



Preventive Health Services Regulations: Religious Institutions' Objections to Contraceptive Coverage

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Summary

Since the enactment of the Patient Protection and Affordable Care Act (ACA) in 2010, controversy has surrounded the applicability of requirements for health plans and health insurers to cover certain recommended preventive health services, including a range of contraceptive services, without cost sharing. The U.S. Departments of Health and Human Services, Labor, and Treasury have issued regulations that provide an exemption from ACA for certain religious employers who have religious objections to contraceptives. The exemption appears to cover churches and church associations, but potentially does not extend to other religiously affiliated employers, such as universities and hospitals. The scope of the exemption has been the subject of intense debate and has raised questions of the legal protections for religious institutions.

Both constitutional and statutory rules govern whether a religious exemption from the coverage requirement is required and what the scope of that exemption may be. Courts have generally held that exemptions to legal mandates that conflict with religious beliefs are permissible, but not required under the First Amendment. The U.S. Supreme Court has indicated in several decisions that a religious exemption is not required for neutral laws of general applicability, and state courts have applied the Court's analysis to state contraceptive requirements. The Court has explicitly noted, however, that an exemption may be included or broadened at the discretion of Congress.

As a statutory protection, the Religious Freedom Restoration Act of 1993 (RFRA) requires that any federal action that substantially burdens religious exercise must (1) further a compelling interest and (2) use the least restrictive means to further that interest. Because the contraceptive coverage requirement is a federal action subject to RFRA, a court must find that the requirement serves a compelling interest and is implemented to burden as few religious objectors as possible without undermining that interest. Courts, including state courts considering challenges to similar provisions in state law, have recognized at least two of the stated purposes of the requirement—public health and gender equity—as compelling interests. State courts have also upheld exemptions that are essentially identical to the one included in the federal rule as sufficient accommodations which use the least restrictive means to avoid undermining that interest.

Employers with health plans that fail to offer the required coverage of contraceptives and do not qualify for an exemption may be subject to penalties or other liability. With respect to the preventive health services requirement, ACA does not expressly include a means of enforcing the provision. However, if a health plan or health insurer does not provide contraceptive coverage, it is possible that enforcement mechanisms found in the Employer Retirement Income Security Act, the Public Health Service Act, and the Internal Revenue Code could be applied. Furthermore, employers who do not cover contraceptives may be subject to liability for sex discrimination under Title VII of the Civil Rights Act of 1964, even if the employer qualifies for the religious exemption.

This report provides an overview of the preventive health services requirements and the exemption for religious employers. It analyzes the legal protections for religious organizations with objections to the requirements and examines state court decisions upholding similar requirements. The report also discusses the implications of non-compliance for organizations that do not qualify for the exemption and fail to provide the required coverage. Finally, the report analyzes several legislative proposals for statutory exemptions (H.R. 3897/S. 2043; H.R. 1179/S. 1467) and provides examples of religious exemptions in other federal laws and in state contraceptive coverage laws.

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Since the enactment of the Patient Protection and Affordable Care Act (ACA) in 2010,¹ religious institutions have raised concerns regarding the applicability of certain statutory provisions that would require the coverage of health services to which religious organizations may object. Specifically, health plans offered by employers and health insurers must cover certain recommended preventive health services without cost sharing (e.g., charging a co-payment or deductible) to patients for such services. Following enactment of ACA, the U.S. Departments of Health and Human Services (HHS), Labor, and Treasury issued interim final regulations that required coverage for a range of preventive services. The resulting rules and related guidance included coverage of contraceptive methods.

