Cheetah™

Health Law Daily Wrap Up, HEALTH CARE REFORM—3d Cir.: States likely to succeed in lawsuit challenging contraceptive exemption regulations, (Jul. 15, 2019)

Health Law Daily Wrap Up

Click to open document in a browser

By Nicole D. Prysby, J.D.

State plaintiffs are likely to succeed in proving that federal agencies did not follow the APA and that regulations expanding the religious exemptions authorizing employers with religious objections to limit employees’ access to health insurance coverage for contraception are not authorized under the ACA.

Pennsylvania and New Jersey are likely to succeed in proving that the agencies did not follow the Administrative Procedure Act (APA) and that the regulations are not authorized under the Affordable Care Act (ACA) or required by the Religious Freedom Restoration Act (RFRA), held the Third Circuit Court of Appeals. The court also concluded that the States will suffer a concrete and imminent financial injury from the increased use of state-funded services were the regulations to go into effect, and that an injunction would redress that injury. Therefore, it affirmed the district court’s order preliminarily enjoining the rules’ enforcement nationwide (Commonwealth of Pennsylvania V. Trump, July 12, 2019, Shwartz, P.).

State challenges to regulations. As previously reported, the Health Resources and Services Administration determined that health plans covered by the Affordable Care Act (ACA) (P.L. 111-148) must provide contraceptive services. This mandate included a narrow exemption for certain religious organizations. In 2017, President Trump issued an executive order directing the relevant agencies to consider amending regulations to address conscience-based objections to the contraception mandate. These agencies promulgated two interim final rules (IFRs) which expanded the religious exemptions authorizing employers with religious objections to limit employees’ access to health insurance coverage for contraception (see Contraception coverage exemptions extended for objecting employers on religious, moral grounds, October 11, 2017).

Pennsylvania and New Jersey (the States) sued seeking to enjoin enforcement of these two new rules. Both have state-funded programs that provide family planning and contraceptive services for eligible individuals and argued that when women lose contraceptive insurance coverage from their employers, they will seek out these state-funded programs and services. The district court granted a preliminary injunction, enjoining the rules’ enforcement nationwide. While the appeal of the order preliminarily enjoining the IFRs was pending, the agencies promulgated two final rules, virtually identical to the interim final rules.

States have standing. The court concluded that the States will suffer a concrete and imminent financial injury from the increased use of state-funded services, and that an injunction would redress that injury. The States are not required to define a specific woman who will be affected by the final rules.

Preliminary injunction granted. The court held that the States are likely to succeed on their procedural APA claims because the agencies failed to comply with the notice-and-comment requirement and this defect tainted the final rules. The regulation provision of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) does not grant the agencies discretion to proceed by IFR in lieu of notice-and-comment rulemaking and the agencies lacked good cause for dispensing with notice of and comment to the IFRs. The court rejected the agencies’ argument that there was an urgent need to alleviate harm to those with religious objections to the current regulations. It also held that previous notice and comment does not allow agencies to forego notice and comment for a later regulation on similar matters. In addition, the notice and comment provided for the final rules suggest that the opportunity for comment was not a meaningful because the final rules are virtually identical to
the IFRs and the IFRs impaired the rulemaking process by altering the agencies’ starting point in considering the final rules.

The court also held that the States were likely to succeed on their substantive APA challenges because neither the ACA nor RFRA authorized the agencies to create exemptions. The unambiguous language of the ACA’s Women’s Health Amendment only authorized the agencies to decide what services would be covered, not who provides them, and RFRA did not require or authorize such broad exemptions, particularly given RFRA’s remedial function that places the responsibility for adjudicating religious burdens on the courts, not the agencies. In addition, the final rules would impose an undue burden on nonbeneficiaries—the female employees who will lose coverage for contraceptive care. The public interest favors minimizing harm to those third parties. Because the current accommodation does not substantially burden employers’ religious exercise and the exemption is not necessary to protect a legally-cognizable interest, the States’ financial injury outweighs any purported injury to religious exercise. Finally, a nationwide injunction is appropriate to provide complete relief (for example, 14 percent of the New Jersey workforce works out of state).

The case is No. 17-3752, 18-1253, 19-1129, 19-1189.

Attorneys: Nicole J. Boland, Office of Attorney General, for the Commonwealth of Pennsylvania. Ethan P. Davis, U.S. Department of Justice, for the President United States of America.

Companies: Commonwealth of Pennsylvania