

HHS Mandated Employer Health Insurance: August 1 is ONE Week Away!

It is just ONE week until August 1, the date by which most employers, health plans, and health insurance issuers must determine whether they are subject to, or qualify for exemption from, the requirements of the federal Patient Protection and Affordable Care Act ("ACA") and in particular the Contraception Mandate issued by the U.S. Department of Health and Human Services ("HHS") under the ACA. Time is running out for organizations to position themselves to comply with, claim exemption from, and/or prepare to mount a legal challenge to application of the HHS Contraception Mandate.

Some organizations may have been hoping that one of the pending lawsuits challenging the HHS Contraception Mandate on religious freedom grounds would quickly succeed. However, in the past two weeks, federal district courts in [Nebraska](#) and the [District of Columbia](#) have issued the first rulings in such lawsuits, dismissing both on technical legal grounds (standing and/or ripeness). In essence, these two courts have concluded that challenges to the HHS Contraception Mandate are premature because HHS has stated that it will issue a revised exemption for religious employers within the next year. But such assurances offer little comfort to religious employers that must determine **now** what health benefits they will provide to their employees consistent with their religious principles.

As August 1 rapidly approaches, what can religious organizations do **now** to best position themselves under the Contraception Mandate? This Law Alert briefly outlines several important considerations. For a more detailed discussion of these topics, please consider joining Dr. Stanley Carlson-Thies of the [Institutional Religious Freedom Alliance](#) ("IRFA") and Gammon & Grange attorneys Scott Ward and Patrick Purtill for a free teleconference on Thursday, July 26, 2012 at 2:00 p.m. For registration information and further details see [IRFA's most recent bulletin](#).

First, organizations must understand the differences between the ACA Employer Mandate and the HHS Contraception Mandate. The "Employer Mandate" generally refers to the provisions of the ACA that go into effect on January 1, 2014, under which any "large employer" that fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan must pay a financial fine. The "Contraception Mandate" refers to guidelines issued by the Health Resources and Services Administration (HRSA) of HHS regarding required coverage for certain services including "women's preventive health care" - which has been defined to include (but is not limited to) various forms of contraception.

Second, organizations must determine whether they (or their health plans) are subject to the ACA Employer Mandate and/or the HHS Contraception Mandate. The Employer Mandate generally applies to "applicable large employers" - primarily employers who, with respect to a calendar year, employed an average of at least 50 full-time employees on business days during the preceding calendar year" *including full-time equivalent employees*. The Contraception Mandate applies to a "group health plan and a health insurance issuer offering group or

individual health insurance coverage" including self-insured plans, and thus indirectly affects organizations who purchase such coverage for their employees or who sponsor such self-insured plans.

Third, organizations must determine whether they may qualify for one or more of the following currently available exemptions from the Contraception Mandate:

(1) "Grandfathered Plans" Exemption: The HHS Contraceptive Mandate, and many other requirements of the ACA, do not apply to a group health plan, or group or individual health insurance coverage, that had individuals enrolled on March 23, 2010, that has taken the necessary steps to maintain its grandfathered status, and that has not made any "impermissible changes" to the plan (such as, for example, elimination of substantially all benefits to diagnose or treat a particular condition or any increase in percentage cost-sharing).

(2) "Religious Employer" Exemption: HHS issued a final rule on February 15, 2012, creating a narrow exemption for a "religious employer," which is defined as an organization that meets all of the following criteria:

- (1) The purpose of the organization is the *inculcation of religious values*.
- (2) The organization *primarily employs* persons who share the religious tenets of the organization.
- (3) The organization *primarily serves* persons who share the religious tenets of the organization.
- (4) The organization is a nonprofit organization as described in § 6033(a)(1) and § 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended. This means that the organization is exempt from taxation under § 6033(a)(1) and *is either a church, a convention or association of churches, an integrated auxiliary of a church or convention or association of churches, or the exclusively religious activities of any religious order.*

Note that *most religious charitable organizations* fall under § 6033(a)(3)(A)(ii) and therefore *are specifically excluded from this definition* of "religious employer." And even if an employer qualifies as a church, convention or association of churches, or integrated auxiliary, this is still not enough to qualify for the "religious employer" exemption. Such organizations must also *primarily employ* and *primarily serve* persons who share their "religious tenets," and the organization's primary purpose must be *inculcation of religious values*.

(3) One Year Temporary Enforcement Safe Harbor: After this "religious employer" exemption was denounced by many faith-based organizations (and others) as so narrow as to be ineffective or meaningless, HHS announced a one-year postponement in enforcement. Under this Safe Harbor, HHS will not take any enforcement action against a qualifying organization for failing to cover contraceptive services without cost sharing under the Contraception Mandate until August 1, 2013. To qualify, an organization must meet all of the following criteria:

- (1) The organization must be organized and operated as a non-profit entity.
- (2) From February 10, 2012 onward, the organization's group health plan must not have provided contraceptive coverage at any point, because of the religious beliefs of the organization.
- (3) The organization's group health plan (or one operated by another entity, such as a health insurance issuer or third-party administrator, on behalf of the organization) must provide to participants a notice which states that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
- (4) The organization must self-certify that it satisfies criteria 1 through 3 above, and must document its self-certification using a form developed by HHS.

Presently, neither the Safe Harbor nor the required HHS certification form makes any allowance for an organization that has previously covered some contraceptive services but specifically refused to cover others it considered to violate its conscience. Organizations that are considering signing the certification should seek legal counsel to ensure that they understand the ramifications of the certification and do not prejudice their rights and potential defenses in any future enforcement action or litigation.

Fourth, organizations should thoughtfully consider their options in response to possible application and enforcement of the Contraception Mandate. Such options may include one or more of the following:

- Complying with the Contraception Mandate.
- Preparing for defensive litigation (i.e., to defend the organization in the event of enforcement efforts by HHS, the Department of Labor, the Internal Revenue Service, or another government agency with enforcement authority under the ACA and regulations).
- Preparing for and pursuing offensive litigation.
- Supporting litigation efforts by others to overturn or modify the Contraception Mandate.
- Joining efforts to prevail upon HHS to promulgate exemptions from the Contraception Mandate that better respect the conscience rights of religious organizations and individuals.
- Prevailing upon Members of Congress to legislatively enact strong religious conscience exemptions from (or to legislatively repeal) the Contraception Mandate.

For more information, please contact Gammon & Grange attorneys [Scott Ward](#) or [Patrick Purtill](#), and join us for the [IRFA teleconference](#) on Thursday, July 26, 2012 at 2:00 p.m.

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