

## DOL, HHS, and Treasury Issue Post-Dobbs Guidance on ACA's Contraceptive Coverage Requirements

Following the United States Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* (and the overturning of *Roe v. Wade*), the Departments of Labor, Health and Human Services, and the Treasury (collectively, the "Departments") issued new guidance in the form of FAQs (available at [www.cms.gov](http://www.cms.gov)) on the Affordable Care Act's ("ACA") preventive services mandate and contraceptive coverage requirements. As background, under these requirements (as set forth in Section 2713 of the Public Health Service ("PHS") Act and Health Resources and Services Administration guidelines), non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance must cover, without the imposition of any cost-sharing requirements, various forms of approved contraceptive care and methods.

Per the Departments, this new guidance was issued to:

- (1) respond to reports that individuals are continuing to experience difficulty in accessing contraceptive coverage without cost sharing;
- (2) clarify the application of the contraceptive coverage requirements to fertility awareness-based methods and emergency contraceptives; and
- (3) address federal preemption of state law. While the guidance did not provide much "new" information, it reminds covered plans of these rules and their application (irrespective of *Dobbs* and the current debate of reproductive rights), and it signals the possibility of increased enforcement efforts by the Biden administration in response to *Dobbs*.

In the guidance, the Departments reiterated that the coverage requirement covers multiple forms of contraceptives (diaphragms, sponges, birth control pills, vaginal rings, shots, implanted devices), sterilization procedures, family planning practices, patient education and counseling (including instruction for fertility awareness-based methods of birth control), and follow-up care focusing on management and evaluation of contraceptive methods. Notably, this also includes emergency contraceptives. As detailed in the guidance, covered plans and issuers must cover, without cost sharing, emergency contraceptives, including over-the-counter products, when they are prescribed by a medical provider. Additionally, the Departments encouraged, but did not require, that plans cover over-the-counter emergency contraceptives with no cost sharing even when such products are purchased without a prescription.

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In addition to detailing the various contraceptive products and services covered, the Departments also addressed when plans and issuers can reimburse an individual for the cost of over-the-counter contraceptives through an employer-sponsored FSA, HRA, and/or HSA and when plans and issuers can use reasonable medical management techniques to determine contraceptive coverage limits.

Most likely in anticipation of future state laws targeting contraceptive coverage and access, the Departments addressed preemption issues and explained that the preventative services mandate and contraceptive coverage requirements, as federal law, will preempt state law to the contrary. The Departments also confirmed that in the event a state passes a law prohibiting plans from providing this care or refuses to enforce the mandate, the Departments will take enforcement action.



## Compliance Check

Notably, the Departments made it clear in the guidance that they are committed to ensuring consumers have access to contraceptive benefits, without cost sharing, and that they would take enforcement action as warranted. The Departments also reminded plans that any violations of the coverage requirements may result in a tax penalty under IRC Section 4980D or a civil monetary penalty under PHS Act Section 2723.

In light of the Biden Administration's push to facilitate access to contraceptive coverage following Dobbs as seen in his recent Executive Order, we expect to see the Departments increase their enforcement efforts in this regard. This seems even more likely based on the last FAQ of the guidance, which provides multiple ways for individuals to report any issues in accessing contraceptive coverage. Consequently, covered employer-sponsored health plans should take all steps necessary to ensure they are complying with the ACA's contraceptive coverage requirements.

This Legal Update is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.