

Supreme Court Ruling - Contraceptive Exemption

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After several years of debate, the Supreme Court ruled in favor of the HHS final rules allowing for an exemption for employers with a religious or moral objection to providing coverage for contraceptive coverage. The exemption, at least for now, is available to most non-governmental organizations who would prefer not to provide group health plan coverage for contraceptives.

General Rule – Contraceptive Coverage Required under the ACA as Preventive Care

Under the Affordable Care Act (ACA), all non-grandfathered individual and group health plans are required to provide preventive services coverage with no cost-sharing. The list of preventive services required to be covered at 100% includes:

Evidenced-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force (USPSTF)	Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices (ACIP) of the Centers for Disease Control and Prevention (CDC)
Evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration (HRSA) for infants, children, and adolescents	Evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the HRSA

This list is updated by the appropriate departments/agencies over time. The requirements are summarized on Healthcare.gov – <https://www.healthcare.gov/coverage/preventive-care-benefits/>.

The HRSA guidelines include contraceptives. Coverage must be provided without cost-sharing for at least one form of contraception in each method identified by the FDA in its current *Birth Control Guide* - <https://www.fda.gov/media/135111/download>.

Exemptions to the General Rule

Through a series of rules issued between 2012 and 2018, the agencies provided:

1. A complete exemption from the requirement to provide contraceptive coverage with no cost-sharing for “religious employers” as described in 26 U.S. Code § 6033(a)(3)(A)(i) or (iii).
2. An accommodation process for “eligible organizations” – non-profit entities and closely held for-profit entities – with religious exemptions to providing contraceptive coverage.
 - o The accommodation process allows eligible organizations to avoid having to contract, arrange, pay, or refer for insurance coverage for contraceptive coverage if certain requirements are met. For fully-insured plans, the insurer assumes responsibility for providing coverage for contraceptive services; for self-funded plans, the TPA assumes such responsibility.
3. A broad exemption for employers who would prefer not to provide contraceptive coverage based on either a religious or a moral objection to such coverage. For such entities, the accommodation process described above is still available, but not required. The exemption applies to the following entities:

- All non-governmental employers who have a religious objection to providing some or all contraceptive coverage; and
- Non-governmental employers, who are not publicly traded, who have a moral objection to providing some or all contraceptive coverage.

Conflict Over Exemption for Employers with Religious or Moral Objection

Since the release of the agencies' rule providing a broader exemption for employers with a religious or moral objection to providing contraceptive coverage, there has been a battle in the courts, primarily by those fighting for women's rights to contraceptives and states worried about the costs associated with contraceptive programs and pregnancies. There was a District Court and then Third Circuit Court decision against the rule, arguing the agencies lacked statutory authority to promulgate this exemption and failed to follow proper rulemaking procedures. A nationwide preliminary injunction was put in place, essentially removing the broader exemption and leaving only an exemption for: (i) religious organizations; and (ii) eligible organizations following the accommodation process.

However, the Supreme Court decision issued this week reversed things, stating *"the Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections. We accordingly reverse the Third Circuit's judgment and remand with instructions to dissolve the nationwide preliminary injunction."* With this decision, the broader exemption is again available, allowing most employers with a religious or moral exemption to avoid providing contraceptive coverage under their group health plans.

Summary

The return of the expanded exemption will be welcomed by employers with religious or moral objections to providing contraceptive coverage. The religious objection is available to all non-governmental entities, whereas a moral objection is available to all but publicly traded non-governmental entities. For those non-profit and closely held for-profit entities currently using the accommodation process, a complete exemption is now allowed. For those entities holding on to grandfathered status solely to avoid having to provide such coverage, the exemption will allow consideration of non-grandfathered plans going forward.

For now, employers with a religious or a moral objection to contraceptive coverage are free to move forward with excluding coverage for some or all contraceptive coverage either upon plan renewal or upon 60 days' advance notice and appropriate plan amendments stating such coverage exclusions. That being said, we recommend that employers who want to exclude such coverage confirm whether carriers are willing to carve out such coverage. In addition, such employers should watch for any future changes as it seems likely that there will be continued litigation on these coverage requirements.

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