SQUIRE PATTON BOGGS

Supreme Court Ruling Limits Insurer and Employer Contraceptive Obligations

US – July 2020

Earlier this month the Supreme Court of the United States upheld a regulation adopted under the Trump administration significantly cutting back the requirement that insurers and group health plans provide coverage for contraceptives without cost sharing under the Affordable Care Act (ACA).

Because of the ruling in *Little Sisters of the Poor v. Pennsylvania*, employers, including publicly traded companies, with religious or moral objections are not required to provide contraceptive coverage under the health plans offered to employees. Previously, only churches and religious orders were excepted from the contraceptive coverage requirement while nonprofit religious organizations and private for-profit entities that objected to contraception for religious reasons could opt out of the requirement. Now, all are excepted from the federal requirement based on religious *or moral* objections and insurers are relieved of their obligation, under the accommodation process, to provide contraceptive coverage to employees through an alternative health care plan. The ruling also means that colleges and universities with religious or moral objections need not provide contraceptive coverage in student health plans, and that individuals who object on religious or moral grounds may seek to obtain insurance coverage in the individual market without contraceptive benefits (except as may be required by state law).

Background

The ACA requires health insurers and group health plans to provide certain preventative care benefits without cost sharing for plan participants. Guidelines established to identify the required preventative care benefits include all contraceptive methods and sterilization procedures approved by the Food and Drug Administration. However, under a separate federal regulation, churches and other religious orders are excepted from the contraceptive coverage requirement.

Federal regulations also provide an accommodation for religious non-profit organizations that object to providing contraceptive coverage due to "sincerely held religious beliefs." The accommodation allows these organizations to opt-out of the contraceptive coverage requirement by certifying to their insurers their sincerely held religious beliefs and objections. The objecting organization's plan can exclude coverage for contraceptives but the insurance company or third-party administrator must offer that coverage to employees, at no cost, under a separate plan. Thus, objecting religious non-profits do not have to provide otherwise required contraceptive coverage but, unlike the exception for churches, such coverage remains available to their employees. In 2014, the Supreme Court extended this accommodation to for-profit entities that object to contraceptive coverage for religious reasons in *Burwell v. Hobby Lobby Stores.*

Impact of Ruling on Employers and Insurers

Under the federal regulations upheld by the Supreme Court in *Little Sisters*, publicly traded entities that object to providing contraception to employees under their health care plans based on religious or moral beliefs are excepted from the contraceptive coverage requirement. Publicly traded entities had not previously been excepted; nor had they been eligible to opt out under the accommodation process. The regulations also extend the exception to entities that had been eligible for the accommodation, namely nonprofit and private for-profit entities. Further, the rules offer the exception to all such entities that object to contraceptives on religious *or moral* grounds; the accommodation had only been available to those that objected for religious reasons. In addition to eliminating objecting employers' obligations to provide contraceptive coverage to their employees, the ruling eliminates the need for insurers to offer contraceptive coverage through the separate plans as part of the existing accommodation process, as it seems likely that employers declining to provide contraceptive coverage will utilize the exception.

Many states require contraceptive coverage to be included in fully insured health benefit plans, and the Supreme Court's decision does not impact these state laws. For women enrolled in fully insured employer plans, the scope of contraceptive benefits may depend on state insurance laws. For example, California law requires expansive contraceptive coverage while Iowa's contraceptive law is much more limited. Thus, despite the Supreme Court ruling, insurance policies issued to employers who are excepted from the ACA's contraceptive coverage mandate need to comply with the state contraceptive coverage requirements. State insurance laws, however, do not extend to all health plans, only to state regulated (fully-insured) and non-federal government plans. State insurance laws do not apply to self-funded employer plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). Consequently, the Supreme Court decision allows employers with self-funded plans to exclude contraceptive coverage.

The ruling raises additional issues related to insurance companies.

- While insurers are permitted to offer coverage without contraceptive benefits to objecting employers, they are not required to do so, and they have discretion on how they will implement the regulations upheld.

- It is unclear how insurers will document the religious and moral beliefs of their customers in order to offer coverage without contraceptive benefits.
- Timing is an issue. Insurers may be able to implement the regulations upheld by the Supreme Court for self-funded and large employer plans in 2020. However, it is unclear whether they will be able to offer coverage without contraceptive benefits to individual and small group plans in 2020 or even 2021 because policy forms and premium rates for such plans have already been filed with regulators for approval and the time for submitting amendments has passed. Regulators will need to adjust their filing deadlines to implement the policy on a timely basis.

More to Come

For now, the Supreme Court's ruling means that, subject to state law, objecting employers can decline to provide health plans that cover contraceptives and insurers will not be required to provide alternative coverage to employees of such employers. However, given the political landscape, this is unlikely to be the last word on coverage of contraceptives under the ACA. Additional legal challenges to the regulations are expected – and the November elections could lead to new regulatory action and a new political backdrop for legal efforts.

Contacts

Douglas Anderson
Principal, Columbus
T +1 614 365 2717
E doug.anderson@squirepb.com

Stacey Grundman
Senior Attorney, Washington
T+1 202 457 6178
E stacey.grundman@squirepb.com

Meghna M. Rao
Associate, Columbus
T +1 614 365 2880
E meghna.rao@squirepb.com

38991/07/20