Debate Over ACA Contraception Mandate Continues

Law360, New York (January 31, 2014, 5:05 PM ET) -- The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010, or collectively the Affordable Care Act, was enacted in March 2010, in an effort to improve access to affordable health care coverage, including, among other things, certain contraceptive services. However, the ACA has been subject to extensive litigation since its enactment. Specifically, there have been numerous lawsuits initiated by those who oppose the ACA’s contraceptive mandate, including those brought by for-profit corporations and nonprofit religious organizations. At first blush, the cases appear to be very similar, after all they both oppose being subject to the ACA’s contraceptive mandate. However, the cases differ in several important respects.

The ACA requires certain employers to provide their employees with a minimum level of health insurance. Further, the ACA generally requires nongrandfathered plans to provide coverage without cost-sharing (e.g., copayment, coinsurance or deductible) for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration, an agency within the U.S. Department of Health and Human Services.

HRSA delegated the creation of guidelines on this issue to the Institute of Medicine. HRSA then adopted IOM’s recommendation to generally require nongrandfathered plans to cover “[a]ll [U.S.] Food and Drug Administration approved contraceptive methods, sterilization procedures and patient education and counseling for women with reproductive capacity.” On Feb. 15, 2012, HHS, the U.S. Department of the Treasury and the U.S. Department of Labor (collectively, the departments) published final rules memorializing the guidelines.

On July 2, 2013, the departments published additional final rules clarifying a religious accommodation under the ACA’s contraceptive mandate. To be deemed eligible for the accommodation, an organization must oppose providing coverage for some or all of any contraceptive services required to be covered on account of religious objections; be organized and operating as a nonprofit entity; hold itself out as a religious organization; and self-certify, in a form and manner specified by the HHS secretary, Kathleen Sebelius, that it satisfies the specified criteria. Based on these criteria, a for-profit company cannot be deemed an eligible organization under the final rules, and therefore, is ineligible for the religious accommodation.

As to be expected, for-profit companies that oppose the ACA contraceptive mandate, and are ineligible for any exception, have turned to the courts to resolve the matter. Amidst a circuit court split on this issue, the U.S. Supreme Court agreed to review the contraceptive mandate as it applies to for-profit corporations by granting certiorari on Nov. 26, 2013.
In Sebelius, et al. v. Hobby Lobby Stores Inc. the question presented to SCOTUS states: “[t]he Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. 2000bb et seq., provides that the government ‘shall not substantially burden a person’s exercise of religion’ unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health care coverage of contraceptives to which the employees are otherwise entitled by federal law [the ACA], based on the religious objections of the corporation’s owners.”

Similarly, Conestoga Wood Specialties v. Sebelius, et al., presented the following question: “[w]hether the religious owners of a family business, or their closely-held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage [m]andate of the ACA.”

The Supreme Court consolidated these two cases that produced differing results in federal circuit courts. The Tenth Circuit held in favor of Hobby Lobby on this issue by upholding its right to challenge the ACA on RFRA grounds. In contrast, the Third Circuit ruled in favor of the government by holding that Conestoga Wood Specialties could not assert an RFRA claim to challenge the ACA. These two cases have been consolidated and scheduled for arguments beginning on March 25, 2014.

Challengers to the ACA’s contraceptive mandate are not limited to for-profit companies. Although eligible for the religious accommodation, some nonprofit religious companies are also challenging the ACA’s contraceptive mandate. For example, the Little Sisters of the Poor Home is a religious nonprofit corporation that provides health care coverage to its employees through a self-insured church plan and a third-party administrator that administers the plan. The Little Sisters of the Poor, under the RFRA, challenges the contraceptive mandate under the ACA. Specifically, the Little Sisters of the Poor, and similarly-situated plaintiffs in other cases, argue that by completing the self-certification, they are authorizing others to provide the disputed contraceptive coverage.

After being denied relief by both the District Court for the District of Colorado and the Tenth Circuit, the Little Sisters of the Poor filed an emergency application for injunction with the Supreme Court on Dec. 31, 2013. In their application, the Little Sisters of the Poor Home argued that the mandate would “expose the Little Sisters of the Poor to draconian fines unless they abandon their religious convictions and participate in the government’s system to distribute and subsidize contraception, sterilization and abortion-inducing drugs and devices.”

In the application, the Little Sisters of the Poor explained that “[t]he second way [they] could ‘comply’ with the [m]andate is by signing a certification form authorizing and directing a third party to provide the required coverage, and deliver the form to the third party, which would qualify the third party for reimbursement payments from the federal government ... Simply put, as a religious matter, [they] believe they cannot sign and send the form.”

That same day, the Supreme Court issued a one-page order that temporarily granted the Little Sisters of the Poor’s emergency application for an injunction. By granting the temporary injunction, the government was enjoined from enforcing the contraceptive coverage requirements imposed by the ACA and its related regulations against the Little Sisters of the Poor, pending the receipt of a response from the government and further order by the Supreme Court.

On Jan. 3, 2014, Donald Verrilli Jr., the U.S. Solicitor General, filed a memorandum in opposition to the emergency application for an injunction. In the memorandum, the government argued that the Little Sisters of the Poor has “no legal basis to challenge the self-certification requirement or to complain that
it involves them in the process of providing contraceptive coverage.” The government further argued that “the [Little Sisters of the Poor’s] religious exercise is not substantially burdened by the requirement that they sign the certification form expressing their religious objection to contraceptive coverage in order to exempt themselves from the contraceptive-coverage provision” under the ACA.

Also on Jan. 3, 2014, the Little Sisters of the Poor filed a reply in support of their emergency application for injunction. Within their reply, the Little Sisters of the Poor argued that “the Little Sisters and other [a]pplicants cannot execute the form because they cannot deputize a third party to sin on their behalf.” Additionally, the reply argues that the self-certification form is not merely an opt-out but instead acts as a permission slip that “authorizes and in some cases commands another organization to provide objectionable drugs to the Little Sisters’ employees within the terms of the Little Sisters’ health plan.”

The Supreme Court ordered on Jan. 24, 2014, that if Little Sisters of the Poor inform the HHS secretary in writing that they are a nonprofit organization that holds itself out as religious with religious objections to providing coverage for contraceptive services, the government is enjoined from enforcing the contraceptive mandate provisions pending a decision by the Tenth Circuit. Further, the order stated that “[t]o meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators.” The Supreme Court specifically cautioned that the order “should not be construed as an expression of the [c]ourt’s views on the merits [of the case].”

As the Supreme Court has already agreed to tackle the mandate’s application to for-profit corporations, and given the split brewing among the nonprofit cases, the court may be given the opportunity to later address the nonprofit religious companies’ challenges as well, if the Supreme Court agrees to accept what are likely to be future petitions for writs of certiorari.

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