ACA COMPLIANCE BULLETIN

HIGHLIGHTS

- Nonprofit religious employers can qualify for an accommodation to the ACA's contraceptive coverage requirement.
- These employers argued that the self-certification and notification requirements violated their religious freedom.
- The parties agreed that there could be an approach that would work for both sides.

COURT'S RULING

- The Supreme Court sent the cases back to the lower courts for further review.
- The lower courts must accommodate religious freedom while ensuring access to contraceptive coverage.

Provided By:
Clarke & Company Benefits, LLC

SUPREME COURT RETURNS CONTRACEPTIVE CASE TO LOWER COURTS

OVERVIEW

On May 16, 2016, the U.S. Supreme Court sent seven related cases challenging the Affordable Care Act's (ACA) contraceptive coverage mandate back to the lower courts to be reconsidered. In these cases, nonprofit religious employers challenged the self-certification requirement under the accommodations approach, arguing that it infringes upon their religious liberty.

Following oral arguments, both the challengers and the federal government agreed that there could be a solution that would satisfy both parties. As a result, the Supreme Court's order **instructs the lower courts to reconsider these cases** in an effort to arrive at an alternative approach that both:

- ✓ Accommodates the employers' free exercise of religion; and
- ✓ Ensures that all women have access to contraceptive coverage.

The Supreme Court's order does not address whether the ACA's contraceptive mandate violates religious liberty.

CLARKE & COMPANY
BENEFITS LLC

Overview of the ACA's Contraceptive Mandate

The ACA requires non-grandfathered health plans to cover women's preventive health services—including contraceptive methods—without charging a copayment, a deductible or coinsurance. Under this rule, plans must cover **all FDA-approved contraceptive methods** for all women with reproductive capacity.

Churches and other houses of worship are exempt from the ACA's requirement to cover contraceptives. In addition, the federal government established an **accommodations approach** for eligible nonprofit religious organizations that object to contraceptive coverage on religious grounds, but do not qualify for the church exemption.

According to the challengers, the accommodations approach infringes upon religious liberty because the self-certification requirement (or HHS notification requirement) makes the organization complicit in the provision of birth control.

Under the accommodations approach, eligible organizations do not have to contract, arrange, pay or refer for any contraceptive coverage to which they object on religious grounds. However, separate payments for contraceptive services will be provided to females in the health plan by an independent third party (such as an insurance company or third-party administrator (TPA)) directly and free of charge. To be eligible for the accommodations, an organization must either:

- ✓ Self-certify that it meets the criteria and provide the self-certification to the plan's issuer or TPA; or
- ✓ Notify the Department of Health and Human Services (HHS) in writing of its religious objection to providing contraceptive coverage, instead of providing the self-certification to the plan's issuer or TPA.

Legal Challenges to the Accommodations Approach

The legal challenges to the accommodations approach brought by the nonprofit religious employers have focused on whether the requirement to self-certify (or notify HHS) of an organization's objections to contraceptive coverage infringes upon religious liberty. According to the challengers, the accommodations approach infringes upon religious liberty because the self-certification requirement (or HHS notification requirement) makes the organization complicit in the provision of birth control.

Most of the lower courts that previously reviewed this issue, including the D.C. Circuit Court of Appeals and the 10th Circuit Court of Appeals, determined that the accommodations approach does not infringe upon an organization's religious liberty. However, on Sept. 19, 2015, the 8th Circuit Court of Appeals held that the accommodations approach imposed a "substantial burden" on the religious rights of nonprofit religious organizations.

The Supreme Court's Ruling

Because the federal appeals courts were split on this issue, the U.S. Supreme Court agreed to consider whether the federal government's approach does enough to accommodate the objections of religious employers. After oral arguments were heard on March 23, 2016, the Supreme Court directed both the challengers and the federal government to file additional briefs to address whether contraceptive coverage could be provided to the challengers' employees, through their insurance companies, without any notice from the employers to their insurer or HHS.

In their additional briefs, both the challengers and the federal government agreed that that there could be a workable alternative that would satisfy both parties.

- The religious nonprofit employers "clarified that their religious exercise is not infringed where they 'need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception,' even if their employees receive cost-free contraceptive coverage from the same insurance company."
- The federal government also confirmed that the self-certification requirement "for employers with insured plans could be modified to operate in the manner posited in the [Supreme] Court's order while still ensuring that the affected women receive contraceptive coverage seamlessly, together with the rest of their health coverage."

As a result, the Supreme Court **ordered the lower courts to reconsider each of these cases in light of this new option**. The Supreme Court instructed the lower courts to allow both parties to arrive at an approach going forward that both accommodates the employers' religious exercise and ensures that women covered by those plans have access to contraceptive coverage.

The Supreme Court cautioned that their order **does not address or make any final determination on whether the employers' religious exercise has been substantially burdened, or whether the accommodations approach is permitted under the U.S. Constitution**.