

## **“The OTHER Mandate”: Compliance, Exemptions, or Civil Disobedience?**

### **HHS Mandated Employer Health Insurance Requirements Begin August 1, 2012**

As the world knows, yesterday the United States Supreme Court declared constitutional the Patient Protection Affordable Care Act (“ACA”), often referred to as “Obamacare.” The decision leaves the August 1, 2012 deadline by which organizations must decide whether to comply with the new requirements, seek to qualify for one of several limited exemptions, or refuse to comply for reasons of conscience (and, therefore, prepare to defend against potential government enforcement).

In its Thursday decision, the Supreme Court ruled by a narrow 5-4 majority that the individual mandate requiring 40 million uninsured citizens to either purchase health insurance or pay a large penalty was a constitutional exercise of Congress’ taxing authority. (Five justices rejected the broader argument that the individual mandate was a constitutional exercise of Congress’ power under the Commerce Clause or the Necessary and Proper Clause of the Constitution.)

This decision leaves in place another mandate that many religious employers have objected to on religious grounds. On January 20, 2012, the U.S. Department of Health and Human Services finalized regulations (“ACA Regs”) that require almost all employers with more than 50 employees to offer health insurance plans that will fully cover reproductive “preventive health services.” Covered services include sterilization (including surgical procedures) and the contraceptive drugs known as Plan B (the “morning after” pill) and *ulipristal* or *ella* (the “week after” pill), which are considered to be abortifacients or abortion-inducing medicines. The requirements imposed by these ACA Regs are sometimes referred to as the “HHS Mandate”.

The HHS Mandate has already led two religious universities to cease offering health insurance to their students and more than fifty employers to challenge the regulations under the First Amendment’s free exercise of religion clause, the federal Religious Freedom Restoration Act, and other legal grounds.

**However, no court will rule on the constitutionality of the HHS Mandate before employers are required by law to comply with the ACA Regs. Faith-based organizations and businesses must therefore decide in the next month whether they are going to comply with these ACA Regs, seek to qualify for one of the limited exemptions available under the ACA Regs, or refuse to comply (and therefore prepare for the legal consequences of such noncompliance, such as facing a government enforcement action).**

As a reminder, here is a quick summary of key provisions of the HHS Mandate:

- Employers with more than 50 employees must comply for all plan years beginning on or after August 1, 2012.
- Employers that fail to comply with the regulations may face fines as high as **\$100 per day per employee** receiving a health insurance plan that fails to comply with the regulation.
- Non-exempted employers with more than 50 employees that decide to stop offering health care coverage to their employees will be forced to pay an annual fine of about **\$2,000 per employee**, beyond the first 30 workers, who are not offered a health plan.

- There are a few situations under which an employer with religious objections to such coverage may avoid the August 1, 2012 compliance deadline, but they must act immediately to do so.

Below, this Alert discusses below the three primary exemption scenarios, the second of which applies to both for-profit and nonprofit employers, regardless of religious affiliation.

**Closed-Door Church Exemption:** First, the HHS regulations provide a very narrow exemption for those few religious employers that (1) meet the IRS's definition of a "church," (2) primarily employ adherents of their own religious faith, (3) primarily serve adherents of their own faith, and (4) have a purpose of inculcating religious values. These "religious employers" need not comply with the HHS mandate. Unfortunately, most public-serving religiously-affiliated schools, colleges, universities, hospitals, health care facilities, and ministries will not meet this exemption.<sup>1</sup>

**Frozen-In-Time Grandfather Exemption:** Second, some health plans may also be exempt from the HHS contraception-coverage requirements under a separate HHS rule (issued on June 17, 2010) that allows employers to continue their health plans that were in existence as of March 23, 2010, so long as the employers make only routine plan changes. Under this "grandfathering" rule, a plan may lose its grandfathered status if it significantly cuts or reduces benefits, raises co-insurance charges, significantly raises co-pay charges, significantly raises deductibles, significantly lowers employer contributions, and adds an annual limit on what an insurer pays or tightens an existing limit. If a religious employer, whether for-profit or nonprofit, had in place a group health plan that did not cover contraceptives or abortifacients as of March 23, 2010 and that plan meets the grandfathering requirements, then it need not begin covering them in August 2012. Such employers would need to scrupulously monitor their health care plan changes over time to ensure that it continues to stay within the grandfathering provisions. Under the current HHS regulations, a grandfathered plan is the only circumstance under which a for-profit employer, regardless of sincerely held religious beliefs, practices, and organizational structure, may be exempt from the contraceptive-coverage requirements of the HHS regulation.

**One-Year-Postponement "Exemption":** Third, the regulations authorize a "temporary enforcement safe harbor" for certain "non-exempted, non-grandfathered group health insurance plans that are established and maintained by nonprofit organizations with religious objections to contraception coverage."<sup>2</sup> The temporary postponement was also announced in guidance issued by the HHS on February 10, 2012, but has not yet been included in any amendments to the HHS regulation. As described it would provide certain organizations a one-year pass from enforcement by HHS or any other federal agency. Therefore organizations that seek the safe-harbor could be exempt from compliance until August 1, 2013, by which time HHS may have issued additional regulations expanding or narrowing exemption for religious employers - or not. To qualify for the safe harbor, a religious employer must

- (1) be organized and operate as a nonprofit entity;
- (2) at any point beginning February 10, 2012 onward, not provide contraceptive coverage in its group health plan because of the organization's religious beliefs;

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<sup>1</sup> Although President Obama announced on February 10, 2012 an "accommodation" to these regulations that would create a broader exemption for some religious nonprofit employers, the HHS regulations finalized on January 20, 2012 did not include that "accommodation." The accommodation-less regulations currently in effect will control unless and until new regulations containing the accommodation are written and finalized. HHS has until August 1, 2013 to issue and finalize those regulations.

<sup>2</sup> Department of Health and Human Services, February 10, 2012, "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code."

- (3) provide or require its group health plan issuer/administrator to provide a notice to plan participants that it qualifies for the one-year enforcement pass; and
- (4) self-certify that it meets the first three criteria using a form provided by HHS, and make its self-certification available for examination.

The August 1 deadline for action is but a month away. Organizations that have religious objections to the HHS contraceptive-coverage mandate should seek legal counsel to determine whether they are exempt, whether their plans are grandfathered, and/or whether they can qualify for the temporary one-year reprieve. Religious employers that do not qualify for any of the above-three categories but object to the HHS regulation's mandate will need to make a choice on August 1, 2012: either (1) comply with the HHS regulation and begin providing health coverage for sterilization and abortion-inducing contraceptives, (2) cease providing employee health insurance altogether, or (3) refuse to provide compliant group health plans and risk a government enforcement action and/or prepare to mount a legal challenge.

Whatever choice you make, you need to make it now.

**If you would like to speak with a Gammon & Grange attorney about whether or not your organization needs to comply with the HHS contraceptive-coverage matters, contact Scott Ward or Patrick Purtill at (703) 761-5000.**

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