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INSURANCE BRIEF

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U.S. Supreme Court Rules on Contraception Mandate

Under the Affordable Care Act (ACA), employers with non-grandfathered health plans are required to provide cost-free coverage for certain preventive care for women, including all FDA-approved contraceptive methods.

On June 30, 2014, the U.S. Supreme Court ruled that closely held for-profit corporations with sincere religious objections to certain types of contraceptives cannot be required to comply with the ACA contraceptive mandate. Such corporations have a legal right under the Religious Freedom Restoration Act (RFRA) not to be forced to include four specific forms of birth control in their workers' plan.

The Supreme Court's ruling creates a narrow exception to the ACA's contraceptive mandate. "Closely held" means owned only by a family or other closely allied individuals, or by a family trust. For all other for-profit employers, the ACA's contraceptive coverage mandate will continue to apply.

In California, this ruling will have no impact on fully insured policies. In 1999 California enacted the Women's Contraceptive Equity Act (WCEA), which "ensures that insurance companies must provide coverage for a variety of FDA-approved contraception". Corporations that self-insure are exempt from WCEA, and the Supreme Court ruling would apply to them. The number of companies that fall into both the categories of "closely held" and self-insured is likely to be small in California, according to a Department of Insurance spokesperson.

For those employees who may be impacted, the government has fashioned an alternative way to assure coverage. Rather than making the corporation owners pay for the coverage to which they object for religious reasons, the employee benefit plan itself — that is, the insurance company or the internal plan administrator — has to take on the obligation, and provide the coverage to the female workers, free of charge. Either this "middle man" has to absorb the cost itself (the owners can't be required to put up the money), or it will get a government subsidy to help cover the cost.

But that may not be the end of the matter. An issue that was not directly before the Court is directly tied up with how the accommodation discussed actually will work. To take advantage of the exemption, a closely held company owned by religiously devout individuals must file a form, specified by the government, in order to trigger the legal duty of the "middle man" to provide the coverage as a stand-in for the company or its owners.

Federal government lawyers have made it clear in court that the "middle man" will not have any authority to step in unless the company or its owners file that government form claiming an exemption for the mandate. Some whose religions tell them to have nothing to do with some forms of birth control believe that even the filing of that formal declaration is itself an act of participation in the provision of those very services for people on their payroll. The form sets in motion, this argument goes, the entire process that results in birth control being made available to the workers for free. *Cont'd on page 2*

U.S. Supreme Court Rules on Contraception Mandate *(cont'd from page 1)*

The Court saw that argument late last year by a Colorado Catholic charity, the Little Sisters of the Poor. To spare that organization from filing a form to which it had specific religious objections, the Court in January said that the Little Sisters could simply file a letter with the government, saying that it was a religious group and that it had religious objections to the coverage.

That issue is now in the process of returning to the Court in pleas by non-profit religious entities, rather than for-profit businesses, seeking what might be called the accommodation to the accommodation. But adopting the Little Sisters of the Poor approach raises its own potential difficulty: how is the coverage triggered if the organization does not have to file the required form?

What's Next: At a minimum, the government may have to write new regulations — or ask for help from Congress — to assure that female workers employed by such organizations will get the coverage. It seems highly unlikely that the organizations seeking this accommodation to the accommodation will be satisfied to accept what the Court said on Monday. Since that was not directly at issue, they would have a quite strong argument that, whatever the Court did say on the point, it actually remains unresolved.

Reinsurance Fee FAQ

The Center for Medicare and Medicaid Services (CMS) released a FAQ which contains one Q&A.

Q: How will a contributing entity complete the reinsurance contributions process?
A: The Department of Health and Human Services (HHS) will implement a streamlined process for the collection of reinsurance contributions. A contributing entity, or a third-party administrator (TPA) on behalf of the contributing entity, can complete all required steps for the reinsurance contributions process on www.Pay.gov : registration, submission of the annual enrollment count, and remittance of contributions.

A form will be available via www.pay.gov where a contributing entity or a TPA on its behalf will provide basic company and contact information, and the annual enrollment count for the applicable benefit year no later than November 15th. The form will auto-calculate the contribution amounts. To complete the submission, entities will also submit payment information and schedule a payment date for remittance of the contributions. Pay.gov provides a 'one-stop' approach to complete the reinsurance contributions process.

CMS began offering training on this process beginning in late June. Please register on https://www.regtap.info/ to receive notices regarding upcoming trainings.

SF HCSO Updates

As of January 1, 2015, the health expenditure rate for large businesses (100 or more total employees) will be $2.48 per hour, and the rate for medium-sized businesses (20-99 total employees) is $1.65 per hour.

On June 17, 2014, the San Francisco Board of Supervisors passed an amendment to the Health Care Security Ordinance (HCSO). Currently employers can meet their expenditure requirement either with irrevocable expenditures, such as insurance premium payments, or with revocable expenditures, such as allocations to health reimbursement accounts where unspent funds are returned to the employer.

The amendment phases in over three years the requirement that all expenditures are irrevocable: sixty percent (60%) of employer expenditures for hours payable to the employee in 2015; eighty percent (80%) for employee hours in 2016; and 100% for hours payable on or after January 1, 2017. The amended Ordinance retains the conditions on revocable expenditures which exist today. This includes making the expenditure available to the employee for at least two years from the date of the expenditure or 90 days after separation.

What's Next? The amended Ordinance requires the Department of Public Health to develop a plan by August 2015 to maximize Healthy SF participants' enrollment in health insurance through CoveredCA. If approved, it would be implemented for the 2016 CoveredCA plan year.

