Health Reform WK-EDGE Wrap Up, HEALTH CARE REIMBURSEMENT AND COMPLIANCE TOP STORY: Contraception coverage exemptions extended for objecting employers on religious, moral grounds, (Oct. 11, 2017)

By Kayla R. Bryant, J.D.

With two new interim Final rules, the Trump Administration has broadened the availability of exemptions to the Patient Protection and Affordable Care Act’s (ACA) (P.L. 111-148) contraception coverage mandate. Under the rules, all publicly traded for-profit companies with religious objections are now exempt, while all but publicly traded companies objecting on moral grounds are now exempt. Lawsuits were quickly filed in the states of California, Massachusetts, and Washington in response to the advance release of the rules.

Rules. Previously, exemption on religious grounds was only available to houses of worship, while religiously-affiliated nonprofits (and eventually, closely-held for-profits) were able to use an accommodation allowing them to opt out of providing and paying for contraception coverage as generally required by the ACA. The new rules greatly expand the exemptions, nullifying the need for an accommodation—which is nonetheless still available. Now, new regulations allow nonprofits, closely-held for-profits, and private colleges to cease offering contraception coverage to employees and students based on moral objections. All companies, including publicly traded companies, may cease offering contraception to employees and students on religious grounds.

Impact. According to the Kaiser Family Foundation (KFF), 10 percent of nonprofits employing 5,000 or more people had elected for an accommodation, which allowed the companies to opt out of providing coverage but required insurers to pay for contraception. The accommodation was not acceptable to a number of organizations, which claimed that the requirement of providing written notice of the objection to the government violated religious freedom protections. In May 2016, the U.S. Supreme Court remanded litigation back to circuit courts in order to allow further examination of alternatives proposed by both sides (see Supreme Court kicks contraception challenge back down the road, orders compromise, May 18, 2016).

The new regulations now render the accommodation issue moot, although any employer eligible for an exemption can choose to use this optional accommodation. Mark Rienzi, attorney for Little Sisters of the Poor, one of the groups involved in litigation opposing the mandate, called the change “a balanced rule that respects all sides— it keeps the contraceptive mandate in place for most employers and now provides a religious exemption. The Little Sisters still need to get final relief in court, which should be easy now that the government admits it broke the law.”

The government projected that there will be a limited number of women losing contraception coverage, but the impact cannot be determined until it is known which employers will choose the newly-available exemption.

States’ swift responses. Massachusetts Attorney General Maura Healey quickly responded to the new regulations by seeking an injunction preventing the implementation of the rules and relevant portions of the regulations. The complaint alleges that the regulatory action violates the Administrative Procedure Act and the First and Fifth Amendments due to a lack of opportunity for public comment, discrimination against women, and allowing the federal government to endorse employers’ religious beliefs over the autonomy of women who disagree. California and Washington followed swiftly with lawsuits containing similar allegations.