



Health Care Reform

LEGISLATIVE BRIEF

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Contraceptive Coverage Requirements for Religious Employers

Effective for plan years beginning on or after Aug. 1, 2012, the Affordable Care Act (ACA) requires non-grandfathered group health plans and health insurance issuers to provide benefits for certain women's preventive health services without imposing cost-sharing requirements. These services include the preventive care and screenings for women described in [guidelines](#) issued by the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (the Departments). One of these guidelines requires non-grandfathered plans and issuers to cover **all FDA-approved contraceptive methods** for women without cost sharing.

Special contraceptive coverage rules apply for nonprofit religious employers and organizations. These rules exempt churches and other houses of worship from the ACA's requirement to cover contraceptives. For other church-affiliated institutions that object to contraceptive coverage, such as schools, charities, hospitals and universities, these rules establish a temporary enforcement delay and an accommodations approach.

On Aug. 27, 2014, the Departments published **two separate rules** which expand the accommodations approach, in response to U.S. Supreme Court decisions on the contraceptive mandate.

- An [interim final rule](#) provides a new way for eligible organizations to provide notice of their objection to covering contraceptive services.
- A [proposed rule](#) would extend the accommodation to certain closely held for-profit companies.

In addition, on July 17, 2014, the Departments released an [FAQ](#) outlining notification rules for employers that plan to discontinue providing contraceptive coverage to employees, as permitted by the Court's ruling.

EXEMPTION FOR CHURCHES

In 2011, the Departments provided an exemption from the ACA's contraceptive coverage requirement for **group health plans of certain nonprofit religious employers** (such as churches and other houses of worship). Under this exemption, eligible employers offering health coverage may decide whether or not to cover contraceptive services, consistent with their beliefs. A "religious employer" was defined as an employer that:

- Has the inculcation of religious values as its purpose;
- Primarily employs persons who share its religious beliefs; and
- Primarily serves persons who share its religious beliefs.

On July 2, 2013, the Departments published a [final rule](#) that simplifies the definition of a "religious employer" as it relates to the contraceptive coverage exemption, effective for plan years beginning on or after Jan. 1, 2013.

Under the simplified definition, a religious employer will qualify for the exemption to the contraceptive coverage mandate if it is a nonprofit entity that is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue Code](#). This definition primarily includes churches, other houses of worship and their affiliated organizations.

The simplified definition is intended to clarify that a house of worship is not excluded from the exemption because, for example, it provides charitable social services to, or employs, persons of different religious faiths.

Contraceptive Coverage Requirements for Religious Employers

ACCOMMODATIONS FOR NONPROFIT RELIGIOUS ORGANIZATIONS

The July 2013 final rule provides accommodations for nonprofit religious organizations that object to contraceptive coverage on religious grounds, but do not qualify for the church exemption. The accommodations are effective for **plan years beginning on or after Jan. 1, 2014**. A temporary enforcement delay applied until then.

An eligible organization is one that:

- Opposes providing coverage for some or all of any contraceptive services which are required to be covered on account of religious objections;
- Is organized and operates as a nonprofit entity;
- Holds itself out as a religious organization; and
- Self-certifies that it meets these criteria (HHS has provided a [self-certification form](#) for this purpose).

Under the accommodations, eligible organizations do not have to contract, arrange, pay or refer for any contraceptive coverage to which they object on religious grounds. However, separate payments for contraceptive services will be provided to females in the health plan by an independent third party, such as an insurance company or third-party administrator (TPA), directly and free of charge.

The final rule does not require the self-certification to be submitted to any of the Departments. Instead, an eligible organization must maintain the self-certification in its records and make the self-certification available for examination upon request. Also, as described below, the religious organization must either **provide the self-certification to the plan's issuer or TPA** or **provide written notice to HHS** that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

Expanded Accommodations Approach: Notice to HHS

In response to legal challenges to the final rule's accommodations approach, the Departments published an [interim final rule](#) on Aug. 27, 2014, which provides an **alternative way** for eligible organizations to provide notification of their objections to covering contraceptives. Under the interim final rule, an eligible organization may **notify HHS in writing** of its religious objection to providing contraceptive coverage, instead of providing the self-certification to the plan's issuer or TPA.

The notice to HHS must, at a minimum, include:

- The name of the eligible organization and the basis on which it qualifies for an accommodation;
- Its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable);
- The plan name and type (for example, a student health insurance plan or a church plan); and
- The name and contact information for any of the plan's TPAs and health insurance issuers.

