New Regulations Expand Exemptions from ACA Contraceptive Coverage Mandate

Katrina Veldkamp

Effective October 6, 2017, new regulations1 jointly issued by the Departments of Treasury, Labor, and Health and Human Services (the “Departments”) expand the exemptions to the ACA’s no-cost contraceptive coverage mandate. Now, any non-governmental employer with religious objections, as well as certain employers with objections based on moral convictions, are exempt from providing contraceptive coverage without having to file any certification or notice claiming such exemption. The regulations also eliminate the requirement that insurers or third party administrators pick up the cost of contraceptive coverage for exempt employers, although plans are still permitted to pass on the cost by use of an optional accommodation process. The Departments expect only a small number of employers will use the broadened exemptions. Public comment on the new regulations is invited until December 5, 2017.

Overview of Previous Exemption and Accommodation Process

The ACA’s contraceptive mandate is a result of regulations and guidelines developed by the Health Resources and Services Administration (“HRSA”) pursuant to authority granted by Section 2713 of the Public Health Service Act. The HRSA guidelines, when first released in 2011, included no-cost coverage for all prescribed FDA-approved contraceptives, sterilization procedures, and related patient education and counseling for women with reproductive capacity. Since then, various regulations have been issued and updated on this subject as a result of ongoing litigation and changes in administration.

The most recent iteration of the regulations, issued in July 2015, exempted churches, houses of worship, nonprofit organizations that hold themselves out as religious organizations, and closely-held for-profit organizations that adopt resolutions establishing objections to covering contraceptives on account of sincerely held

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religious beliefs. The July 2015 regulations required objecting organizations (other than churches and houses of worship) to self-certify to the Departments of Labor or Health and Human Services. This certification was designed to pass on the responsibility for arranging for payment for contraceptive services to the organization’s insurer or third party administrator (the “accommodation process”). The new regulations issued this month expand the list of objecting organizations and make the accommodation process optional.

**New Regulations – Religious Exemption**

Under the new regulations, any non-government employer plan sponsor may be exempt from coverage of all or a subset of contraceptives or sterilization and related patient education and counseling based on sincerely held religious beliefs. This expands the pool of exempt employers to include publicly traded for-profit organizations and eliminates previous conditions that closely-held for-profit organizations had to meet in order to take advantage of the exemption. Institutions of higher education that arrange for student health insurance may also object to and be exempt from contraceptive coverage.

In addition to the exemption for plan sponsors, the regulations exempt health plans sponsored by objecting employers and health insurance issuers that have their own religious objections to contraceptive coverage. These rules extend the exemption to plans sponsored by an entity other than an employer, such as a union plan. However, the departments note that the exemption for health insurance issuers does not extend to the plans purchasing that insurance, unless the plan sponsor is also exempt. Therefore, the only plan sponsors that will be eligible to purchase coverage from an exempt insurer are those that are also exempt.

Employers claiming the exemption no longer have to self-certify to the Departments. Rather, the accommodation process is optional, so employees of objecting employers that do not use the accommodation process will have to pursue other avenues, such as state programs, to obtain contraceptive coverage. Additionally, third party administrators that have their own religious objections to complying with the accommodation process may decline to enter into or continue contracts with plans that elect to use the accommodation process. Exempt employers who are currently using the accommodation process do not need to file a new self-certification or notice unless they change their insurer or third party administrator. Exempt employers can also revoke their use of the accommodation process, but must notify plan participants and beneficiaries of the elimination of the benefit. The revocation will be effective either (i) the 1st day of the 1st plan year that begins on or after 30 days after the date of the revocation, or (ii) 60 days after notice of material modification to the summary of benefits and coverage.

Note that even though an exempt employer does not have to certify that it is exempt, if the plan is subject to ERISA, the plan document, SPD, and summary of benefits and coverage still have to clearly state that some or all contraceptive coverage is excluded.

Individuals may also raise their own religious objections to contraceptive coverage under the new regulations, such that plan sponsors and insurers will not be penalized for offering those individuals plans that do not include contraceptive coverage, even if the sponsor or insurer does not have religious objections to such coverage. However, if state law requires contraceptive coverage, the individual exemption cannot be used to circumvent those laws.

**New Regulations – Moral Conviction Exemption**

In addition to objections based on religious beliefs, the new regulations add an exemption based on sincerely held moral convictions for nongovernmental plan sponsors that are nonprofit entities or for-profit entities with no publicly traded ownership. This is a narrower employer pool than that available under the religious
exemption. As with the religious exemption, though, higher education institutions that arrange for student health coverage, health insurance issuers, and individuals may also be exempt, within the same limitations that apply to such entities under the religious exemption.

While the Departments acknowledge that the regulations do not define “moral convictions,” they indicate that they look to the description of moral convictions in a Supreme Court case (Welsh v. United States, 398 U.S. 333 (1970)) to explain the scope of protections. Moral convictions include ones: (1) that the individual deeply and sincerely holds; (2) that are purely ethical or moral in source and content; (3) that nevertheless impose upon the individual a duty; and (4) that occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons, such that one could say the individual’s beliefs function as a religion in his or her life. Therefore, the Departments take the position that moral convictions are protected when they occupy a place parallel to that filled by religious beliefs in religious persons and organizations. As with the religious exemption, employers claiming the moral conviction exemption are not required to self-certify, but may elect to use the optional accommodation process that is available under the religious exemption. ERISA disclosure requirements will continue to apply.

