

Obama's Compromise On Contraception Won't End Lawsuits

By Rachel Slajda

Law360, New York (February 01, 2013, 8:25 PM ET) -- The Obama administration's Friday proposal to allow religious organizations to opt out of directly providing contraceptives to employees could narrow the lawsuits challenging the Affordable Care Act's birth control mandate, but experts say it's unlikely that any regulatory compromise will end the litigation completely.

The Department of Health and Human Services was forced to rewrite the rules after Catholic and other religious groups, supported by congressional Republicans, claimed that the mandate infringed on their religious liberty and demanded a broader exemption.

Some opponents sued. Many lawsuits are ongoing, and some are on hold pending a new final rule on the mandate. The question is whether the administration will be able to stop those lawsuits in their tracks with a new rule.

The new proposed rule, released Friday, would continue to exempt houses of worship from the requirement for health plans to provide contraception at no cost to employees. For nonprofit religious organizations like hospitals and schools, the insurer — or a third-party administrator if the organization is self-insured — will have to provide birth control at no cost to either the employee or the organization.

“What this does is allow those eligible organizations to essentially wash their hands of directly providing contraceptive services and obligates the insurer to establish and offer individual policies directly to these employees,” said Andy Anderson, at partner in the employee benefits practice at Morgan Lewis & Bockius LLP.

Experts say that if the final rule is substantially the same as the new proposed rule, it could whittle down the number of lawsuits. Some religious organizations will be satisfied that the rule puts enough distance between themselves and the contraception.

The proposed rule also changed the definition of “religious employer,” which applies largely to houses of worship that are entirely exempt, streamlining the definition and eliminating three prongs out of the original four-prong test. That could satisfy some plaintiffs that took issue with the original definition, which excluded religious employers that employed or offered social services to people of different faiths.

“Some people will view this as an elegant workaround of a difficult issue,” said Jeffrey Tanenbaum, chairman of the employment practice group at Nixon Peabody LLP.

The new rule could also erect higher legal obstacles for those plaintiffs that press on, Tanenbaum said, by further removing the providing of contraception from the employers' responsibility.

"It creates an additional hurdle for those claiming that this is still a violation of the separation of church and state," he said. "Although I suspect we're still going to see courts coming out in different ways on that issue."

Experts predict that no matter what the final rule looks like, some litigation will continue, and new suits could crop up.

"There are certainly organizations who won't be satisfied with even this level of interaction associated with contraceptive services," Anderson said. "That may still lead a number of these organizations to say, 'We appreciate the accommodation, we're happy we're eligible, but we're still not going to be involved.'"

The proposed rule also does not make any accommodations for for-profit companies whose owners have personal religious objections to providing contraception, and will therefore not affect the suits filed by such companies.

The next step is a 60-day comment period, which will likely bring in plenty of input to the agency. An advanced notice of proposed rulemaking, published in March, generated more than 200,000 comments, according to HHS.

The comments should offer an idea of how different groups view the concessions. One group to watch is the insurance industry, which will bear the burden of providing contraception to women who work for religious nonprofits.

It could prove quite the burden, says Anderson, who represents insurers.

"It's an awful lot of work on the insurers' side," he said. "The record-keeping requirements in here, how the insurers get paid for it, which is a reduction in a fee they'll be paying to participate in the exchange. This is a pretty convoluted process from start to finish for the insurer."

For religious organizations that have an outside insurer, their insurer will be responsible for providing a separate plan to employees for contraception. Under the proposed rule, those insurers would not be reimbursed because, HHS said, the savings from giving women access to birth control would make it cost-neutral.

Anderson called that idea "optimistic."

For self-insured religious organizations, the third-party administrator that administers their health plans will be required to contract with an insurer to provide the additional coverage. Those insurers will be compensated with a reduction in the fees they have to pay to offer plans on the federally facilitated exchange, HHS said. The insurer will have to compensate the third-party administrator for any costs.

It's also unclear whether HHS — or the Internal Revenue Service or Employee Benefits Security Administration, which are also listed on the proposed rule — has any authority to require the third-party administrators to participate, he said.

The coming weeks, when stakeholders announce their positions on the rule and submit comments, will be key in predicting just how far the administration's proposal will go in ending these disputes.

--Editing by Sarah Golin and Lindsay Naylor.

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