



Subject: 1) Supreme Court Ruling – Women’s Preventive Services Mandate; and 2) Re-issued Model Marketplace Notices
Date: July 9, 2020

Supreme Court Ruling - Women's Preventive Services Mandate

In a 7-2 decision, the Supreme Court determined that the women’s preventive health services regulations issued on November 15, 2018, can stand. These regulations provide a way for health plans to opt out of covering contraceptive services.

As background, the Affordable Care Act requires health plans to cover certain preventive services, without imposing any cost-sharing requirements (co-pay, co-insurance, or deductible), when such services are delivered by in-network providers. One of the approved types of covered preventive services is contraceptive methods including prescribed FDA-approved methods and sterilization procedures, and patient education and counseling, in accordance with the [guidelines](#) recommend by the Health Resources and Services Administration (HRSA).

The original law specifically exempted church plans sponsored by qualified religious employers from providing contraceptive services. The final 2018 regulations issued by the tri-governing agencies (Departments of Labor, Health and Human Services, and IRS) provide that virtually any non-government plan, including one sponsored by closely-held and publicly traded entity, private entities, as well as institutions of higher education and private universities offering student health coverage, to opt out of some or all of the contraceptive mandates based on religious grounds, either through seeking an accommodation process, or by exempting itself. An accommodation or exemption option was also made available for a slightly narrower group of entities, specifically, all non-government, non-publicly traded entities based on a moral opposition to providing contraceptive services.

To seek the accommodation, the entity must either:

1. Submit a self-certification form to the insurer or third party administrator using [EBSA Form 700, Certification Form for Eligible Organizations](#); or,
2. Self-certify to the Department of Health and Human Services (HHS) or the Department of Labor, using the [model HHS Self-certification Form](#).

To exempt itself from the obligation, the entity must simply exclude the offending coverage.

On July 8, 2020, the Supreme Court ruled on the matter in the case of *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, et. al.* (No. 19-431, S. Ct. Jul. 8, 2020). According to this opinion, and at least for the time being, the final regulations stand as issued in 2018. It is likely challenges to these rules will continue under any number of theories; one of which might be that HRSA exceeded its authority, and that the rules are arbitrary and capricious.

Interplay with other laws. The ACA's contraceptive coverage rules notwithstanding, the Pregnancy Discrimination Act, applicable to employers employing 15 or more employees, requires that if a plan covers preventive health services and/or coverage for prescription drugs, devices and services for medical conditions, it must likewise provide equal coverage for contraceptive services, drugs and devices. Further, plans subject to state insurance laws may still be required to provide coverage for these types of services.

Re-issued Model Marketplace Notices

The ACA requires all employers to provide a notice of marketplace options to their employees explaining the pros and cons of obtaining coverage through the health insurance marketplace. The DOL's Employee Benefits Security Administration (EBSA) provides two model Marketplace Notices that can be used to communicate this information to employees.

As with many government-issued model forms, these forms must undergo periodic review by the Office of Budget and Management prior to reissuance. EBSA has recently reissued the model marketplace forms with a revised expiration date of June 30, 2023. There have been no changes made to content from prior versions of the model forms.

As background, all employers subject to the Fair Labor Standards Act (FLSA) are required to provide the Marketplace Notice to their employees. The FLSA generally applies to virtually all employers employing at least one employee.

The notice must be provided to all newly hired employees, including full-time and part-time employees, without regard to eligibility status for the health plan, within 14 days from the date of hire.

Both model notices can be viewed and/or downloaded from the [DOL-EBSA website](#). One model notice is to be completed by employers offering coverage, and the other for employers who do not offer coverage.

- ♦ Model notice for use by employers who **offer** coverage to some or all employees:
English ([PDF](#) or [Word](#)) or Spanish ([PDF](#) or [Word](#))
- ♦ Model notice for employers who **do not offer** health coverage:
English ([PDF](#) or [Word](#)) or Spanish ([PDF](#) or [Word](#))

About the Author

Karen R. McLeese is Vice President of Employee Benefit Regulatory Affairs for CBIZ Benefits & Insurance Services, Inc., a division of CBIZ, Inc. She serves as in-house counsel, with particular emphasis on monitoring and interpreting state and federal employee benefits law.
Ms. McLeese is based in the CBIZ Kansas City office.

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