

## Obama Administration Further Clarifies Federal Contraceptive Coverage Requirement

In February 2013, the Obama administration issued two important documents aimed at clarifying how the new federal contraceptive coverage requirement will be implemented. Proposed federal regulations, released on February 2, detail how objections by some religiously affiliated employers would be addressed while still ensuring seamless coverage of contraception for employees and dependents. That was quickly followed, on February 20, by a set of “frequently asked questions” related to contraceptive coverage and the underlying requirement from the Affordable Care Act that most private health plans cover a range of preventive services without copays, deductibles or other out-of-pocket costs for patients.<sup>1</sup>

### Rules for Religious Objections

The proposed regulations are largely consistent with what the administration had previously outlined. First, they continue to provide a complete exemption from the contraceptive coverage requirement for health plans offered by a narrow group of religious employers closely tied to houses of worship. That exemption was first announced in mid-2011. In response to public comments, the administration proposed simplifying its previous, four-part definition of “religious employer,” instead using a single definition tied to the Internal Revenue Code. It is as yet unclear whether this change will significantly affect the number of institutions that would qualify for the exemption—and, thereby, the number of women who would be denied the health and financial benefits of

contraceptive coverage regardless of whether they share the employer’s objection to contraceptive use. In an accompanying fact sheet, however, the administration asserts that “this proposal would not expand the universe of employer plans that would qualify” beyond what the administration originally intended.<sup>2</sup>

Second, the proposed rules spell out aspects of an additional “accommodation,” first announced by President Obama in February 2012, for a broader range of self-declared religiously affiliated nonprofit organizations, such as universities, hospitals and social relief agencies.<sup>3</sup> Unlike employees of organizations exempted entirely, employees of organizations that qualify for the accommodation are meant to have seamless coverage of contraceptive services without out-of-pocket costs. This coverage would be provided by the organization’s insurance company; the organization itself, as the administration puts it, “would not have to contract, arrange, pay or refer for any contraceptive coverage to which they object on religious grounds.”<sup>2</sup> Actuarial and research evidence indicates that including full coverage of contraception should not raise the insurance company’s costs and may actually reduce them, because contraceptive use averts costs from unplanned pregnancies.<sup>4</sup>

The rules provide additional details for how this arrangement would work for objecting organizations that are self-insured (meaning that they do not purchase coverage from an insurance

company). In such cases, responsibility for arranging the coverage would fall on the company the organization contracts with to administer its plan. Because savings from preventing unplanned pregnancies would not accrue to the company providing the contraceptive coverage, the rules propose having the federal government absorb the costs of that coverage. For-profit employers, meanwhile, would not be eligible for the exemption or accommodation.

The administration is accepting comments on the proposed regulations through April 8. A final rule will need to be in place by August 1, when a one-year “safe harbor” period ends for religiously affiliated nonprofits.

### Guidance for Health Plans

The requirements to cover contraception and other preventive services for women went into effect in August 2012, affecting most new or renewed plans at the start of their next plan year; for millions of Americans, that meant January 2013. The administration’s “frequently asked questions” guidance was designed to address some initial confusion among health plans about what exactly they must cover and how they must cover it.

The guidance makes it clear that plans must cover the “the full range” of contraceptive methods approved by the Food and Drug Administration (FDA).<sup>1</sup> That would include not only a range of oral contraceptive pills, but also rings, patches, injectables, implants, hormonal and copper IUDs,

barrier methods and female sterilization procedures. The guidance also specifically mentions contraceptive sponges, spermicides and other methods generally available over the counter, which must be covered if the method has been approved by the FDA and is “prescribed for a woman by her health care provider.” Unfortunately, the administration advises that because contraceptive coverage is required under a package of women’s preventive services, “services relating to a man’s reproductive capacity, such as vasectomies and condoms” are excluded from the requirement.

The guidance also clarifies that services related to the provision and use of a contraceptive method must be covered without cost-sharing. It specifically mentions follow-up services, management of side effects, counseling for continued adherence, and device removal. The same logic would apply, for example, to any necessary lab tests or anesthesia. The administration repeated earlier guidance that health plans may use “reasonable medical management techniques”—for example, drug formularies that require copayments for some brand-name drugs that have generic equivalents. But the new guidance requires plans to have a process to waive such restrictions when a woman’s provider determines it is medically appropriate for her needs to do so. The guidance displays that same deference to health care providers’ judgment for determining when the plan must cover more

than one well-woman visit in a year. More broadly, the administration reaffirmed that the preventive services requirements apply only to services obtained from in-network providers; yet, it clarified that if a plan’s network does not have anyone to provide a given service, the plan must cover it out-of-network without cost-sharing.

### Continuing Controversy

Neither the regulation on religious objections nor the guidance on implementation are likely to quell the ongoing attacks on the contraceptive coverage provision. Numerous socially conservative groups and like-minded members of Congress have argued that anything less than a total exemption for all employers with objections to contraception—whether nonprofit or for-profit—constitutes religious discrimination.

Moreover, more than 45 lawsuits challenging the provision were pending at the end of February.<sup>5</sup> The lawsuits brought by nonprofit organizations have typically been judged by the courts to be premature, because of the one-year safe harbor period. The administration clearly hopes that the final version of its religious accommodation will be judged—by the courts, if not by all the nonprofit plaintiffs—to appropriately address their objections.

For-profit employers have not been granted the safe harbor, and many are already subject to the requirement. So far, although several courts have granted employers temporary injunc-

tions as the cases are being argued, only one district court has issued a ruling on the merits of the case, ruling against a Missouri-based mining company. That case has headed to the Eighth Circuit Court of Appeals, the first of several that may be expected to reach the appellate courts over the next year or two. The U.S. Supreme Court will undoubtedly take up the issue at some point. Although the Supreme Court has long held that entering into commercial activity means accepting your faith cannot be superimposed on others, there is no guarantee the Court will follow that precedent.—*Adam Sonfield*

### REFERENCES

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