A [model notice](#) to HHS has been provided that eligible organizations may, but are not required to, use. If any of the information required to be included in the notice changes, the organization must provide updated information to HHS.

HHS will then notify the insurer for an insured health plan (or the DOL will notify the TPA for a self-insured plan) that:

- The organization objects to providing contraception coverage; and
- The insurer or TPA is responsible for providing enrollees separate no-cost payments for contraceptive services for as long as they remain enrolled in the plan.

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2/13; BK 2/15

Contraceptive Coverage Requirements for Religious Employers

Regardless of whether the eligible organization self-certifies in accordance with the July 2013 final rules, or provides notice to HHS in accordance with the interim final rule, the obligations of insurers and/or TPAs regarding providing or arranging separate payments for contraceptive services are the same.

Application to Insured Health Plans

For insured group health plans, the religious organization must either provide **the self-certification to the health insurance issuer** or **written notice to HHS** that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services. An issuer may not require any further documentation from the eligible organization regarding its status as an eligible organization.

An issuer who receives a copy of the self-certification or notification from HHS must then:

- Provide separate payments for contraceptive services for the women in the health plan of the organization without cost sharing, premium, fee or other charge to the women or to the organization or its plan; and
- Notify plan participants and beneficiaries that the issuer provides separate payments for contraceptive services at no cost for so long as the participant or beneficiary remains enrolled in the plan.

According to the Departments, issuers generally will find that providing such contraceptive coverage is cost neutral because they will be insuring the same set of individuals under both policies and will experience lower costs from improvements in women's health and fewer childbirths. However, any costs of the health insurance issuer will be offset by adjustments in federally facilitated Exchange (FFE) user fees that insurers pay.

Application to Self-insured Health Plans

For self-insured group health plans, the religious organization must either provide **the self-certification to its TPA** or **written notice to HHS** that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services. A TPA that receives a copy of the self-certification from an eligible organization or a notification from the DOL may decide not to enter into, or remain in, a contractual relationship with the eligible organization to provide administrative services for the plan. However, a TPA may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the DOL.

A TPA that agrees to enter into (or remain in) a contractual relationship with the organization must **provide or arrange separate payments** for contraceptive services for women in the plan without cost sharing, premium, fee or other charge to the women or to the eligible organization or its plan. The TPA can provide these payments on its own or it can arrange for an issuer or other entity to provide payments. The costs of these payments can be offset by adjustments in federally-facilitated Exchange (FFE) user fees paid by a health insurance issuer with whom the TPA has an arrangement.

Although the Departments believe that there are no self-insured health plans that do not have TPAs, the July 2013 final rule provides these plans with a safe harbor from enforcement of the contraceptive mandate, provided:

- The plan submits to HHS specific information showing that it does not use the services of a TPA; and
- If HHS agrees that the plan does not use a TPA, the plan gives notice to plan participants and beneficiaries in any application materials distributed in connection with enrollment (or re-enrollment) that is effective beginning on the first day of each applicable plan year indicating that it does not provide benefits for contraceptive services.

Application to Institutions of Higher Education

The Departments also established rules for religious nonprofit organizations that are institutions of higher education. If this type of organization arranges for student health insurance coverage, it is eligible for an accommodation comparable to the type available for a religious organization with an insured group health plan.

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2/13; BK 2/15

Contraceptive Coverage Requirements for Religious Employers

LEGAL CHALLENGES

For-profit Employers

Most of the legal challenges to the contraceptive mandate have involved for-profit employers that do not qualify for the exemption or accommodations, but that object on religious grounds to providing coverage for certain types of contraceptives. On June 30, 2014, in [Burwell v. Hobby Lobby Stores, Inc. et al.](#), the U.S. Supreme Court created a narrow exception to the contraceptive mandate for closely held for-profit businesses that object to providing coverage for certain types of contraceptives based on their sincere religious beliefs.

In light of the Court's decision in *Hobby Lobby*, the Departments issued a [proposed rule](#) on Aug. 27, 2014, that would amend the definition of an "eligible organization" for purposes of the accommodations approach under the July 2013 final rule. The amended definition would include a **closely held for-profit entity that has a religious objection** to providing coverage for some or all of the contraceptive services otherwise required to be covered. This proposed change would extend the accommodations approach available for non-profit entities to group health plans established or maintained by certain closely held for-profit entities with similar religious objections to contraceptive coverage.

