

DOES OBAMACARE STRIKE THE RIGHT BALANCE BETWEEN WOMEN'S CONTRACEPTIVE RIGHTS AND RELIGIOUS FREEDOM?

Employers' Advisor Blog Archives
January 6, 2014

Effective for plan years beginning on or after January 1, 2014, employer-sponsored group health plans that are not grandfathered must provide women with access to a list of 16 contraceptive services without cost sharing (i.e., without co-pays or deductibles). These methods include all Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. Included are oral contraceptives (the "pill"), barrier methods, implants and injections, emergency oral contraceptives ("Plan B" and "Ella"), and intrauterine devices. The issue for many religious employers is focused on four of the 16 methods: two drugs (Plan B and Ella) and two intrauterine devices, each of which may prevent an embryo from implanting in the womb.

In an effort to balance women's rights with the notion of religious freedom, the law does not require group health plans covering employees of churches and other houses of worship to make these services available to their employees and dependents, but the group health plans maintained by their nonprofit affiliates (e.g., faith-based colleges, universities, nursing homes, and hospitals) can exclude these services from health plan coverage only if they meet the requirements of an "accommodation" set forth in the law. Under the "accommodation," the sponsoring employer must execute and deliver to its health insurance issuer (or third-party administrator, in the case of a self-insured plan) a certification stating, among other things, that it opposes some or all of the services on religious grounds. The certification must be provided before the first day of the 2014 plan year. Upon receipt of the certification, the insurer and third-party administrator must provide these services directly to the employer's health plan enrollees, without cost to the employer or enrollees. Third-party administrators, but not insurers, have the right to cancel their services contract with an employer that provides such a certification. The law does not exempt "for-profit" employers under any circumstances, regardless of the religious beliefs of the owners.

In 2013, for-profit employers and nonprofit, church-related employers filed court challenges, claiming that the requirement to provide some or all of these services violates their religious freedoms. In November 2013, the Supreme Court agreed to hear a pair of cases on whether for-profit employers can refuse to provide insurance coverage for contraceptive services if their owners have religious objections to the coverage. One of these cases is addressed in our [December 2013 issue of *Employee Benefits Developments*](#). And last week, just hours before New Year's Day, Supreme Court Justice Sotomayor issued an order temporarily exempting the Christian Brothers Employee Benefit Trust, a self-insured medical plan maintained and administered by the Little Sisters of the Poor, from having to provide the coverage. The order was issued despite the Obama administration's argument that the Little Sisters could opt out of the contraceptive coverage requirement by completing "a self-certification form" and providing it to the entity that administers their health benefits. The self-certification procedure, the Justice Department argued, does not impose a substantial burden on the rights of the Little Sisters to exercise their religion. Attorneys for the Little Sisters argued that the "accommodation" forces the Little Sisters to find an insurer (or administrator) that will cover sterilization and contraceptive drugs and devices that the Little Sisters consider to be

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abortion-inducing and requires them to sign a form that triggers the start of the objectionable coverage.

Last November, Jay Carney, the White House press secretary, emphasized the important public health interests that are at stake when he said: "Our policy is designed to ensure that health care decisions are made between a woman and her doctor. The president believes that no one, including the government or for-profit corporations, should be able to dictate those decisions to women." The question is whether the law, as written, accomplishes that policy without unduly burdening the exercise of religion. We should have an answer from the Supreme Court this summer.