Gammon & Grange PC

G&G Law Alert™
Nonprofit

Alerting Leaders to Key Legal Developments May 18, 2012

# HHS Mandated Employer Health Insurance Requirements Begin August 1, 2012 – Do you need to comply?

This week, the Franciscan University of Steubenville became the first university to cease offering health insurance to its students in response to what has become known as the "HHS Mandate." As many religious employers are aware, on January 20, 2012, the Department of Health and Human Services ("HHS") finalized regulations under the Patient Protection Affordable Care Act ("ACA Regs"). These ACA Regs require almost all employers with more than 50 employees to offer health insurance plans that will fully cover reproductive "preventive health services." Covered services include sterilization procedures and the contraceptive drugs known as Plan B (the "morning after" pill) and *ulipristal* or *ella* (the "week after" pill), which are considered to be abortifacients or abortion-inducing medicines.

The regulations require employer compliance in all plan years beginning on or after August 1, 2012. Employers that fail to comply with the regulations may face fines as high as $100 per day for each employee receiving a health insurance plan that fails to comply with the regulation. A non-exempted employer with more than 50 employees that decides to stop offering health care coverage to its employees, will be forced to pay an annual fine of about $2,000 for each employee beyond the first 30 workers, who is not offered a health plan. However, there are a few situations under which an employer with religious objections to such coverage may avoid the August 1, 2012 compliance deadline. This Alert discusses three primary exemption scenarios, the second of which applies to both for-profit and nonprofit employers, regardless of religious affiliation.

**Closed-Door Church Exemption:** First, the HHS regulations provide a very narrow exemption for those few religious employers that (1) meet the IRS's definition of a "church," (2) primarily employ adherents of their own religious faith, (3) primarily serve adherents of their own faith, and (4) have a purpose of inculcating religious values. These "religious employers" need not comply with the HHS mandate. Unfortunately, most public-serving religiously-affiliated schools, colleges, universities, hospitals, health care facilities, and ministries will not meet this exemption.[1]

**Frozen-In-Time Grandfather Exemption:** Second, some health plans may also be exempt from the HHS contraception-coverage requirements under a separate HHS rule (issued on June 17, 2010) that allows employers to continue their health plans that were in existence as of March 23, 2010, so long as the employers make only routine plan changes. Under this "grandfathering" rule, a plan may lose its grandfathered status if it significantly cuts or reduces benefits, raises co-insurance charges, significantly raises co-pay charges, significantly raises deductibles, significantly lowers employer contributions, and adds an annual limit on what an insurer pays or tightens an existing limit. If a religious employer, whether for-profit or nonprofit, had in place a group health plan that did not cover contraceptives or abortifacients as of March 23, 2010 and that plan meets the grandfathering requirements, then it need not begin covering them in August 2012. Such employers would need to take great care as their health care plan changes over time to ensure that it continues to stay

[1] Although President Obama announced on February 10, 2012 an "accommodation" to these regulations that would create a broader exemption for some religious nonprofit employers, the HHS regulations finalized on January 20, 2012 did not include that "accommodation." The accommodation-less regulations currently in effect will control unless and until new regulations containing the accommodation are written and finalized. HHS has until August 1, 2013 to issue and finalize those regulations.

within the grandfathering provisions. Under the current HHS regulations, a grandfathered plan is the only circumstance under which a for-profit employer, regardless of religious values and organizational structure, may be exempt from the contraceptive-coverage requirements of the HHS regulation.

**One-Year-Postponement "Exemption":** Third, the regulations authorize a "temporary enforcement safe harbor" for certain "non-exempted, non-grandfathered group health insurance plans that are established and maintained by nonprofit organizations with religious objections to contraception coverage."[2] The temporary postponement was also announced in guidance issued by the HHS on February 10, 2012, but has not been included in any amendments to the HHS regulation. As described it would provide certain organizations a one-year pass from enforcement by HHS or any other federal agency. Therefore organizations that seek the safe-harbor would be exempt from compliance until August 1, 2013, by which time HHS may have issued additional regulations creating a broader exemption for religious employers — or not. To qualify for the safe harbor, a religious employer must (1) be organized and operate as a nonprofit entity; (2) at any point beginning February 10, 2012 onward, not provide contraceptive coverage in its group health plan because of the organization's religious beliefs; (3) provide or require its group health plan issuer/administrator to provide a notice to plan participants that it qualifies for the one-year enforcement pass; and (4) self-certify that it meets the first three criteria using a form provided by HHS, and make its self-certification available for examination.

The deadline for action is rapidly approaching. Organizations that have religious objections to the HHS contraceptive-coverage mandate should seek legal counsel to determine whether they are exempt, whether their plans are grandfathered, and/or whether they can qualify for the temporary one-year reprieve. Religious employers that do not qualify for any of the above-three categories but object to the HHS regulation's mandate will need to make a choice on August 1, 2012: either comply with the HHS regulation and begin providing health coverage for sterilization and abortion-inducing contraceptives, cease providing employee health insurance altogether, or refuse to provide compliant group health plans and risk an enforcement action or other legal challenge.

**If you would like to speak with a Gammon & Grange attorney about whether or not your organization needs to comply with the HHS contraceptive-coverage matters, contact Scott Ward or Mae Cheung at (703) 761-5000.**



[2] Department of Health and Human Services, February 10, 2012, "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code."