Final Regulations on Orientation Periods

On June 20th the Departments of Labor, Treasury and Health and Human Services released final regulations addressing the 90-day waiting period and orientation periods.

Effective date: Plan years beginning on or after January 1, 2015. For the remainder of 2014 employers may rely on the proposed regulations which are substantively identical to the Final Regulations.

The Final Regulations clarify that orientation periods are "reasonable" and "bona fide" based on all relevant facts and circumstances. The Final Regulations provide little explanation or guidance as to the circumstances under which an orientation period might satisfy these requirements; however, they clarify that the one month limit on orientation periods is determined by adding one calendar month and subtracting one calendar day, measured from an employee's start date in a position that is otherwise eligible for coverage.

For example, if an employee's start date in an otherwise eligible position is May 3, the last permitted day of the orientation period is June 2. If there is not a corresponding date in the next calendar month upon adding a calendar month, the last permitted day of the orientation period is the last day of the next calendar month. For example, if the employee's start date is January 30, the last permitted day of the orientation period is February 28 (or February 29 in a leap year).

The Final Regulations note that an employer would not be able to impose a full one-month orientation period and the full 90-day waiting period without potential exposure to a penalty under the "pay or play" employer mandate. An employer subject to the mandate may be exposed to penalties if they do not offer coverage by the first day of the fourth full calendar month of employment. For example, if an employee is hired as a full-time employee on January 6, a plan may offer coverage May 6 and comply with both the orientation period and waiting period provisions, but be exposed to a penalty under the employer mandate.

What's Next: Employers should review the terms of their group health plans and work with qualified ERISA counsel to ensure that any orientation period is reasonable, bona fide and employment-based, and not merely a subterfuge for the passage of time. In addition, employers should consider application of the pay-or-play mandate when structuring eligibility and waiting periods to ensure that coverage is offered to new full-time employees no later than the first day of the fourth full calendar month of employment.

FMLA Spouse Definition

In June the Department of Labor released a Notice of Proposed Rulemaking (NPRM) to amend the regulatory definition of spouse under the Family and Medical Leave Act (FMLA) so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live.

This amendment aligns FMLA with COBRA and Sec. 125 rules which already were updated at the time of the Supreme Court's ruling last year on the Defense of Marriage Act. After that ruling the President instructed the Cabinet to review all relevant federal statutes to ensure the decision, including its implications for federal benefits and programs is implemented.

FMLA will now recognize the "place of celebration" instead of the "state of residence". This will allow all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live.

The full text of the NPRM, as well as information on the deadline and procedures for submitting comments can be found at www.dol.gov/whd/fmla/nprm-spouse.

PCORI / CER Fees Due July 31st

The Patient Centered Outcomes Research Institute (PCORI) fees which fund Comparative Effectiveness Research (CER) are due July 31, 2014.

The Fee: For the first year, October 1, 2012— September 30, 2013, the fee is $1.00 multiplied by the number of lives covered in the first year. For the second year, October 1, 2013 – September 30, 2014, the fee is $2.00 per covered life.

Form 720: File Form 720 annually to report and pay the fee no later than July 31 of the calendar year immediately following the last day of the policy year to which the fee applies. If you file Form 720 only to report the fee, do not file it for any other quarters. If you file Form 720 to report quarterly excise tax liability, do not make an entry on the line for IRS No. 133 on those filings. Deposits are not required for this fee so plan sponsors are not required to pay the fee using EFTPS.

Calculating the Fee: For self-insured plans, plan sponsors may choose from three different methods. Once chosen, the plan sponsor must use only the one method for that reporting year. Here are the options:

Actual Count Method. Plan sponsors calculate the sum of lives covered for each day of the plan year and then divide that sum by the number of days in the year. This count includes employees plus dependents.

Snapshot Method. Plan sponsors calculate the sum of the lives covered on one or more dates in each quarter of the plan year and then divide that number by the number of dates used. Each date must be within three days of the date used for the first quarter. E.g. If using February 15th (1st quarter), then must use a day between May 12 – 18th (2nd quarter). Under this method, the plan sponsor can count the number of covered employees and multiply that number by 2.35 to obtain the spouse and dependents count.

The 5500 Method. By adding the total number of employee lives on the first day of the plan year to the total number of lives on the last day of the plan year as reported on the Form 5500 (without dividing by 2). Can only use this method if the 5500 for that plan year is filed no later than the due date for the fee imposed for that plan year. E.g. Calendar plan year 2013, the 5500 is due by 7/31, and the employer obtains an automatic 2 ½ month extension. The employer is not eligible to use the Form 5500 method because they did not file by the 7/31 fee due date.

Health Reimbursement Account (HRA). In the event the employer has a self-funded medical plan and a HRA covering the same group, the fee will be payable on the self-funded medical plan. If the employer offers a self-funded medical plan to one class (e.g. management employees) and a self-funded HRA to non-management employees, then the fee would be based on the aggregate number of covered lives. If the employer has a fully-insured medical plan and a HRA covering the same group, the fee is payable on the HRA. Most HRA third-party administrators are able to provide the covered lives count required to make payment.

Retiree Coverage: The fee applies to health insurance policies and self-insured health plans that provide accident and health coverage to retirees, including retiree-only policies and plans;

COBRA continuation coverage: COBRA and similar continuation coverage (Cal-COBRA, for example) must be taken into account when determining the PCORI fee.

Please contact your SML Account Team if you have any questions.