PALEY ROTHMAN
ATTORNEYS AT LAW

What the Contraception Coverage Rules and Other ACA Changes Mean for Employers

By Jessica Summers

SUMMARY: The bottom line is that, for most employers, not much has changed with respect to their obligations under the Affordable Care Act (ACA). Though the Trump Administration continues efforts to scale back the ACA through legislation and regulation, the ACA's employer mandate is alive and well and, with Democrats taking control of the House, we do not expect to see monumental changes to the requirement anytime soon.

On November 7, 2018, the U.S. Department of Health and Human Services and the IRS issued a pair of new final rules to free certain employers from the original rule under the Affordable Care Act (ACA) requiring that most employer-sponsored group health plans cover contraception at no cost to the individual. The first of the two rules provides an exception for individuals and entities (including higher education institutions) that object on the basis of a sincerely held religious belief. The second of the two rules allows businesses (provided that they are not publically traded), non-profits and individuals to obtain an exception on the basis of a non-religious moral conviction. HHS has claimed that the new rules will only impact a relatively small number of individuals and will not broadly change the availability of contraception coverage.

These rules are set to go into effect in sixty days. However, the prospects of this happening are hazy given the legal turmoil still swelling around their predecessors. In October 2017, the Administration issued nearly identical "interim rules" without the required public notice and comment (which has now been conducted). The interim rules drew significant protest and litigation and two federal judges issued nationwide injunctions prohibiting the interim rules from going into effect (a third case ruled for the Administration). Each of the decisions is currently on appeal and, given that the content of the interim and final rules are the same, but the process of introducing them is different, it is possible, but not guaranteed that the appeals could have an impact on the final rules.

So what does this mean for most employers? Frankly, probably not a lot. In the 2014 case of Burwell v. Hobby Lobby Stores, Inc., the Supreme Court decided that closely-held for-profit companies and their shareholders can assert a sincerely held religious belief to allow the company to be exempt from the ACA's contraception requirement pursuant to the Religious Freedom Restoration Act of 1993. The new regulations extend the opportunity to take a religious exemption to non-profits and for-profit entities that are not closely held and adds the moral exception option. However, to be able to take advantage of either of the exemptions non-profit and for-profit entities will need their board or shareholders' approval, which is likely to be difficult where the entity is not closely-held or affiliated with a religious or political group. Employers interested in claiming an exception should be aware that the regulations set out a specific, detailed process that must be followed to self-certify and notify the employer's insurance company.

For most employers, we expect that the new regulations will only come up in that they may have to field questions from employees about this issue, given the wave of press coverage that has come with the new regulations.

Another big change in the ACA framework that will come up in the new year, is the elimination of the individual mandate penalty. Under the ACA's framework, most individuals must obtain health insurance coverage or pay a penalty. The 2017 Tax Cuts and Jobs Act reduced the penalty for not having coverage to zero starting in 2019. This functionally nullifies the individual mandate because there is no penalty for non-compliance.

Of note for some employers, the Tax Cuts and Jobs Act also further delayed the 40% tax that the ACA would apply the premiums paid for high-cost employer health insurance that exceeds certain limits (known

as the “Cadillac Tax”) until 2022. This is not the first time that the effective date for the Cadillac Tax has been bumped back and there is some bi-partisan support to eliminate it altogether, raising the question of whether it will ever go into effect.

There are many moving pieces as the Administration and Congress continue to recon with what they envision versus what they have the power to change about the ACA (short of repealing it, which has been attempted countless times by House Republicans to no avail). However, for employers with fifty or more full-time (or full-time equivalent employees) one big thing remains the same - the employer mandate. The employer mandate was not impacted by the Tax Cuts and Jobs Act and there is little prospect that it will be substantially changed in the near future. Although the mandate has been in effect since 2015, the IRS only just began sending 2015 penalty notices in late 2017. Thus, some employers may still be facing the rude awakening that they are, and have been, subject to the mandate. **For those who have been compliant, despite all the press and discussion about changes to the ACA, the bottom line is that continued compliance is critical and, under the Trump Administration, the IRS is still collecting employer mandate penalties.**

 | 4800 Hampden Lane, 6th Floor, Bethesda, MD 20814-2930 | 301-656-7603 | 301-654-7354 fax **www.paleyrothman.com**