

# CONTRACEPTIVE COVERAGE REQUIREMENTS

DECEMBER 2018



## HIGHLIGHTS

- The rules expand the number of employers that are exempt from the contraceptive coverage mandate.
- The guidance also makes the accommodations approach optional for eligible organizations.

Employers who claim an exemption may provide a self-

## IMPORTANT DATES

### November 7, 2018

The Departments finalized regulations expanding exemptions from the contraceptive coverage mandate.

### January 14, 2019

The final regulations are scheduled to take effect 60 days after publication.

## FINAL REGULATIONS EXPAND EXEMPTIONS FROM THE CONTRACEPTIVE MANDATE

### OVERVIEW

On Nov. 7, 2018, the Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury (Departments) finalized two rules expanding certain exemptions from the Affordable Care Act's (ACA) contraceptive coverage mandate.

- The first [final rule](#) expands the exemption for employers that object to providing contraceptive coverage based on their sincerely held religious beliefs.
- The second [final rule](#) provides an exemption for certain employers that object to providing contraceptive coverage based on their non-religious moral convictions.

### ACTION STEPS

Under the final rules, a covered plan sponsor, issuer or plan will not be penalized for failing to include contraceptive coverage in the plan's benefits.

However, any entity that improperly claims an exemption may face fines and lawsuits for not complying with the contraceptive coverage mandate.

## Background

Effective for plan years beginning on or after Aug. 1, 2012, the ACA requires non-grandfathered health plans to cover certain women's preventive health services without cost-sharing (such as a copay, coinsurance or deductible). Under these rules, plans must cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.

A narrow exemption applies to churches and other houses of worship. In addition, an **accommodations approach** applies to other church-affiliated institutions that have religious objections to providing contraceptive coverage (such as schools, charities, hospitals and universities), which allows them to choose not to contract, arrange, pay or refer for any contraceptive coverage. Instead, separate payments for contraceptive services will be provided to females in the health plan by an independent third party.

In 2014, the U.S. Supreme Court also created a narrow exception to the contraceptive mandate for **closely held for-profit businesses** that object to providing coverage for certain types of contraceptives based on their sincerely held religious beliefs. To be eligible for the accommodations, an organization **must self-certify** (or notify HHS) that it meets the criteria and provide the self-certification to the plan's issuer or third-party administrator (TPA).

A number of lawsuits have been filed challenging the Departments' accommodations approach, asserting that it infringes on religious liberty. In October 2017, the Trump administration issued two interim final rules that expanded the availability of the religious exemptions to the contraceptive coverage mandate, in an effort to end this long-running litigation.

***A plan sponsor, issuer and plan covered by these expanded exemptions will not be penalized for failing to include contraceptive coverage in the plan's benefits.***

## Expansion of the Religious Exemption

The two new final rules issued by the Departments finalize the interim final rules from 2017 with only minor technical changes for clarity. Specifically, these rules:

- Extend the religious exemption to include entities and individuals that have sincerely held religious beliefs against providing contraceptive or sterilization coverage;
- Extend the religious exemption to include nonprofit organizations, small businesses and individuals that have non-religious moral convictions against providing contraceptive or sterilization coverage; and
- Make the accommodations approach optional for eligible organizations.

As a result, objecting employers are no longer required to choose between direct compliance and compliance through the accommodation. **A plan sponsor, issuer and plan covered by these exemptions will not be penalized for failing to include contraceptive coverage in the plan's benefits.**

## Eligible Organizations

The final rules exempt entities only from providing an otherwise mandated contraceptive item to which they object on the basis of their religious beliefs or moral conviction. Eligible entities include the following:

### Exemption Based on Religious Objections

This exemption may apply to all types of nongovernmental employers that have sincerely held religious objections to providing contraceptive or sterilization coverage, including:

- Churches, integrated church auxiliaries, conventions or associations of churches, or religious orders;
- Nonprofit organizations;
- For-profit entities (both privately held and publicly traded), **regardless of whether they are closely held**;
- Institutions of higher education (in arranging student health coverage);
- Individuals with respect to their own coverage, where the plan sponsor and/or issuer (as applicable) is willing to offer them a plan omitting contraceptive coverage to which they object;
- Health insurance issuers, to the extent they provide coverage to a plan sponsor or individual that is also exempt; and
- Any other nongovernmental employers.

### Exemption Based on Moral Objections

This exemption is narrower than the exemption based on religious objections. It may only apply to the following types of nongovernmental employers that have sincerely held moral objections to providing contraceptive or sterilization coverage:

- Nonprofit organizations;
- Privately held for-profit entities; and
- Institutions of higher education (in arranging student health coverage);
- Health insurance issuers, with respect to plans that are otherwise also exempt under the rules; and
- Individuals with respect to their own coverage, where the plan sponsor and/or issuer (as applicable) is willing to offer them a plan omitting contraceptive coverage to which they object.

The Departments specifically chose not to extend the moral objection exemption to publicly held for-profit entities and nonfederal governmental employers, such as local government hospitals.

For purposes of the exemption based on moral objections, moral convictions are protected in ways similar to religious beliefs when the convictions are those that:

- A person “deeply and sincerely holds;”

- “[A]re purely ethical or moral in source and content, but that, nevertheless, impose ... a duty; and
- “[C]ertainly occupy ... a place parallel to that filled by ... God in traditionally religious persons,” such that one could say the “beliefs function as a religion.”

### ***No Self-certification Requirement***

Under these new rules, employers who claim an exemption **may voluntarily, but are not required to, provide any self-certification or notice to the government**. The legal challenges to the accommodations approach have focused on whether the requirement to self-certify (or notify HHS of) an organization’s objections infringes on religious liberty by making the organization complicit in the provision of contraceptives. The new rules are intended to end this litigation by making the self-certification requirement optional.

**However, any entity that improperly claims an exemption may face fines and lawsuits for not complying with the contraceptive coverage mandate.**

If an exempt group wishes to use the optional accommodation process, it may file the same kind of form or notice required under the previous accommodation process. Those forms are being updated in conjunction with these final rules.