Alerts

New Mandate on Coverage for Contraceptives: Strategies for Organizations

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Health Law Alert

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UPDATE: *On February 10, 2012, the President announced a revision to the Section 2713 mandate that would offer an accommodation for group health plans sponsored by religiously affiliated employers. Under this proposed accommodation, certain preventive care services, including contraceptive services, would be provided directly by insurance companies, rather than through the employer-sponsored health plan itself. The new policy does not address how the Section 2713 mandate will apply to self-insured plans. We expect the formal regulatory guidance regarding this new accommodation to be issued in the near future and will keep you apprised on those developments.*

ORIGINALLY PUBLISHED ALERT:

Maintaining "Grandfathered Plan" Status for Group Health Plan Critical to Avoiding New Mandate on Coverage for Contraceptives

On January 20, 2012, the U.S. Department of Health and Human Services (HHS) reiterated earlier guidance setting forth the preventive care services that must be offered in certain group health plans. This guidance, issued under the authority of section 2713 of the Patient Protection and Affordable Care Act of 2010 ("Section 2713"), requires group health plans to provide various preventive care services for women without cost sharing, including contraceptive and sterilization services.

While the new HHS guidance does include a narrow exception for certain religious organizations, those religious employers that serve individuals who do not share their religious beliefs (including certain health care organizations, educational institutions, and social service agencies) would not be exempt from Section 2713's requirements. Such organizations will instead be given an extra year (until the first plan year beginning on or after August 1, 2013) to comply with the new mandate. All other employers are required to comply with Section 2713 for plan years beginning on or after August 1, 2012.

Importantly, Section 2713 does not apply to those plans that have maintained "grandfathered plan" status for their group health plan. A group health plan will be considered a grandfathered plan if it has not made significant changes in the types of benefits it offers and has not increased the participant's share of costs under such plans beyond specified limits since the date on which the Affordable Care Act was signed into law (March 23, 2010). The standards for maintaining grandfathered plan status, including the annual notice that is required to be

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provided to plan participants regarding such status, are set forth in Section 54.9815-1251T of the Treasury Regulations.

Thus, employers who have maintained grandfathered plan status for their group health plans and that do not intend to comply with Section 2713's mandate must ensure that such status is maintained indefinitely.

What Options for Avoiding Section 2713 Are Available to Employers Who Have Lost Grandfathered Plan Status for Their Group Health Plan?

Those employers who have changed their group health plan so that such a plan no longer qualifies for grandfathered status have few options to avoid the new HHS mandate. Any group health plan that is not a grandfathered plan must comply with Section 2713. In this regard, current law does not permit employers to offer a "limited scope" group health plan that offers no preventive care services, as such plans would appear to violate Section 2713.

Further, current law does not allow the Secretary of HHS to grant a waiver from Section 2713, even where enforcement of Section 2713 would result in a significant decrease in access to benefits. Such waivers are presently only available to plans that are subject to restricted annual limits on benefits, and not to plans that offer limited preventive care services.

Willful noncompliance with Section 2713 does not appear to be a tenable position for employers who do not intend to comply with Section 2713, as any violation of the Public Health Service Act could potentially result in the assessment of penalties of up to $100 per day. For an employer with 1,000 employees, for example, the daily penalty for noncompliance with Section 2713 could be as much as $100,000.

As a last resort, employers that do not intend to comply with Section 2713 could terminate their group health plan altogether, and encourage their employees to obtain individual policies. As of January 1, 2014, such individual policies are to be offered on state health insurance exchanges on a guaranteed issue, guaranteed renewability basis. Employers, however, will likely be subject to penalties for the failure to offer group health plan coverage upon the termination of their plan, in addition to any employee relations issues that may arise.

Strategies for Employers Affiliated with Religious Organizations That Cannot Follow the Section 2713 Mandate

Multiple religious organizations have expressed opposition to the Section 2713 mandate, including the U.S. Conference of Catholic Bishops, the National Association of Evangelicals, and the Union of Orthodox Jewish Congregations of America, among many others. Given the limited options available for avoiding the new mandate for nongrandfathered group health plans, those employers who will not be able to comply with the new rules due to their religious beliefs but who wish to continue offering group health plans to their employees must pursue other courses of action.

One option would be to work towards changing the law. Proposed legislation, such as the Respect for Rights of Conscience Act of 2011 (H.R. 1179) and the Religious Freedom Restoration Act of 2012 (S. 2043), would exempt religious organizations from complying with those mandates established by the Affordable Care Act with which they are opposed on the basis of their religious beliefs.

Another option would be to pursue or join litigation proposed by various groups that would challenge the constitutionality of HHS's decision. For example, the U.S. Conference of Catholic Bishops has announced that it intends to bring a legal challenge to Section 2713's mandate and the limited religious exemption it allows. We expect that such legal challenges will emphasize that the new mandate is not in furtherance of a "compelling government interest" to provide increased access to contraceptives, given the fact that the statute itself provides a full exemption from that same mandate to any plan that has maintained its grandfathered plan status.

Thus, employers affiliated with religious organizations that cannot comply with Section 2713's mandate due to their religious tenets should focus on working with elected officials to advocate the passage of legislation that would broaden the exemption available under Section 2713, keeping in mind any restrictions on political activities that apply to tax-exempt organizations. If those efforts prove unsuccessful, litigation may be the only available option for such entities.

If these approaches, or others like a class action, are not successful, religiously affiliated corporations may need to consider realigning their religious sponsorship so as to continue both their social service efforts and yet be in compliance with the law. This may result in the termination of their religious identity. In light of the serious nature of such a possible

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termination, it is vital that not only legal counsel surrounding insurance plans be sought but board education on this topic result long before such a possibility might arise.

For more information on this or related topics, please contact Anthony E. Antognoli or the Rev. Fr. William P. Grogan.

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