A not-for-profit health and tax policy research organization

Galen Institute comments on the HHS Proposed Rule regarding mandatory coverage of contraception services under the Patient Protection and Affordable Care Act

The Galen Institute submitted on April 5, 2013, comments concerning the Obama administration's latest Notice of Proposed Rule Making concerning the HHS mandate requiring employers and health plans to provide free contraceptives, sterilization, and abortion-inducing drugs. The comments were prepared by John S. Hoff, Esq., a founding trustee of the Galen Institute.

The comments explain why the "proposed regulations, and the current regulations they would amend, do not adequately reflect employers' religious objections to the required services, are insufficient to protect employers' First Amendment right to the free exercise of religion, and are begrudgingly narrow in scope, inadequate, and unworkable."

The full content of our submitted comments follows:

Re: File Code CMS-9968-P

Coverage of Certain Preventive Services under the Affordable Care Act

Galen Institute

The Galen Institute submits the following comments on the proposed rulemaking relating to the coverage of contraceptive and other preventive services, 78 Fed. Reg. 8456 (February 6, 2013). Galen is a non-profit, Section 501(c) (3) public policy research organization devoted to advancing a vibrant, patient-centered health sector that respects and supports individual freedom, consumer choice, and innovation.

Summary

Galen believes the administration's determination to use the Patient Protection and Affordable Care Act to require employers to provide free contraceptive coverage for their employees, even when the employer has religious objections to doing so, is seriously misguided. The administration's fixation on using employer-sponsored health insurance as a lever to provide free contraception coverage conflicts directly with the conscience of many employers.

The proposed regulations, and the current regulations they would amend, do not adequately reflect employers' religious objections to the required services, are insufficient to protect employers' First Amendment right to the free exercise of religion, and are begrudgingly narrow in scope, inadequate, and unworkable.

The attempt by this tortured regulation to find an accommodation to the coverage mandate shows the extraordinary difficulty – indeed impossibility – of attempting to go around the constitutionally-protected right to religious liberty. The only way to ensure that employers' rights are protected is to eliminate the underlying requirement that they provide contraceptive coverage. The exceptions contemplated by the Notice of Proposed Rulemaking (NPRM) are insufficient to counteract the intrusions on personal liberty created by the coverage mandate.

The proposed scheme

The scheme contemplated by the NPRM posits two categories of employers. A narrowly constricted category of "religious employers" would be exempt from the mandate. In addition, "eligible organizations" that are "religious organizations" would be "accommodated" through a baroquely complicated mechanism intended to convince them that they are not responsible for providing or paying for contraceptive coverage to which they object. The accommodation is for "religious organizations," but this term is not defined. The term will be applied retroactively by the government on the basis of unknown criteria, giving it broad discretion and providing space for political favoritism. Even for those employers who fall within the amorphous category of "religious organizations," moreover, the proposed "accommodation" is of little value, particularly for those who self-insure.

The exemption for "religious employers" is unconstitutionally narrow.

"Religious employers" – churches, including their "integrated auxiliaries," and religious orders – are exempt from the mandate to provide coverage of contraceptive services. (Proposed 45 CFR Section 147.131(a)) The term, however, is very narrow.

An organization is a "religious employer" if (among other requirements) it is a non-profit organization and falls within the terms of IRS Section 6033(a)(3)(A)(i) or (iii). Clause (i) thus exempts churches and their "integrated auxiliaries." Clause (iii) provides an exemption for religious orders.

The proposed regulations would eliminate the current requirement that to be considered a "religious employer," the church or religious order must inculcate its values and serve primarily people of its own faith. Even as thus amended, however, the exemption from the contraception coverage mandate is still limited to churches and religious orders. It is too narrow and would not exempt other employers with religious objections, even, for instance, not-for-profit organizations like universities and hospitals.

The accommodation for eligible organizations is too narrow, undefined, and unworkable.

The proposed regulations provide an "accommodation" for employers that are not "religious employers" if they are "eligible organizations." To be an "eligible organization," the employer must be a not-for-profit organization, and it must be a "religious organization." (Proposed Section 147.131(b))

For-profit employers are excluded from the accommodation. The proposed rule does not provide an "accommodation" for for-profit organizations and their owners and managers, regardless of their religious objections to the mandate. The rule should be

amended to reflect their First Amendment rights; the free exercise of religion guaranteed by the Constitution is not limited to that of not-for-profit institutions.

The key term – "religious organization" – is not defined. To be eligible for an accommodation as an "eligible organization," an employer must be a not-for-profit organization that "holds itself out as a religious organization." The key element of an "eligible organization" is that it be a "religious organization." This term is critical to the scope of the "accommodation," but it is not defined in the proposed regulation text or fleshed out in preambular discussion. The only guidance, provided indirectly by the structure of the scheme, is that it is a different concept than "religious employer."

It is not clear, therefore, what institutions would be eligible for the accommodation. The status even of such major institutions as universities, schools, and hospitals founded on religious tradition and based on religious principles but that provide education, research, and health care would qualify as "religious organizations."[1]

The regulations should clearly define what is considered to be a religious organization, and the administration should disclose what it considers to be covered by this term.

