



Proposed Update to Contraceptive Services Mandate

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On January 30, 2023, the Departments of Labor, Treasury, and Health and Human Services (collectively, “the Departments”) issued a new proposed regulation related to the provision of contraceptive services in a group health plan. This rule would strengthen access to birth control coverage under the Affordable Care Act (“ACA”) so that all women who need or want birth control are able to obtain it. Briefly, the rule:

- Creates a new, optional pathway for individuals to obtain contraceptive services when a group health plan does not provide such services due to religious objection; and
- Removes the existing exemption for moral objection.

■ Background

Under the ACA’s preventive care mandate, all non-grandfathered group health plans must cover all FDA-approved contraceptive services without participant cost-sharing.

Under a final rule issued in 2018, non-governmental employers sponsoring a group health plan and objecting to providing some (or all) of the mandated contraceptive services based on seriously held religious beliefs or moral objection are exempt from the requirement. An optional accommodations process is available to allow participants to obtain contraceptives for no cost from a carrier and/or TPA without involvement of the objecting employer sponsor.

■ What's New?

The new proposed rule creates individual contraceptive arrangements for participants to obtain contraceptives without the involvement of their objecting plan sponsor that invoked the religious exemption and does not use the optional accommodation process.

Under the proposed rule, a willing provider may provide contraceptive services directly to eligible individuals at no cost. The provider will then seek reimbursement from a health insurance carrier participating in the federal or state-run Exchange and that carrier will, in turn, receive a reduction in Exchange user fees. Objecting group health plan sponsors are not required to provide notice to participants of the availability of this process, although they are still subject to the disclosure rules that normally apply to group health plans such as SPD and SBC distribution.

Additionally, the proposed rule would rescind the moral objection exemption from the contraceptive mandate. Group health plans that previously relied on this exemption would be required to cover contraceptive services. The proposed rule does not make any changes to the exemption or accommodation process for religious objection.

■ Employer Action

Group health plans excluding coverage of contraceptives under a religious exemption may continue to do so without further action. Plans that exclude coverage of contraceptives under non-religious moral grounds may need to consider changes to contraceptive coverage if the rule is finalized "as is." The Departments are seeking comment on the type and magnitude this design change would have on plans who historically have relied on the moral objection exemption, as well as alternatives to a full rescission.

It should be noted that this rule is in proposed form and is not final. Any final rule may change from the proposed rule and should include an effective date. It is possible, when finalized, that the new rule could face legal challenges.