This requirement has generated controversy and debate involving religious groups who oppose contraception based on their religious beliefs. HHS, Labor, and Treasury have issued final rules to exempt certain religious employers from complying with the requirement that health plans include contraceptive services. However, the controversy has intensified over the scope of the exemption, which appears to apply to churches, but potentially not other religiously affiliated institutions such as universities, hospitals, and social service providers. This report will analyze the legal implications for the preventive services requirements and the potential penalties faced by religious organizations that do not comply with the rule. It also examines proposed legislative options and examples of religious exemptions in existing state and federal law.²

Background

ACA, as amended, greatly expanded the scope of federal regulation over health insurance provided through employment based group health coverage, as well as coverage sold in the individual insurance market. Federal health insurance standards created by ACA require, among many other things: an extension of dependent coverage to age 26 if such coverage is offered; the elimination of preexisting condition exclusions; a bar on lifetime annual limits on the dollar value of certain benefits; and a prohibition on health insurance rescissions except under limited circumstances.³

¹ P.L. 111-148 (2010), §§1001-104, 1201-1255. ACA was amended by the Health Care Education and Reconciliation Act of 2010, P.L. 111-152 (2010) (HCERA). These acts will be collectively referred to in this report as “ACA.”

² It is important to note that health plans seeking to participate in an American Health Benefit Exchange and health insurers providing coverage in the individual and small group markets will be required to provide the “essential health benefits package” described in section 1302 of ACA. *See* P.L. 111-148, §§1201 (creating section 2707 of the Public Health Service Act), 1301(a)(1)(B). Section 1302(a) of ACA contains categories of benefits that must be offered as part of the essential health benefits package, and one category is “preventive and wellness services and chronic disease management.” 42 U.S.C. §18022(b)(1)(I). HHS recently issued a bulletin with respect to its future approach in defining the essential health benefits package. *See* Department of Health and Human Services, Center for Consumer Information and Insurance Oversight, Essential Health Benefits Bulletin, December 16, 2011, *available at* http://cciio.cms.gov/resources/files/Files2/12162011/essential_health_benefits_bulletin.pdf. Additional HHS guidance indicates that the preventive services described in section 2713 of the PHSA will be a part of this package. *See* Department of Health and Human Services, Centers for Medicare & Medicaid Services, Frequently Asked Questions on Essential Health Benefits Bulletin, February 17, 2012, *available at* <http://cciio.cms.gov/resources/files/Files2/02172012/ehb-faq-508.pdf>. This report does not address any potential issues associated with defining contraceptive services as an essential health benefit under ACA.

³ Besides the creation of new private health insurance standards, Title I of ACA contains a number of additional requirements that affect individuals and employers. For example, ACA contains an “individual responsibility requirement,” a provision compelling certain individuals to have a minimum level of health insurance (i.e., an “individual mandate”). Individuals who fail to do so are subject to a monetary penalty, administered through the tax code. In addition, under ACA, certain large employers may be subject to a tax penalty if they do not offer coverage, or (continued...)

Section 2713 of the Public Health Service Act (PHSA), as added by ACA and incorporated under section 715(a)(1) of the Employee Retirement Income Security Act (ERISA) and section 9815(a)(1) of the Internal Revenue Code (IRC), requires group health plans and health insurance issuers that offer group or individual health insurance coverage to provide coverage for certain preventive health services without imposing any cost sharing requirements. Section 2713(a)(4) indicates that such services will include “with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration...”⁴

Following the enactment of ACA, HHS commissioned the Institute of Medicine (IOM) to recommend preventive services that should be considered in the development of comprehensive guidelines. The IOM made its recommendations in a July 19, 2011 report.⁵ Among the IOM’s recommendations was coverage of “the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.”⁶

On August 1, 2011, HHS, Labor, and Treasury (the Departments) published guidelines based on the IOM’s recommendations.⁷ The guidelines are supported by the Health Resources and Services Administration (HRSA).

Interim final regulations that address the coverage of preventive health services were first published in the *Federal Register* on July 19, 2010.⁸ On August 3, 2011, in response to comments received about these regulations, an interim final rule that amended the July 19, 2010 regulations was published.⁹ Most notably, the interim final rule provides HRSA with the authority to exempt “religious employers” from the preventive health services guidelines “where contraceptive services are concerned.”¹⁰ A definition for the term “religious employer” was added by the interim final rule:

[A] “religious employer” is an organization that meets all of the following criteria:

(1) The inculcation of religious values is the purpose of the organization;

(...continued)

they offer coverage that does not meet certain affordability criteria. This report only addresses enforcement of the new minimum standards for private health insurance coverage set out primarily in sections 1001 and 1201 of ACA.