Self-certification cannot take the place of definition. To trigger the accommodation, the employer must certify to its insurer that it holds itself out as a religious organization and that it has a religious objection to providing the mandated contraceptive coverage. (Proposed Section 147.131(b))

The insurer then is required "automatically" to provide separate, individual coverage for those services, without premium and without copayment, to each worker (and dependent) covered by the employer's health plan. Neither the religious organization nor the worker can be charged for the coverage. (Proposed Section 147.131(c))

The religious organization's self-certification, in theory, is self-operating and sufficient to invoke the adjustment. According to the preamble, there would not be "an inquiry into the organization's character, mission, or practices." (78 Fed. Reg. at 8462) But the regulation actually will not operate on such a laissez-faire basis. The self-certification no doubt will be reviewed and judged. In fact, the agencies' explanation of the scheme provides its own warning. The organization is required to maintain a record of its self-certification and make it available for examination on request. (78 Fed. Reg. at 8462) Clearly, the government will be making a judgment as to whether an organization is a "religious organization." The preamble further states that whether an organization is designated as "religious" for these purposes "is not intended as a judgment about the mission, sincerity, or commitment" of the organization. (78 Fed. Reg. at 8468) Perhaps not, but the government will be determining whether it is a religious organization (on the basis of unknown standards) – retroactively, years later.

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[1] Proposed Section 147.131(b); 78 Fed. Reg. at 8462.

The "accommodation" does not satisfy employers' religious objections. The notion of the government only "accommodating" religious organizations that are not churches or religious orders is itself constitutionally suspect. But even accepting this crabbed view of the constitutional protections, does it work?

The regulations would purport to insulate an employer that is a religious organization from the coverage to which it objects by providing that neither the employer nor the employee can be charged for it. But this is insufficient to satisfy the moral objections of "religious organizations." They are still forced to be involved in facilitating the placement of the coverage to which they object. The requirement imposed on the insurance company kicks in only where the employer has purchased insurance. The employer, moreover, is providing the insurer with the names of the employees and thus facilitating the delivery of the coverage. By obtaining insurance for its employees, the religious organization is setting in motion a process that results in the coverage to which it has moral objections, even if it is not (knowingly) paying for it. The proffered "accommodation" does not neutralize the employer's moral role in the process.

The accommodation is premised on fanciful assumptions. Nor is the scheme likely to work as a practical matter. The insurance company that provides the employer's health plan will have to create a new product – a policy that does nothing except cover contraception services without premium or copayment. Will this happen? Does the Federal government have authority to require an insurance company to create a new product and provide this coverage merely because it is selling insurance to employers?

If insurers do create this product, they will have to deal with each individual employee with respect to the contraception coverage; they may not be set up for this, since by definition they are in the employer, not the individual, market.

How is the "free" coverage to be paid for, since the insurer cannot charge either the beneficiary or the employer?

The proposed regulations set forth an elaborate scheme to compensate the insurer for the cost of the coverage, plus a margin: The insurer would tell HHS its cost for the coverage; if HHS approves this cost estimate, the insurer would receive an adjustment to the "user fee" it must pay to participate in a Federally Facilitated Exchange. If the insurer issues the contraception coverage in a state that does not have an FFE (i.e., a state with a state-run exchange), the cost of the coverage in that state could be included in the adjustment to the user fee charged when the insurer is selling through an FFE in another state. (Proposed Section 156.50)

If, as may prove to be the case, the Federal government does not have authority to impose the FFE user fee, this funding mechanism would fail at the outset. Even if legally valid, the user fee may not mean much to the insurer. The mandate on the insurer to provide a contraception-only policy kicks in only when it has sold insurance to an employer that is an "eligible organization;" but insurers selling group insurance to

employers will not be operating through an Exchange and will not be paying a user fee that can be adjusted (unless it happens also to be in the individual/small group market).

This mechanism, moreover, contemplates that HHS will be able to deconstruct the insurer's costs to figure out how it calculated the employer's premium to make sure the insurer didn't slip in a charge for the contraception coverage, and that it will be able to calculate the insurer's cost of providing the contraception coverage. This will be an interesting – probably probably excruciating – exercise, particularly since HHS believes that the coverage has no net cost (because of an offsetting reduction in other health expenses).[2]

Finally, it should be noted that the NPRM is not clear whether this FFE-adjustment scheme is available to insurers that also are providing the main coverage for the employer or whether it applies only to insurance obtained by third party administrators of self-insured plans. The preamble discusses the adjustment to the FFE fee in the context of self-insured plans (78 Fed. Reg. at 8463, 8465), apparently on the assumption that an insurer would actually save on overall costs by providing the free contraception coverage. The proposed regulation text itself, however, does not seem to be limited to self-insured plans. (Proposed Section 156.50)

Self-insured employers are entirely unaccommodated. The text of the proposed rules does not include a provision for self-insured plans. The agencies, it is apparent, still have not figured out how they hope to deal with self-insured plans. It probably is not possible to do so. The preamble offers three alternate approaches. All of them would require the third-party administrator (assuming there is one) to find and then arrange with an insurance company to provide the contraception-only insurance.[3] The insurance company providing the contraception coverage for the third-party administrator would receive the "adjustment" to its FFE user fee, and hand over to the administrator a portion of it to reflect the administrator's costs. It is unclear why an insurer would find it worthwhile to get into this limited business, and what happens when the third-party administrator cannot find an accommodating insurer?

In summary: The proposed scheme will not work for self-insured employers. More generally, it fails to protect the rights of all employers with religious objections to the mandated contraceptive coverage and is unworkable as a practical matter. It demonstrates that the mandated coverage itself is misguided.

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[2] 78 Fed. Reg. at 8463. The preamble raises the possibility of using a national per capita estimate, rather than making individual cost estimates. Id. at 8466.

[3] There does not appear to be any real difference among the three alternative proposed approaches – except for the use of different adverbs to describe the third-party administrator's role in finding an insurance company – "voluntarily," "automatically," and "directly." It is not apparent what these words mean or what is the difference among the three proffered alternatives.