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**New ERISA Disability Claims Procedures – Action Steps for Plan Sponsors**

Venessa Blanco

Late last year, the U.S. Department of Labor (DOL) finalized updated disability claims regulations for plans covered by Title I of ERISA. The new regulations apply to both health/welfare and retirement plans (qualified and nonqualified) alike. Although “top hat” or executive non-qualified deferred compensation plans are exempt from many of Title I provisions, they are not exempt to these new rules.

The final regulations were to take effect January 1, 2018, but have since been delayed in response to an Executive Order released by President Trump. The order requires agencies to review existing regulations to determine whether they can be repealed, replaced, or modified to make them less burdensome. The regulations are now set to take effect on April 1, 2018.

**Action item:** Plan sponsors will want to follow developments closely and be prepared to implement the new requirements should they go into effect next year (this could require both plan amendments and new plan internal procedures and controls). These steps should be taken well in advance of the date the new rules take effect so that plans are ready to comply when required to do so. **Plan sponsors may want to contact vendors and start internally reviewing and identifying benefit plans, severance arrangements, non-qualified deferred compensation plans and employment agreements that will be subject to the new disability claims requirements, as disability benefits can be found in a wide variety of ERISA covered plans.**

Although 401(k) class action fee cases get a lot of press, disability benefit claims continue to be the most heavily litigated area in ERISA. According to the DOL, even though fewer private sector employees participate in disability plans than in group health plans, disability cases dominate the ERISA landscape, accounting for nearly 65% of claims filed. If the new regulations take effect in April, they will affect the way claims and appeals are handled internally, and may provide greater leeway to plaintiffs in bringing these claims before the court.
The changes are intended to bring disability claims in line with the procedural changes made to group health plans as amended under the Affordable Care Act. Under the new rules:

- Claims and appeals must be adjudicated in a manner designed to ensure independence and impartiality in the persons involved in making the benefit determination;
- Benefit denial notices must contain a complete discussion of why the plan denied the claim and the standards applied in reaching the decision, including the basis for disagreeing with the views of health care professionals, or with disability benefit determinations by the Social Security Administration;
- Claimants must be given timely notice of their right to access to their entire file and other relevant documents and be guaranteed the right to present evidence and testimony in support of their claims during the review process;
- Claimants must be given notice and a fair opportunity to respond before denials at the appeals stage are based on new or additional evidence or rationales;
- Plans cannot prohibit a claimant from seeking court review of a claim denial based on a failure to exhaust administrative remedies under the plan if the plan failed to comply with the claims procedure requirements unless the violation was the result of a minor error;
- Certain rescissions of coverage are to be treated as adverse benefit determinations triggering the plan’s appeals procedures; and
- Required notices and disclosures issued under claims procedure regulation must be written in a culturally and linguistically appropriate manner.

Several of these changes may impact future litigation in this area. The DOL asserts that these changes will provide claimants with full and fair review of claims and appeals. Presumably, these changes will also reduce the number of claims brought before the courts. Certainly, the requirement that a plan administrator may not prevent a claimant from seeking court review for failure to exhaust administrative remedies appears to open the door to more proceedings. The regulations suggest that in this instance, a court should apply a de novo standard of review, which is less favorable than the deferential or arbitrary and capricious standards often applied in these cases. Use of the de novo standard allows a court to re-visit the claims with fresh eyes, as opposed to giving deference to the claims administrator’s decision to deny the claim. This alone may provide incentive for claims administrators to ensure timely and accurate reviews. Additionally, the new rules also require claims administrators to explain why they disagree with medical professionals who may have also reviewed the claim. This explanation is now required as part of the administrative record. Plaintiffs who do end up pursuing litigation will be better equipped, as the additional rules are designed to create a more in depth administrative record for the court to review should the claim ever reach litigation.

Plan sponsors should note that the new claims regulations only apply to plans that administer their own benefit determinations. If benefit determinations are outsourced to a third-party administrator (for example in a fully-insured arrangement), or by another source, (such as the Social Security Administration), then these rules do not apply to the plan sponsor directly. In that case, the insurance company or third party responsible for claims will be subject to these rules.

Plans that administer their own disability benefit determinations should continue to monitor and adjust for changes to these procedures. If you are unsure how your plans will be affected by this change, please reach out to our attorneys for assistance.
Building Blocks of ERISA

What is a MEWA?

This month’s Building Block provides basic information about multiple employer welfare arrangements (MEWAs).

Click here to view this month’s Building Blocks of ERISA

Firm News & Events:

Boutwell Fay LLP Welcomes Katrina Veldkamp

We are pleased to announce that Katrina Veldkamp has joined the Firm as an Attorney in our Newport Beach, California office. Katrina is an attorney who has advised both private and public sector clients on issues related to employee benefits. Katrina is a member of the American Society of Pension Professionals and Actuaries. Visit her page under Our Attorneys (http://www.boutwellfay.com/our-attorneys/) for her full biography and contact information. Please join us in welcoming Katrina to the Firm!

Evan Giller to Speak at JCEB Employee Benefits Webinar

Evan will speak at the ABA Joint Committee on Employee Benefits webinar on November 16 Parts I and II. The webinar, Practical Issues for Section 403(b) and 457 Plans for Not-For-Profit, Governmental and Religious Organizations, is from 1:00-2:30 pm Eastern. Click here for more information.
Free CLE for In-house Counsel!

In-house counsel are invited to attend the NAMWOLF Regional Conference:
Trending Employment Law and Diversity Issues for Silicon Valley

This half-day CLE event will take place on November 16 from 12:00 pm – 7:00 pm in San Jose, California. Contact us at attorneys@boutwellfay.com for more information or click here to register. Sherrie Boutwell will be attending on behalf of Boutwell Fay!

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