Thus, under the proposed rules, a qualifying closely held for-profit entity would not be required to contract, arrange, pay or refer for contraceptive coverage. Instead, payments for contraceptive services provided to participants and beneficiaries in the eligible organization's plan would be provided or arranged separately by an issuer or a TPA.

The proposed rule includes **two possible approaches** for defining a "qualifying closely held for-profit entity." According to the Departments, a closely held corporation—also referred to as a "close" or "closed" corporation—is commonly understood to be a corporation in which the stock is owned by a small number of persons and for which no active trading market exists. The proposed rules would define a "qualifying closely held for-profit entity" as either:

1. An entity that is not publicly traded and that has fewer than a specified number of shareholders or owners; or
2. An entity that is not publicly traded, and in which a specified fraction of the ownership interest is concentrated in a limited and specified number of owners.

The proposed rule does not specify the number of owners or concentration of ownership; instead, the Departments requested comments on an appropriate number and/or concentration. The Departments also requested comments on other possible approaches, as well as documentation and disclosure of a closely held for-profit entity's decision not to provide contraceptive coverage.

The proposed rule also provides that valid corporate action taken in accordance with the entity's governing structure, in accordance with state law, stating its owners' religious objection can serve to establish that the entity objects to providing contraceptive coverage on religious grounds.

On July 17, 2014, the Departments released an [FAQ](#) outlining notification rules for employers that plan to discontinue providing contraceptive coverage to employees, as permitted by the Court's ruling. The FAQ addresses situations where a closely held for-profit corporation's health plan will cease providing coverage for some or all contraceptive services mid-plan year. It states that this reduction in coverage will trigger certain notice requirements to plan participants and beneficiaries.

For plans subject to the Employee Retirement Income Security Act (ERISA), ERISA requires disclosure of information relevant to coverage of preventive services, including contraceptive coverage. Specifically, existing DOL regulations require a plan's summary plan description (SPD) to include a description of the extent to which preventive services (which includes contraceptive services) are covered under the plan.

Accordingly, if an ERISA plan excludes all (or a subset of) contraceptive services from coverage under its group health plan, the plan's SPD must describe the extent of the limitation or exclusion of coverage. For plans that reduce or eliminate coverage of contraceptive services after having provided such coverage, expedited disclosure requirements for material reductions in covered services or benefits apply. ERISA and related regulations generally require

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2/13; BK 2/15

Contraceptive Coverage Requirements for Religious Employers

disclosure no later than 60 days after the date of adoption of a modification or change to the plan that is a material reduction in covered services or benefits.

Other disclosure requirements may also apply. For example, state insurance laws applicable to health insurance issuers could require additional disclosures to participants and beneficiaries.

Non-profit Employers

The legal challenges to the accommodations approach for non-profit entities have focused on the **self-certification requirement**. According to the challengers, the self-certification process infringes on religious liberty because it makes the non-profit organization complicit in the provision of birth control.

On July 3, 2014, the U.S. Supreme Court granted Wheaton College, an Illinois Christian school, a [temporary injunction](#) from the self-certification requirement. According to the Supreme Court's order, if the college **informs HHS in writing** about its religious objections to contraceptive coverage, the federal government cannot enforce the contraceptive mandate against the college. The college is not required to send copies of its letter to issuers or TPAs.

In response to the injunction for Wheaton College, the Departments provided an **alternative way** for eligible organizations to provide notification of their objections to covering contraceptives. The interim final rule from Aug. 27, 2014, allows an eligible organization to notify HHS in writing of its religious objection to providing contraceptive coverage, instead of providing the self-certification to the plan's issuer or TPA.

Numerous legal challenges to the self-certification requirement are still making their way through the court system. On Nov. 14, 2014, the District of Columbia Circuit Court of Appeals [ruled](#) against a group of non-profit religious employers, holding that the accommodations approach provides sufficient protection of religious freedom. This decision followed a Florida district court [ruling](#) from Oct. 28, 2014, that temporarily blocks the federal government from enforcing the alternative self-certification approach on a non-profit Catholic university.