⁴ 42 U.S.C. §300gg-13(a)(4).

⁵ See Inst. of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (2011), available at <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx>.

⁶ *Id.* at 109-110.

⁷ See Health Resources & Services Admin., *Women’s Preventive Services: Required Health Plan Coverage Guidelines* (2011), available at <http://www.hrsa.gov/womensguidelines/>.

⁸ Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 *Federal Register* 41,726 (July 19, 2010) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

⁹ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 *Federal Register* 46,621 (August 3, 2011) (to be codified at 26 C.F.R. pt. 54, 29 C.F.R. pt. 2590, 45 C.F.R. pt. 147).

¹⁰ *Id.* at 46,623.

- (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; and
- (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.¹¹

This definition was criticized by some for being so narrow that many religious institutions that provide health, educational, or charitable services would likely not be considered religious employers for purposes of the exemption.¹² The Departments received over 200,000 comments on the amended interim regulations, with some commenters urging a broader definition for the term “religious employer.”¹³

On February 15, 2012, the Departments published final rules on the coverage of contraceptive services.¹⁴ The final rules provide for the adoption of the definition established in the August 3, 2011 interim final rule. In response to those who urged a broader exemption that would include religiously affiliated employers that may not qualify as “religious employers” under the definition, the Departments noted:

A broader exemption ... would lead to more employees having to pay out of pocket for contraceptive services, thus making it less likely that they would use contraceptives, which would undermine the benefits [of requiring coverage of contraceptive services without cost sharing].¹⁵

At the same time, however, the Departments provided for a temporary enforcement safe harbor for non-exempted, nonprofit organizations with religious objections to contraceptive coverage.¹⁶ During the safe harbor, the Departments plan to develop and propose changes to the final regulations that would accommodate these nonprofit organizations:

Specifically, the Departments plan to initiate a rulemaking to require issuers to offer insurance without contraception coverage to such an employer (or plan sponsor) and simultaneously to offer contraceptive coverage directly to the employer’s plan participants (and their beneficiaries) who desire it. Under this approach, the Departments will also require that, in this circumstance, there be no charge for the contraceptive coverage.¹⁷

In guidance issued by HHS, the agency explained that the temporary enforcement safe harbor will be in effect until the first plan year that begins on or after August 1, 2013.¹⁸ The guidance

¹¹ *Id.* at 46,626. The definition is codified at 45 C.F.R. §147.130(a)(1)(iv)(B).

¹² *See, e.g.*, U.S. Conf. of Catholic Bishops, *Background: The New Federal Mandate for Contraception/Sterilization Coverage* (January 20, 2012), available at <http://usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/preventiveservicesbackgrounder-3.pdf>.

¹³ Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 *Federal Register* 8725, 8726 (February 15, 2012).

¹⁴ *See id.*

¹⁵ 77 *Federal Register* at 8728.

¹⁶ 77 *Federal Register* at 8727.

¹⁷ 77 *Federal Register* at 8728.

¹⁸ Center for Consumer Info. and Ins. Oversight, Centers for Medicare & Medicaid Services, U.S. Dept. of Health and (continued...)

indicates that organizations that meet all of the following criteria will not be subject to enforcement action for failing to provide contraceptive coverage in a group health plan that it establishes or maintains:

- (1) The organization is organized and operates as a non-profit entity.
- (2) From February 10, 2012 onward, contraceptive coverage has not been provided at any point by the group health plan established or maintained by the organization, consistent with any applicable State law, because of the religious beliefs of the organization.
- (3) The group health plan established or maintained by the organization provides to participants notice, as prescribed in the guidance, that states that contraceptive coverage will not be provided under the plan for the first plan year beginning on or after August 1, 2012.
- (4) The organization self-certifies that it satisfies the aforementioned criteria and documents its self-certification in accordance with procedures prescribed in the guidance.¹⁹

Finally, the guidance maintains that the Department of Labor and the Department of the Treasury will also not take any enforcement action against an organization that complies with the conditions of the temporary enforcement safe harbor.²⁰

