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U.S. Supreme Court Rules on Religious and Moral Exemption to Contraceptive Coverage Under the Affordable Care Act

On July 8, 2020, the United States Supreme Court ruled 7-2 in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 591 U.S. -- (2020), that employers with religious and/or moral objections can limit access to contraceptive coverage under the Affordable Care Act.

Background

On March 23, 2010, the Patient Protection and Affordable Care Act of 2010 ("ACA") was signed into law. 124 Stat. 119. The ACA requires covered employers to offer a group health plan or group health insurance coverage that provides certain minimum essential coverage. 26 U.S.C. § 5000A(f)(2). Among other things, covered employers must provide women with "preventive care and screenings" without cost sharing requirements. 42 U.S.C. § 300gg-13(a)(4). The statute did not define "preventive care and screenings," nor did it provide a list of required services, but only explained that they would be "*as provided for* in comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA").

Pursuant to its authority, in August 2011, HRSA released its first set of Preventive Care Guidelines ("Guidelines"), which included a contraceptive mandate, requiring health plans to provide coverage for all contraceptive methods and sterilization procedures approved by the Food and Drug Administration as

well as related education and counseling. 77 Fed. Reg. 8725 (2012). The Departments of Health and Human Services, Labor, and the Treasury ("Departments"), which jointly administer the relevant ACA provision, promulgated rules under § 300gg-13(a)(4), including a church exemption that allowed certain nonprofit religious employers who self-certify to be exempt from the contraceptive mandate. 78 Fed. Reg. 39871 (2013). The church exemption provided for an accommodation allowing plan participants and beneficiaries to receive separate payments from the health insurance issuer for contraceptive services without cost-sharing. In response to challenges to the self-certification accommodation, and the contraceptive mandate itself, the Departments promulgated two additional rules known as the religious exemption and the moral exemption to the contraceptive mandate. The religious exemption applies to any entity that objects based on "sincerely held religious beliefs" as to its establishing, maintaining, providing, offering, or arranging for (1) coverage or payments for some of all contraceptive services, or (2) a plan, issuer, or third party administrator that provides or arranges such coverage or payments. 45 C.F.R. § 147.132. The religious exemption applies to churches and religious orders, nonprofit organizations, closely held for-profit entities, for-profit entities that are publicly traded, institutions of higher education and health insurance issuers. The moral exemption similarly applies to any entity that objects based on "sincerely held moral convictions," to its establishing, maintaining, providing, offering, or arranging for coverage or payments for (1) some or all contraceptive services, or (2) a plan, issuer, or third party administrator that provides or arranges such coverage or payments. 45 C.F.R. § 147.133. The moral exemption applies to nonprofit organizations and non-publicly traded for-profit entities, institutions of higher education and health insurance issuers. Although objecting entities may choose to use the accommodation process to allow contraceptive coverage for plan participants, they are not required to do so.

After the rules were promulgated, the Commonwealth of Pennsylvania filed an action seeking declaratory and injunctive relief, which was joined by the State of New Jersey, arguing that the Departments lacked statutory authority to promulgate the religious and moral exemptions, and they were procedurally invalid. The District Court issued a nationwide preliminary injunction against the implementation of the rules, and the federal Government appealed, as did one of the homes operated by the Little Sisters. The Third Circuit affirmed the lower court and the exemption rules never went into effect.

Decision

The U.S. Supreme Court held that the Departments' final rules providing religious and moral exemptions to the contraceptive mandate are both substantively and procedurally valid. 591 U.S. --, at *14. The statute provides that a health plan or insurer must offer coverage for "preventive care and screenings ... as provided for in comprehensive guidelines supported by [HRSA]." 42 U.S.C. § 300gg-13(a)(4). Justice Clarence Thomas writing for the majority found that, on its face, the phrase "as provided for" in the statute allows HRSA sweeping authority to both identify what preventive care must be covered and to identify and create exemptions from its own guidelines. 591 U.S. --, at *14, 16. In response to the dissent's argument that the exemptions thwart Congress' intent to provide contraceptive coverage and that women will be adversely impacted, the majority reasoned that such policy concerns cannot justify supplanting the text's plain meaning. Moreover, nothing in the ACA requires that contraception be covered, nor is there language in the statute indicating an intent by Congress that contraception be

covered. As the ACA provided a basis for both exemptions, the Court did not address whether the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq*., provided an independent basis for the exemptions. Id. at *19. As for the procedural argument, the Court found that the Departments complied with each of the statutory procedures under the Administrative Procedure Act ("APA") by providing adequate notice before promulgating the rules and requesting and encouraging public comments. Id. at *25. The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings.

Implications

- **The nationwide injunction has not yet been lifted.**
  Instead, on remand, the court will have to address several unresolved issues, including the States' challenge to the exemptions on the alternate ground that they are arbitrary and capricious in violation of the Administrative Procedure Act. It is unclear whether they can withstand a procedural challenge in that they may lack a "rational connection" to the problem the Departments were trying to resolve by overbroadly exempting employers who had no religious objection to the self-certification and accommodation rule. The court will likely also have to address whether the exemptions are authorized or required by the RFRA.

- **Employers can object to contraceptive coverage for religious and moral reasons.**
  Once the rules go into effect, employers can object to contraceptive coverage for religious or moral reasons and can decline to cover contraceptive services for employees and students.

- **The accommodation process will no longer be required but remains optional.**
  Under the exemption rules, the accommodation process, which enables employees and students of objecting employers to access contraceptives without cost-sharing, is now optional. Thus, employers are not required, but still have the option of voluntarily providing an accommodation of separate payments for contraceptive coverage to those requesting such coverage. 45 C.F.R. § 147.131.

- **Procedure for invoking the optional accommodation process.**
  To invoke the optional accommodation process, an organization eligible for one of the exceptions must contract with one or more health insurance issuers and provide self-certification that it is an eligible organization. The issuer must expressly exclude contraceptive coverage from the group health insurance coverage and provide *separate* payments for any contraceptive services required to be covered for plan participants and beneficiaries enrolled in the plan. 45 C.F.R. § 147.131. However, the issuer must not impose any cost-sharing requirements, premiums, fees or other charges on the eligible organization, and must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.

- **Funding for the optional accommodation.**
  Funding of payments for contraceptive services by participating issuers are provided through an adjustment of the Federally-facilitated Exchange ("FFE") user fees. 45 C.F.R. § 156.50(d).

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If you have any questions regarding this alert, please do not hesitate to contact us.

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