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Leaked! New Draft Rule Expands Affordable Care Act Exemptions for Religious or Moral Objections

by Mark E. Chopko & Kristin J. Jones

The Trump Administration promised to protect religious organizations that objected to forms of contraceptive coverage under the Affordable Care Act. A widely published draft of the new rules indicates plans to significantly expand protections for both nonprofit and for-profit organizations objecting to contraception and sterilization coverage in their group health plans.

Under current regulations, group health insurance must include coverage for contraceptives. Churches are exempt from the regulation, and other employers affiliated with religious institutions, while covered, are accommodated through a self-certification process. The self-certification process gives religious employers an opportunity to object to coverage, shifting the cost of coverage and implementation to the insurer or plan administrator. Dozens of lawsuits were filed asserting that the accommodation did not resolve the religious objections. A year ago, the U.S. Supreme Court directed the parties to try harder to reach an agreement on how to balance religious objections with the coverage mandate. After the general election, it was widely anticipated that a broader exemption would be forthcoming.

If adopted as a rule, as indicated in the draft, the coverage exemption would be substantially expanded. The exemption would cover all employers – both nonprofit and for-profit – objecting to contraception or sterilization coverage for religious or moral reasons. Because the regulation expands the scope of the exemption to all employers, the existing self-certification process would generally become moot, although the option would remain available for an objecting entity. Where no objection exists, the draft regulation would continue to require contraception and sterilization coverage to the extent coverage is currently required. Further, employers would still be required to disclose noncoverage of these services in plan documents.

For individuals with a religious or moral objection, the new rules would provide no relief unless it comes from the employer. Employers would not be required to offer a separate benefit package excluding coverage for contraceptives. This “individual exemption” does not require an employer to provide a plan omitting contraceptive coverage; it merely allows an employer to do so.

The anticipated new rule, consistent with current standards, sets a federal minimum coverage standard. The regulation would not preempt the rights of states to pass or enforce stronger contraceptive mandates. In fact, the regulation text expressly states that the “individual exemption” would not be available to prevent the application

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of a state law requiring coverage of contraceptives or sterilization. In light of the conflicting standards, religious employers should continue to focus on the scope of the religious exemption under their own state's laws. Further attention should also be focused on whether the employer's plan will be subject to the Employee Retirement Income Security Act (ERISA), which can preempt contrary state rules.

Currently, the regulation remains in draft form and will be effective only if and when it is published. Given the number of other regulations and policies and even executive orders that have found their way into print in advance of enactment, it bears watching whether this "leak" is a trial balloon and the published regulation will be modified based on reactions. This development shows that religious entities must be attentive to a rapidly changing regulatory environment.



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