



update

Compliance News for Plan Sponsors

July 20, 2015

Departments Publish Final Rule on Required Preventive Services Under the Affordable Care Act

The Affordable Care Act¹ requires non-grandfathered health plans to provide certain preventive services in network without charge to the participant or beneficiary.² On July 14, 2015, the Departments of Labor, Treasury, and Health and Human Services (the “Departments”), which are responsible for implementing group health plan standards under the Affordable Care Act, published a final rule clarifying certain issues.³ The most significant development is how the Departments will define a closely held for-profit entity that may seek an accommodation in connection with the otherwise applicable requirement to provide free contraceptive services to women.⁴ The final rule applies to the plan year beginning on or after September 14, 2015 (*i.e.*, January 1, 2016, for calendar-year plans).

This *Update* summarizes the changes in the governing regulations and what plan sponsors should do to stay current. It also summarizes the new rules applicable to religious employers that object to covering some or all of the required contraceptive services.

Background

The preventive services that must be provided without cost sharing fall into four different categories: services with an “A” or “B” recommendation from the U.S. Preventive Services Task Force (USPSTF), vaccines recommended by the Centers for Disease Control and Prevention (CDC), the Bright Futures guidelines developed by the American Academy of Pediatrics with support from the Health Resources and Services Administration (HRSA), and certain women’s services listed in HRSA guidelines (supplementing some of the USPSTF recommendations). The requirement to provide free contraceptive services to women emanates from the latter, and it took effect with the plan year beginning on or after August 1, 2012.

¹ The Affordable Care Act is the shorthand name for the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-48, as modified by the subsequently enacted Health Care and Education Reconciliation Act (HCERA), Public Law No. 111-152.

² For background on the preventive services requirements, see Sibson Consulting’s March 12, 2013 *Capital Checkup*, [“New Guidelines on Preventive Care Benefits for Non-Grandfathered Plans.”](#)

³ The final rule was published in the [July 14, 2015 Federal Register](#).

⁴ For information on the latest answers to frequently asked questions (FAQs) about the contraceptive coverage requirement, see Sibson’s May 28, 2015 *Update*, [“Additional Coverage Required for Preventive Services Under the Affordable Care Act.”](#)



Health Compliance News:

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Changes in the Governing Regulations

The final rule makes three changes to the governing regulations:

- If a plan's network does not have a provider who can provide a required item or service, the plan must cover that item or service when provided or performed by an out-of-network provider, and may not impose cost sharing for that item or service.
- Rules issued in 2010 provide that if a recommended preventive service does not include specific frequency, method, treatment or setting rules for the provision of that service, a plan sponsor can use reasonable medical management techniques to determine any coverage limitations. The new final rule clarifies that plan sponsors may continue to rely on the relevant clinical evidence base and established reasonable medical management techniques, and do not generally have to defer to the recommendations of a treating physician.⁵
- Rules issued in 2010 state that plan sponsors may stop providing an item or service once the underlying guideline or recommendation has been changed. The new final rule requires that plan sponsors continue to provide the coverage (without cost sharing) through the end of the plan year, except when the USPSTF has downgraded the recommendation from "A" or "B" to "D" or there is a safety concern. The Departments intend to issue guidance if these types of situations arise.

The Departments previously addressed the first two in answers to FAQs.

How to Stay Current

Plan sponsors may want to visit the healthcare.gov website once each year to access the information that is necessary to identify any new items or services that must be provided. HHS intends to update this list to include the date on which each existing recommendation or guideline was issued. HHS will also include new recommendations or guidelines. The general rule is that plan sponsors must provide the required item or service starting with the plan year that begins one year after the recommendation or guideline is issued.

In the past, this website has not kept pace with newly issued recommendations. It also has not reflected the detailed guidance provided in answers to FAQs, so plan sponsors will likely need to continue to monitor FAQs for guidance on these requirements.

Accommodation for Certain Religious Organizations

Religious employers — narrowly defined as churches and their related organizations — continue to be exempt from the contraceptive coverage requirement and do not need to take any action. To the extent that such employers object to the provision of contraceptive items or services, their employees (and covered family members) will not receive such services as required preventive services.

Other employers may be eligible for an accommodation with respect to the contraceptive coverage requirement, even if they are not within the narrow category of religious employers. The accommodation, which applies to a broader range of religious organizations, both nonprofit and for-profit, may be elected by an employer. The electing organization must notify its health insurer or third-party administrator (TPA) of the objection, or, alternatively, notify HHS.⁶ The health insurer or TPA will then be required to

⁵ As summarized in the FAQs discussed in Sibson's [May 28, 2015 Update](#), there will be situations where a plan sponsor will need to yield to the judgment of the patient's attending provider (e.g., when a provider recommends a particular contraceptive item or service as medically necessary).

⁶ The self-certification form (EBSA Form 700) and the model notice to HHS are available at [Patient Protection and Affordable Care Act — Coverage of Preventive Services](#).

ensure that the organization's employees (and covered family members) receive free contraceptive coverage from the health insurer or TPA.⁷

To elect the accommodation, an organization must oppose providing some or all of the required contraceptives on account of religious objections. In addition, the organization must either be (1) organized and operated as a nonprofit entity that holds itself out as a religious organization, or (2) a closely held for-profit entity whose highest governing body (e.g., a board of directors or trustees) has adopted a resolution (or taken a similar action) setting out the entity's objection to providing some or all of the contraceptives on account of the owners' sincerely held religious beliefs. The final regulation defines a closely held for-profit entity as one that is not publicly traded, where 50 percent or more of the entity is owned by five or fewer individuals.

Nonprofit and closely held for-profit institutions of higher education may also qualify as eligible organizations with respect to their insured student health plans.

Implications for Plan Sponsors

Plan sponsors with non-grandfathered plans must take steps to ensure that those plans are administered consistently with the new final rule. They should monitor the preventive benefits page at healthcare.gov at least annually, and assure that plan administrators are properly covering in-network preventive benefits without participant cost sharing. Religious organizations, including closely held for-profit organizations, that wish to elect the accommodation should work with legal counsel to determine if it is available and how to implement it.

⁷ For background information on the litigation that led to the broadening of the accommodation to certain for-profit entities, see Sibson's August 7, 2014 *Capital Checkup*, "[First Guidance Published on Contraceptive Coverage Cases.](#)"

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