ECKERT SEAMANS ATTORNEYS AT LAW

August 5, 2020

Employee Benefits Alert

U.S. Supreme Court Rules on Contraceptive Mandate

The Affordable Care Act's (ACA) contraceptive mandate requires employer-provided health coverage to include certain of contraceptives for female employees. However, in the Supreme Court's recent ruling in *Little Sisters of the Poor v. Pennsylvania*, 591 U.S. ___ (2020), a 7-2 majority upheld regulations expanding exemptions to the contraceptive mandate for employers with "religious or moral objections." The decision marks the third time in six years that the Court has grappled with the contraceptive mandate and seems unlikely to be the last.

Background

The Contraceptive Mandate

The "contraceptive mandate" stems from a provision in the ACA requiring health plans to provide women with "preventive care and screenings" without "any cost sharing requirements." 42 U.S.C. § 300gg-13(a)(4). However, because the ACA did not define these terms further, it fell to the Health Resources and Services Administration (HRSA), a division of the Department of Health and Human Services, to determine what "preventive care and screenings" included. Ultimately, the guidelines included coverage for FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling.

Religious Exemptions under the Obama Administration

Separate regulations were enacted soon thereafter to provide exemptions for churches and other houses of worship from having to comply with the contraceptive mandate. In addition, an "opt-out" process, also known as "accommodation", was put in place for religious nonprofits that objected to having to comply due to "sincerely held religious beliefs." In order to opt out, the employer would need to self-certify that they met certain criteria with their health insurance issuer or third-party administrator ("TPA"). Individual employees participating in exempted plans for these nonprofits could then separately obtain contraceptive coverage through an insurer or claims administrator, who was required to offer that coverage at no cost. Therefore, religious non-profit organizations did not have to provide the required contraceptive coverage, but unlike the exemption for churches, coverage remains available to their employees.

This accommodation process was subsequently extended to for-profit entities that objected to contraceptive coverage for religious reasons by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The Court ruled that the contraceptive mandate, as applied to closely-held, for-profit corporations with religious objections, violated the Religious Freedom Restoration Act (RFRA). Another case challenging the contraceptive mandate made its way to the Supreme Court in 2016 but was ultimately vacated and remanded. *Zubik v. Burwell*, 136 S.Ct. 1557 (2016). In that case, religious nonprofits argued that even the opt-out process placed a substantial burden on the free exercise of their religion.

Expansion of Religious Exemption under the Trump Administration

In 2017, The Trump administration issued new rules that expanded the exemption to certain private employers with religious or moral objections, who could then opt out of providing coverage without any notice.

In addition to adding "moral" objections as a basis for certain employers to be exempted from the requirement, this marked a considerable expansion of the religious exemption, which was previously only available to churches and other places of worship, to include non-profit organizations and for-profit organizations, including those that are publicly held, as well as institutions of higher learning. By exempting all of these employers, The rule retained the accommodation process, but made it optional for the employers that qualified for an exemption.

Pennsylvania and New Jersey subsequently challenged the regulations in federal court, arguing that the new rules violated both the ACA and the procedural requirements of the Administrative Procedure Act (APA). A District Court issued a nationwide injunction preventing the exemption from being enforced which the Third Circuit affirmed. The Trump Administration and the Little Sisters of the Poor appealed.

Little Sisters of the Poor v. Pennsylvania

The Supreme Court reversed the decision of the Third Circuit with instructions to lift the injunction. A 7-2 majority upheld the expanded exemptions, rejecting arguments that it either violated the ACA or was issued with procedural defects under the APA. As Justice Thomas explained, the ACA gives HRSA "virtually unbridled discretion to decide what counts as preventative care and screenings." As a result, the court found that the administration "had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections."

In his decision, Thomas explained that because the rules were consistent with the ACA, there was no need to consider the government's argument that the exemptions were either required or authorized by the Religious Freedom Restoration Act (RFRA), which bars federal laws from placing a substantial burden on an individual's free exercise of their religion.

The Contraceptive Mandate Moving Forward

Exemptions from the Contraceptive Mandate after the Little Sisters Decision

As a result of the Supreme Court's ruling, any nongovernmental employer that objects to providing coverage of contraceptives and related services based on sincerely held religious beliefs will be exempt from the contraception mandate. The exemption covers churches, nonprofit organizations, and for-profit entities, whether or not closely held, including those that are publicly traded.

In addition, an employer that objects to coverage based on sincerely held moral convictions is exempt from the contraception mandate. However, publicly traded entities are not eligible for this exemption.

The accommodation process, which requires insurers and TPAs to provide contraceptive coverage at no cost if they are specifically notified by the objecting employer, remains voluntary.

Continuing Effect of State Requirements

Despite the Supreme Court ruling, insurance policies issued to employers who are exempted from the ACA's contraceptive mandate still need to comply with any state contraceptive coverage requirements. Many states require contraceptive coverage to be included in fully insured health benefit plans, and the Supreme Court's decision does not affect these state laws. For women enrolled in fully insured employer plans, the scope of contraceptive benefits may depend on state insurance laws.

Potential Future Litigation and Rule Changes

The attorneys general of Pennsylvania and New Jersey have indicated that they will continue to challenge the rules on the grounds that they are arbitrary and capricious under the APA. Accordingly, employers can expect the final status of the rules to remain in question at least for the foreseeable future. The dispute will go back to the lower courts to determine whether the expansion of the exemptions was the product of reasoned decision-making, which virtually guarantees that the litigation surrounding the exemptions will continue beyond the 2020 election.

ECKERT SEAMANS
ATTORNEYS AT LAW

This Employee Benefits Alert is intended to keep readers current on matters affecting employee benefits, and is not intended to be legal advice. If you have any questions, please call Christine B. Bowers at 412.566.6181, William S. Carter at 412.566.6016, Kathryn A. English at 412.566.1226, Heather Stone Fletcher at 412.566.6112, Michael J. Herzog at 412.566.6130, Sandra R. Mihok at 412.566.1903, Paul M. Yenerall at 412.566.1944, or any other attorney with whom you have been working.