

Legal Update from Flagler Law Group



Our Mission is to serve the legal needs of Christian publishing organizations by leveraging focused expertise into practical solutions.

Brian Flagler founded Flagler Law Group in the spring of 2006 to serve the legal needs of publishers, designers, producers, and distributors of Christian media. With a combined 20+ years in the industry, we know Christian publishing. We believe that our experience handling matters for a diverse variety of Christian publishers, ministries, and other organizations **from the publishing perspective** significantly contributes to the value that we offer our clients.

(541) 549-8401
brian@flaglerlawgroup.com

October 2013

Religious Organizations Excepted from Health Care Law Contraception Requirements

By Craig Gipson and Brian Flagler

October 1, 2013 marked another milestone in the implementation of the Affordable Care Act (ACA) as state health insurance exchanges began allowing open enrollment. Another deadline looms for nonprofit Christian publishers seeking to avoid the ACA's controversial contraception requirement (the law refers to this exception as a religious "accommodation"). In July, the federal government released its final regulations covering required contraceptive services and religious accommodation to offering such services [see [February 2013 Legal Update](#)]. A recent federal appellate court decision also has provided hope that for-profit organizations may soon be entitled to a similar accommodation.

Is my organization eligible for the accommodation?

For now, the accommodation applies to plans beginning on or before January 1, 2014 for nonprofit organizations meeting the legal definition of an "eligible organization", which requires that the organization: (1) oppose some or all of the contraceptive services provided in the law; (2) be organized and operate as a nonprofit entity; (3) hold itself out as a religious organization; and (4) self-certify that the organization qualifies under the first three criteria. This final element was modified so that an eligible organization no longer must specify which contraceptive services it refuses to cover (some organizations objected to all required contraceptive services while others objected only to those which affect an already-formed embryo).

Publishers which are part of and receive health coverage from a denomination or church may be entitled to a complete exemption from the contraception coverage requirement. The regulations seek to exempt from compliance "houses of worship and their integrated auxiliaries" that object to certain contraceptive services. If an organization is part of a nonprofit entity covered by Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code (a "religious organization"), it may be entitled to such an exemption.

What is required to claim the accommodation?

The requirements to claim the accommodation differ based on whether an eligible organization: (1) has an issued health plan; (2) has a self-insured plan with a third party administrator; or (3) has a self-insured plan without a third party administrator.

A. Issued Health Plans

For eligible organizations with issued health plans, the procedure is fairly simple: complete the self-certification form provided at the link below and deliver a copy of the form to the plan issuer before the first plan year beginning on or after January 1, 2014.

B. Self-Insured Plans with a Third Party Administrator

Eligible organizations with self-insured plans and a third party administrator follow a similar procedure: provide the self-certification form to the third party

administrator before the first plan year beginning on or after January 1, 2014. For self-insured plans, the self-certification form must include both pages found at the link below; the second page certifying that: (1) the organization will not act as the plan administrator; and (2) it acknowledges responsibilities of a third party administrator under the final regulations.

The organization also may not directly or indirectly interfere with a third party administrator's efforts to arrange separate payment for contraceptive services or seek to influence a third party administrator's decision to provide such payments. Another consideration for organizations with self-insured plans is that there is no requirement for a third party administrator to remain in that role if it objects to its responsibilities in arranging payments for contraceptive services.

C. Requirements Applying to Issued and Self-Insured Plans

The self-certification form is all that is required for the accommodation. Organizations must keep an original of the form on file for examination upon request by a government agency but otherwise the form only needs to be provided to the issuer or third party administrator. In fact, issuers and third party administrators may not require any additional documentation from the organization beyond its self-certification as an eligible organization. As mentioned above, this prohibition extends to requiring the organization to provide exactly which contraceptive services it objects to. A new self-certification form must be provided if an organization changes issuers or third party administrators.

Upon receipt of the self-certification form, issuers or third party administrators must notify plan participants and beneficiaries that the issuer or administrator will provide payments for contraceptive services separate from their group health plan at no additional cost. Under the final regulations, issuers may choose to offer customized exclusions of certain services or exclude all contraceptive services from the group plan at the issuer's prerogative. Issuers will also no longer be required to issue individual health insurance policies for contraceptive services but may elect to provide payments in another manner.

D. Self-Insured Plans without a Third Party Administrator

For organizations with a self-insured plan without a third party administrator the procedure is a bit more complex. The first step is to notify the U.S. Department of Health and Human Services (HHS) that the organization seeks safe harbor from enforcement of the contraceptive coverage requirements but does not use the services of a third party administrator. Once approved by HHS, the organization must provide plan participants with materials indicating that it does not cover contraceptive services. At least 60 days before the first day of the first plan year beginning on or after January 1, 2014, the organization must provide HHS with certain information regarding its plan, as provided in the final regulations.

What about for-profit organizations?

The regulations are explicit that the accommodation "does not extend to for-profit organizations." However, a recent federal appellate court ruling could be the first step down the road of applying the accommodation to both nonprofit and for-profit organizations. In upholding Hobby Lobby's appeal to enjoin the government from enforcing the contraception mandate until its case is resolved, the court recognized Hobby Lobby's right to free exercise of religion and found it likely that Hobby Lobby would prevail in its case. On September 19, the government appealed the *Hobby Lobby* decision to the U.S. Supreme Court. As noted in the [February ECPA Legal Update](#), religion law scholars have anticipated that the Supreme Court would ultimately have to decide the issue of whether the contraception requirement violates certain religious liberty laws.

The decision in *Hobby Lobby* is good news for for-profit publishers which favor an accommodation similar to what their nonprofit counterparts receive. However, the decision applies only to Hobby Lobby (and Mardel which is also party to the suit), meaning that it does not insulate for-profit publishers from liability should the

government choose to enforce the contraception requirements in 2014. With the language used by the federal appellate court in its *Hobby Lobby* decision and the pending appeal before the Supreme Court, it may be unlikely that the government will enforce the contraception requirements so soon but it is not legally precluded from doing so. In the event that the government enforces the requirement before the *Hobby Lobby* case is resolved, a for-profit publisher could file its own suit and seek an injunction against enforcement similar to Hobby Lobby.

Accommodation Form

For plan years beginning on or after January 1, 2014, written self-certification must be provided to the organization's issuer or third party administrator using the form found at the following link:

<http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc>



www.ecpa.org

info@ecpa.org

This update is provided as an informational service of ECPA to its members and does not serve as, and should not be understood to provide, legal advice. Please contact [Brian Flagler](#) or your attorney if you would like to discuss application of this update to the specific circumstances of your publishing organization.

For more information about ECPA programs, contact us at 480-966-3998 or consult our website at www.ecpa.org. ECPA members may subscribe to Legal Updates by contacting stoomb@ecpa.org.

To unsubscribe, please [click here](#).

Having trouble reading it? [Read it online](#).