

# Legal Update from Brian Flagler

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## Religious Employers and the Health Care Mandate: Who Is Exempt?

By Brian Flagler and Craig Gipson

In a lawsuit filed October 2, Tyndale House Publishers joined the list of employers challenging new federal health care regulations on religious liberty grounds. At least 30 other lawsuits are pending as religious organizations ranging from universities to publishers seek relief from the law. Tyndale's suit raises two primary arguments: (1) that the government may not compel religious organizations to cover certain contraceptive or abortifacient drugs and procedures; and (2) the exemption in the law for religious organizations should be broad enough to cover, in this case, publishers of Bibles and Christian content. The Alliance Defending Freedom represents Tyndale in the matter; Flagler Law Group is not involved in the lawsuit.

### What do the health care regulations require?

The Patient Protection and Affordable Care Act (PPACA) requires employers with more than 50 employees to provide a minimum level of health insurance for its employees. With some exceptions, employer health plans must cover "preventive services" at no cost-sharing to employees. According to regulations implementing the law, "preventive services" must include all FDA-approved contraceptive drugs, surgical sterilization, and education and counseling for such services. Included in the FDA's definition of contraceptive drugs are intrauterine devices, Plan B drugs (commonly referred to as the "morning after" pill), and ella drugs (commonly referred to as the "week after" pill).

### What are the penalties for non-compliance?

The fines for failing to adhere to the new regulations may vary based on a company's number of employees and other factors. In its suit, Tyndale states that failing to provide health coverage could lead to monetary penalties of \$2000 per employee per year. Providing health coverage but excluding certain FDA-approved contraceptives could lead to fines of \$100 per employee per day. The Department of Labor is also authorized to sue employers that are not in compliance, and in some cases plan beneficiaries can sue.

### Are there exceptions to the law?

There are two notable exceptions of several contained in the law: (1) "religious employers," as defined in federal regulations; and (2) plans falling within the law's grandfather provision. A "religious employer" for purposes of the PPACA is an organization that meets all of the following criteria: (1) the inculcation of religious values is the purpose of the organization; (2) the organization primarily employs persons who share the religious tenets of the organization; (3) the organization serves primarily persons who share the religious tenets of the

organization; (4) the organization is a certain kind of nonprofit organization as described in specific provisions of the Internal Revenue Code, including churches, religious orders, and some connected entities.(1) Tyndale's lawsuit challenges the government's definition as being too narrow and excluding many religious employers. The outcome of these suits and any subsequent appeals will likely determine how expansive the definition of "religious employer" becomes.

Grandfathered plans under the law are also not subject to the "preventive services" coverage requirement.(2) A grandfathered plan "means coverage provided by a group health plan, or a group or individual health insurance issuer, in which an individual was enrolled on March 23, 2010," and which has not made changes detrimental to employee benefits beyond certain limits allowed in the regulations.(3) The grandfathered plan can apply to new employees or enrollees in the plan after March 23, 2010 but notice of the plan's grandfathered status is required and exceptions apply in some instances. Publishers should confer with their insurance providers to verify if their offered plans qualify under the grandfather provision.

### **Are the religious liberty challenges likely to succeed?**

The argument that the government cannot compel certain religious organizations to take action in violation of their beliefs is well supported by legal precedent. Whether a religious publisher fits within the category of organizations that courts will exempt is a more difficult question to answer. University of Virginia law professor and respected religion legal expert Douglas Laycock wrote that the government asking certain religious institutions "to pay for something that they believe sometimes results in homicide is a grave threat to religious liberty."(4) However, Laycock points out that the government may be within its authority to require a secular employer like Microsoft to cover contraceptive or abortifacient drugs.(5) Under the First Amendment and a statute called the Religious Freedom Restoration Act, the government must satisfy a very high standard to burden a person's free exercise of religion. Tyndale House argues in this case that the government has not satisfied that requirement.(6)

The government would have a difficult time arguing that economic and other considerations validate an exemption but religious liberty rights do not.(7) Companies like McDonald's and Jack in the Box received waivers from the government after claiming that the costs imposed by the new law would force them to drop the low-cost health plans currently offered to part-time and low-wage employees.(8) The question remaining, then, is whether Tyndale is within the category of organizations entitled to claim an exemption based on the exercise of religious rights.

(1) 45 C.F.R. § 147.130(a)(1)(iv)(B)

(2) 77 Fed. Reg. 8728 (Feb. 15, 2012)

(3) 45 C.F.R. § 147.140(a)(1)

(4) Douglas Laycock, Free Exercise of Religion and Insuring Contraception, *EerdWord*, <http://eerdword.wordpress.com/2012/03/19/free-exercise-of-religion-and-insuring-contraception-by-douglas-laycock/> (March 19, 2012).

(5) Douglas Laycock, The Bishops and Religious Liberty, *Commonweal*, <http://commonwealmagazine.org/bishops-religious-liberty> (June 15, 2012).

(6) Court decisions on whether the government can meet its high burden have been split: one judge issued an injunction on behalf of an HVAC company in Colorado owned by religious believers, but a judge in Illinois issued a ruling against a ceramics company in Missouri owned by religious persons.

(7) The Religious Freedom Reformation Act (RFRA) requires that the government cannot burden a person's free exercise of religion unless the law is generally applicable, furthers a compelling government interest, and is done in the least restrictive way to advance that government interest. Granting exemptions likely shows the law is not generally applicable and granting an exemption on economic

grounds likely shows the government interest is not compelling.  
(8) Drew Armstrong, McDonald's, 29 other firms get health care coverage waivers, *USA Today*, [http://usatoday30.usatoday.com/money/industries/health/2010-10-07-healthlaw07\\_ST\\_N.htm](http://usatoday30.usatoday.com/money/industries/health/2010-10-07-healthlaw07_ST_N.htm) (October 7, 2010).



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