TEMPORARY SAFE HARBOR

HHS established a [temporary enforcement safe harbor](#) from enforcement of the contraceptive mandate for nonprofit organizations that do not provide some or all of the required contraceptive coverage based on their religious beliefs. The enforcement safe harbor is effective for plan years beginning before **Jan. 1, 2014**. For plan years beginning on or after Jan. 1, 2014, the accommodations approach described above is effective.

Under the terms of the safe harbor, the Departments will not take any enforcement action against employers, group health plans or group health issuers that meet the eligibility criteria for the safe harbor and that fail to cover some or all of the recommended contraceptive services without cost sharing.

Eligibility for Safe Harbor

To be eligible for the temporary enforcement safe harbor, all of the following criteria must be met:

1. The organization is organized and operates as a nonprofit entity;
2. From Feb. 10, 2012, going forward, the organization's group health plan has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with applicable state law, because of the organization's religious beliefs;
3. The organization's group health plan (or another entity on behalf of the plan, such as the issuer or TPA) must provide a notice to the plan's participants that states that some or all of the contraceptive coverage will not be provided under the plan for the first plan year beginning on or after Aug. 1, 2012; and
4. The organization must self-certify that it satisfies criteria 1-3 above, and must document its self-certification.

As an exception, a group health plan will satisfy the second criterion if, as of Feb. 10, 2012, it took some action to try to exclude or limit its contraceptive coverage, but was not successful. To qualify for this exception, the organization

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2/13; BK 2/15

Contraceptive Coverage Requirements for Religious Employers

must certify that it (or its plan or issuer) took some action before Feb. 10, 2012, to try to exclude from coverage some or all contraceptive services because of the organization's religious beliefs, but that these services were covered under the plan despite this action.

A religious employer that potentially qualifies for the exemption to the contraceptive coverage requirement may, if eligible, take advantage of the temporary enforcement safe harbor. According to HHS, using the safe harbor will not prevent an eligible religious employer from later invoking the exemption.

Notice

The required notice must be in any application materials distributed in connection with enrollment (or re-enrollment) in coverage that is effective **for each plan year** beginning before Jan. 1, 2014. The notice is required to be provided by the group health plan, although the plan may ask another entity (such as the issuer or TPA) to accept responsibility for providing the notice on its behalf.

For insured coverage, unless the issuer accepts responsibility in writing for providing the notice, the issuer does not lose protection under the safe harbor solely because the plan does not distribute the notice as required or because the issuer relies in good faith on a representation by the plan that turns out to be incorrect. The notice must provide as follows:

NOTICE TO PLAN ENROLLEES

The organization that sponsors or arranges your group health plan has certified that it qualifies for a temporary enforcement safe harbor with respect to the Federal requirement to cover contraceptive services without cost sharing. During this period, coverage under your group health plan will not include coverage of [some] contraceptive services.

Certification

To qualify for the safe harbor, an organization must certify its eligibility using the attached certification form. The required certification must be signed by an authorized organizational representative, and must be completed and made available for examination by the first day of the plan year to which the temporary enforcement safe harbor applies. Organizations are only required to complete the certification one time.

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2/13; BK 2/15

Contraceptive Coverage Requirements for Religious Employers

CERTIFICATION FORM

(To Be Used for Plan Years Beginning BEFORE Jan. 1, 2014)

This form is to be used to certify that the health plan established or maintained or arranged by the organization listed below qualifies for the temporary enforcement safe harbor, as described in HHS bulletin entitled "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code," pertaining to coverage of FDA-approved contraceptive services for women without cost sharing.

Please fill out this form completely.

	Name of the organization establishing or maintaining or arranging the plan
	Name of the individual who is authorized to make, and makes, this certification on behalf of the organization
	Mailing and email addresses and phone number for the individual listed above

(Check the applicable box)

- I certify that the organization is organized and operated as a non-profit entity; and that, from Feb. 10, 2012, onward, the plan has consistently not provided all or the same subset of the contraceptive coverage otherwise required, consistent with any applicable State law, because of the religious beliefs of the organization.
- I certify that the organization (or its plan or its issuer) took some action before Feb. 10, 2012, to try to exclude from coverage under the plan some or all contraceptive services because of the religious beliefs of the organization, but that, subsequently, such contraceptive services were covered under the plan despite such action, and that, but for that coverage, I could make the certification above.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

Signature of the individual listed above

Date

Failure to provide the requisite notice to plan participants renders a group health plan ineligible for the temporary enforcement safe harbor.

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2/13; BK 2/15