Legal Requirements for Religious Exemptions to Health Care Coverage Requirements

One of the most controversial issues related to the final rules is whether the exemption for religious employers comports with established principles that protect the religious freedom of churches and other religiously affiliated organizations. Both constitutional and statutory rules govern whether an exemption would be required and what the scope of that exemption may be. The First Amendment's religion clauses serve as a guarantee that individuals and entities will neither be required to act under a prescribed religious belief (the Establishment Clause), nor be prohibited from acting under their chosen religious beliefs (the Free Exercise Clause).²¹ The Religious Freedom Restoration Act of 1993 (RFRA) requires that federal actions that substantially burden religious exercise must have a compelling governmental interest and be narrowly tailored to meet that interest.²²

(...continued)

Human Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code (February 10, 2012), *available at* <http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf>.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 2.

²¹ U.S. Const. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."). For discussion of the constitutional and statutory standards of review used in relation to the free exercise clause, see CRS Report RS22833, *The Law of Church and State: General Principles and Current Interpretations*, by Cynthia Brougher.

²² 42 U.S.C. §2000bb et seq.

Courts have generally held that religious exemptions are not constitutionally required for laws and regulations that do not specifically target religious exercise.²³ However, such exemptions may be enacted by Congress or promulgated by an agency as a matter of public policy. Thus, religious exemptions to requirements for health benefits coverage are generally regarded as permissible, but not required.

Neutral Laws of General Applicability

Although the U.S. Supreme Court had historically applied a heightened standard of review to government actions that allegedly interfered with a person's free exercise of religion,²⁴ the Court reinterpreted that standard in its 1990 decision, *Employment Division, Department of Human Resources of Oregon v. Smith*. Since then, the Court has held that the Free Exercise Clause never "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability."²⁵ Under this interpretation, the constitutional baseline of protection was lowered, meaning that laws that do not specifically target religion are not subject to heightened review under the Constitution. Accordingly, it is less likely that religious groups will be able to successfully argue for constitutional protection from laws of general applicability that incidentally burden their religious exercise.

Even before the Court's reinterpretation of the requirements for religious exercise under the First Amendment, it indicated in multiple decisions that religious groups are not guaranteed to avoid burdens on their religious exercise when a law serves a valid and important public purpose. Since 1879, the Court has drawn an important distinction in free exercise cases—that religious exercise includes both beliefs and actions:

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. ... Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.²⁶

The Court's decision permitted the government to regulate individuals' actions stemming from a religious belief, but not the religious belief itself.

The history of the Court's free exercise jurisprudence indicates that religious beliefs cannot excuse "compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."²⁷ Under this rule, the Court has upheld laws proscribing behavior that may be

²³ See, e.g., *Reynolds v. United States*, 98 U.S. 145 (1879); *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

²⁴ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

²⁵ *Smith*, 494 U.S. at 879.

²⁶ *Reynolds*, 98 U.S. at 166-67.

²⁷ *Smith*, 494 U.S. at 878-79.

compelled by some religious beliefs, including polygamy laws,²⁸ child labor laws,²⁹ Sunday-closing laws,³⁰ conscription laws,³¹ tax laws,³² as well as controlled substances laws.³³

The Court's landmark 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith* definitively established that religious exemptions are not constitutionally required for religiously motivated actions that would violate a generally applicable law.³⁴ In *Smith*, members of the Native American Church were fired from positions at a private organization after they ingested peyote, a substance prohibited under controlled substances laws, for sacramental purposes. They challenged their subsequent ineligibility for unemployment benefits as a violation of their free exercise rights. In other words, they sought to avoid the resulting penalty of violating the controlled substances law because their actions were motivated by their religious beliefs. The Court rejected this argument, noting that the free exercise of religion has never been held to be absolute such that individuals may avoid complying with generally applicable laws because those laws conflict with their religious beliefs.³⁵

Thus, exemptions from generally applicable laws are not constitutionally guaranteed for individuals with religious objections to those laws. Prior to *Smith*, whether such an exemption was required would depend on whether the law was justified by a compelling interest.³⁶ As noted earlier, the Court nonetheless upheld laws that imposed incidental burdens on religious exercise without religious exemptions. However, in *Smith*, the Court indicated that the compelling interest standard was not applicable for exemptions for generally applicable criminal laws:

