

Developments in the PPACA Contraceptive Coverage Controversy

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Origins

Under the Patient Protection and Affordable Care Act of 2010 (“**PPACA**”), non-grandfathered group health plans subject to the PPACA’s plan design mandates must provide a number of preventive services without cost sharing when the services are received in-network by a covered participant. The inability for a plan sponsor to engage in significant cost shifting and maintain grandfathered status has led to the number of grandfathered plans steadily dwindling over time. The PPACA itself did not directly define which preventive services were covered, instead it identifies them in four categories and outsources their identification as follows:

1. Preventive services receiving an A or B recommendation from the United States Preventive Services Task Force.
2. Immunizations as recommended for individuals by the Centers for Disease Control and Prevention.
3. Preventive services for infants, children, and adolescents recommended by the Health Resources and Services Administration.
4. Preventive services for women recommended by the Health Resources and Services Administration.

This drafting in the PPACA permitted the evolution and expansion of the prevented services mandate over time. The recommendations for preventive services for women eventually appeared and included a requirement that non-grandfathered plans cover a variety of contraceptive services for women starting with the first plan year beginning on or after August 1, 2012 (i.e., January 1, 2013 for calendar year plans).

The Religious Accommodation Compromise

Regulatory guidance released in 2013 exempted the group health plans of religious employers. Religious employers were narrowly defined as houses of worship, with no exemption for many religiously affiliated non-profit organizations or any for-profit organization, however religiously inclined it or its owners happened to be. The 2013 regulations permitted an accommodation for a non-profit, religiously affiliated organization that:

1. On account of religious objections, opposes providing coverage for some or all of any contraceptive services otherwise required to be covered;
2. Is organized and operates as a nonprofit entity;
3. Holds itself out as a religious organization; and
4. Self-certifies that it meets these criteria in accordance with the provisions of the final regulations.

The non-profit religiously affiliated organization would then provide a copy of the certification form to its insurance carrier or third-party administrator (“**TPA**”), who would arrange for the provision and payment of the mandated women’s contraceptive services at no cost to the objecting organization. This cost absorption would then be offset by adjustments to the user fees paid by health insurance issuers in the federal public insurance marketplace. It is common for the same legal entity to operate as both an insurer and TPA or belong to a family of closely related legal entities who do, easing the payment by adjustments to the user fees.

Hobby Lobby’s victory at the Supreme Court benefits closely held businesses whose owners object to providing the mandated contraceptive services (*Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)). The *Hobby Lobby* decision, and many objections about the certification process and its implications for the non-profit, religiously affiliated employers, resulted in further regulatory guidance appearing in August of 2014 (issued as final in 2015). This regulatory guidance softened the process by having a company notify the U.S. Department of Health & Human Services (“**HHS**”) by letter that it was requesting the religious accommodation. HHS would then contact the insurer or TPA directly to complete the process. The regulatory guidance also expanded the accommodation to apply to closely held, for-profit entities objecting on religious grounds and defined them as:

1. Entities that are not a non-profit entity;
2. Having no publicly traded ownership interests; and
3. More than 50 percent of the value of the entity’s ownership interest is owned directly or indirectly by five or fewer individuals. For this purpose, all of the ownership interests held by members of a family are treated as being owned by a single individual.

The Ongoing Dispute

The U.S. Supreme Court consolidated seven separate cases for review to determine whether the preventive services mandate violates the Religious Freedom Restoration Act of 1993 (“**RFRA**”). This review is frequently reported in the media as the “Little Sisters of the Poor” case, which is one of the seven cases filed, although the case is officially known as *Zubrik v. Burwell*, because *Zubrik* was the first case filed.

Under RFRA, the government is barred from imposing a substantial burden on the exercise of religious beliefs, unless the policy or program to be imposed is the least restrictive means the government could use to achieve a compelling government interest. The government argues that women’s contraceptive services are a compelling government interest and that the accommodation approach was the least restrictive means to achieve it. Many employers eligible for the accommodation continue to object on the basis that the mandate amounts to a hijacking of their plan and continues to require them to participate in providing the women’s contraceptive services that they object to on religious grounds.

The Development

The vacancy on the U.S. Supreme Court resulting from the unexpected death of Justice Scalia creates the potential likelihood for a 4-4 tie in *Zubrik*, which could be problematic due to the somewhat varying results of the lower court rulings for the seven cases. In an interesting development on March 29, 2016, the Supreme Court ordered additional briefs from both sides in *Zubrik* regarding the following issues:

1. How to use the religious non-profit entities' existing insurance providers, but without any involvement by the non-profits other than to have their own health plans without contraceptive benefits (if they wish).
2. How to assure that the coverage is available for the religious non-profit entities' employees through the insurer(s), but without requiring any notice by the non-profit entities.
3. How the religious non-profit entities would contract to provide health insurance for their employees and inform the insurer that they do not want the plan to include contraceptive coverage of the type to which they object on religious grounds. The non-profits would not be required to provide this coverage, pay for this coverage, or be required to provide any notice. The insurers would separately notify the non-profits' employees that the insurer will provide the coverage free of charge outside the non-profits' health plans.
4. Other proposals "along similar lines."

The religious non-profits welcome the move, as it appears to demonstrate the Supreme Court wants to consider options outside of providing the contraceptive coverage through the non-profits' health plans. The progress of and decision in *Zubrik* will be closely followed, not only for the impacts to the seven consolidated cases, but also for what impact, if any, it may have for closely held, for-profit religious employers.