would get the money to pay for birth control pills if they cannot “impose any premium, fee or other charge” for the coverage. “Actuaries, economists and insurers estimate that providing contraceptive coverage is at least cost neutral, and may result in cost savings when taking into account all costs and benefits for the insurer,” the government said in a regulatory filing. For nonprofits that are self-insured, birth-control coverage for their workers may be more complicated. The responsibility will fall to TPAs. If there is a cost to TPAs for the coverage, the government intends to reimburse them by reducing the fees their insurers pay for the privilege of selling plans in new health insurance marketplaces, called exchanges, which are being established under the health law.

Employers looking to take advantage of the religious-employer exemption should confer with counsel to ensure that all criteria are met. Controversy over the contraceptive services coverage mandate is expected to continue based on religious liberty concerns. Should you have questions about this or any aspect of healthcare reform, contact your Conner Strong & Buckelew account

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