To: Our Clients and Friends August 7, 2012

THE CONTRACEPTIVE MANDATE: WHAT DO RELIGIOUS EMPLOYERS DO NOW?

In a landmark 5-4 decision announced on June 28, the United States Supreme Court upheld the key provisions of the Patient Protection and Affordable Care Act ("ACA"). Although the Court narrowed the provisions of ACA relating to Medicaid, the rest of the law was untouched. As a result, the ACA's numerous, significant changes to employer-provided health insurance coverage continue to be law.

Perhaps most noteworthy for religious employers are the provisions requiring group health plans to provide preventive health services without charging a co-pay, coinsurance payment, or a deductible. On August 1, 2011, the Department of Health & Human Services (HHS) adopted guidelines outlining the required preventive health care for women. That guidance requires coverage for all FDA-approved contraceptive services, including the "morning after" pill and the "week after" pill. These pills are usually considered abortifacients because they interrupt normal reproductive function after the egg has been fertilized. Coverage of these services at no cost is required for plan years beginning on or after August 1, 2012. For calendar-year plans, this means coverage is required beginning January 1, 2013.

Church Employer Exemption

When this HHS guidance was initially issued, many religious and faith-based employers objected to the contraceptive requirement on the ground that this coverage was in direct conflict with their religious beliefs. HHS subsequently amended the regulations to provide a church exemption. But this exemption does not include most religious employers. Specifically, the exemption only applies to a religious employer that satisfies all of the following requirements:

1. The inculcation of religious values is the primary purpose of the organization;

2. The organization primarily employs persons who share its religious beliefs;

3. The organization primarily serves persons who share its religious beliefs; and

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4. The organization is a nonprofit described in Internal Revenue Code sections 6033(a)(1) and 6033(a)(3)(A)(i) or (iii) [these sections apply to churches, conventions or associations of churches, and religious orders].

Because the exemption does not apply to organizations that provide substantial services to those who do not share their beliefs, it likely does not apply even to many church employers

Grandfathered Plan Exemption

In addition to the "church" employer exemption, the mandate is subject to a "grandfathered" plan exemption. Generally, this exemption applies to plans that both (i) were in existence on March 23, 2010, and (ii) have not changed their plans to eliminate benefits, increase percentage cost sharing, increase copayments or fixed dollar cost-sharing beyond certain amounts, decrease the employer contribution rate more than 5%, or decrease the annual limit on benefits. The employer must also provide notice to plan participants that the plan is a "grandfathered" plan. It is important to note that grandfathered plans only remain grandfathered until one of the changes noted above is made.

Potential Additional Exemptions

There is still the possibility of further amendments to the regulations. On March 12, 2012, HHS issued an "advance notice of proposed rulemaking" in which it requested comments on how to reconcile the contraceptive coverage requirement and the religious beliefs of faith-based employers. The notice puts forward some suggestions, including requiring insurers or third-party administrators to provide contraceptive coverage to individuals who want it at no cost to the individual and with no involvement by the employer. Religious employers will likely object to HHS's proposed "solutions," and thousands of comments and objections were filed by the June 19 deadline. Thus, while the regulations could be amended further, compliance deadlines are quickly approaching, and the regulatory changes that may be made are not likely to be sufficient for most religious employers.

Extension of Compliance Deadline

Prior to the foregoing proposed rulemaking, HHS announced a temporary nonenforcement safe harbor for nongrandfathered and nonexempt group health plans established and maintained by nonprofit organizations with religious objections to contraceptive coverage. The safe harbor provides an additional year (until plan years beginning on or after August 1, 2013) to comply for an organization that meets all of the following criteria:

1. it is a nonprofit entity;

2. its plans have not covered contraceptive services for religious reasons at any time after February 10, 2012 (the date the new safe harbor was announced);

3. it provides participants with a notice (in the open enrollment materials) that the plan will not cover contraceptives for the first plan year beginning on or after August 1, 2012, and

4. it self-certifies that it satisfies the first 3 conditions (and documents its self-certification).

As written, the safe harbor only applies to employers that do not provide any contraceptive coverage. HHS has subsequently described the safe harbor as applying to employers who provide some but not all contraceptives. But HHS has not amended the actual safe harbor document or the required notice and certification language. Therefore, it is unclear whether religious employers who cover many contraceptives but not abortifacients qualify for the safe harbor.

Litigation

As you may have heard, numerous religious employers (most recently, Wheaton College) and even a state attorney general have filed lawsuits challenging the contraceptive mandate. These lawsuits are in their early stages and, even if successful, may only protect the actual parties to those lawsuits. A couple of these lawsuits have recently been dismissed due to technical reasons (lack of standing and ripeness), but the courts will eventually reach the question of whether this mandate unconstitutionally infringes on the religious exercise of religious employers. And the mere filing of these lawsuits has raised the profile of this issue in Washington, DC.

Strategic Planning

Because some steps may need to be taken prior to the applicable effective date, religious employers need to plan now for how they will respond to this “contraceptive” coverage mandate. In this regard, we have been advising various religious employers on the following issues:

(1) whether the organization qualifies (and will continue to qualify) for either the “grandfathered plan” exemption or the narrow “church” exemption;

(2) the penalties and other implications that would result from either refusing to comply with the mandate or discontinuing health care benefits for employees;

(3) the extent to which adopting, clarifying and/or implementing faith-based conduct standards for employees could preclude their use of objectionable contraceptives;

(4) whether the organization’s current benefit plan covers objectionable contraceptives (perhaps inadvertently);

(5) whether the organization qualifies for a one-year extension of the compliance deadline provided to certain religious employers;

(6) whether additional religious accommodations being developed by the Obama Administration are likely to resolve the religious objections; and

(7) the pros and cons of participating in legal challenges to the mandate, and the strategy and timing for such action.

Please feel free to contact any one of us if you would like to discuss these issues in more detail.

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