The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."³⁷

Despite not recognizing a constitutional requirement for religious exemptions, the Court emphasized that the legislature remained free to consider whether an exemption was appropriate through the political process.³⁸

Although federal courts have never considered the constitutionality of requirements to cover contraceptives and related health services, at least two state courts have considered challenges to religious exemptions to similar rules at the state level. State laws in California and New York require health insurance plans that cover prescription drugs to include coverage for prescription

²⁸ *Reynolds*, 98 U.S. 145.

²⁹ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

³⁰ *Braunfeld v. Brown*, 366 U.S. 599 (1961)

³¹ *Gillette v. United States*, 401 U.S. 437 (1971).

³² *United States v. Lee*, 455 U.S. 252 (1982).

³³ *Smith*, 494 U.S. 872.

³⁴ *Id.*

³⁵ *Id.* at 878-80.

³⁶ *See Sherbert*, 374 U.S. 398.

³⁷ *Smith*, 494 U.S. at 884-85 (quoting *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 451 (1989)).

³⁸ *Id.* at 890 ("Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process.").

contraceptives (see Table A-1). Each state includes an exemption for religious employers that is essentially identical to the federal exemption. Courts in both states upheld the requirements as neutral laws of general applicability under the *Smith* analysis.³⁹ The California Supreme Court explained that a law may have references to religion, as the religious exemption to contraceptive coverage does, while remaining a law of general applicability.⁴⁰

In addition to finding that the law was neutral toward religion on its face, the California Supreme Court also held that the law did not indicate latent hostility toward religion, rejecting the argument that the law discriminated against the Catholic Church because its beliefs oppose the use of contraceptives.⁴¹ The court noted that most religious employers were subject to the state coverage requirements, yet because most of those employers' religious tenets did not oppose contraceptives, they could not qualify for the exemption. By providing an exemption for the religious employers that would object, including the Catholic Church, the court explained that the law could not be understood as discrimination against that church, but rather an accommodation that benefited it: "That the exemption is not sufficiently broad to cover all organizations affiliated with the Catholic Church does not mean the exemption discriminates against the Catholic Church."⁴² Reaching the same conclusion, the New York Court of Appeals (its highest court) echoed this explanation: "To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion."⁴³

Religious Freedom Restoration Act of 1993: Applying Heightened Scrutiny to Burdens on Religious Exercise

Congress responded to the Court's holding in *Smith* by enacting RFRA in 1993, which statutorily reinstated the heightened standard of protection for government actions interfering with a person's free exercise of religion.⁴⁴ Although the Court in 1997 struck down as unconstitutional portions of RFRA that applied to state and local governments, the heightened standard provided by RFRA still applies to federal government actions.⁴⁵ RFRA provides that a statute or regulation of general applicability may substantially burden a person's exercise of religion only if it (1) furthers a compelling governmental interest and (2) uses the least restrictive means to further that interest.⁴⁶ This standard is sometimes referred to as strict scrutiny analysis.

³⁹ *Catholic Charities of Sacramento v. Superior Court*, 85 P.3d 67 (Cal. 2004) (hereinafter *Catholic Charities of Sacramento*); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006) (hereinafter *Catholic Charities of Albany*).

⁴⁰ *Catholic Charities of Sacramento*, 85 P.3d at 84.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Catholic Charities of Albany*, 859 N.E.2d at 464.

⁴⁴ P.L. 103-141, 103d Cong., 1st Sess. (November 16, 1993); 42 U.S.C. §2000bb *et seq.*

⁴⁵ *See City of Boerne v. Flores*, 521 U.S. 407 (1997).

⁴⁶ 42 U.S.C. §2000bb-1(b). In some instances, RFRA may be preempted by another federal law. *See* S.Rept. 103-111, at 12-13 (1993) (stating that "nothing in this act shall be construed as affecting religious accommodation under title VII of the Civil Rights Act of 1964"). Although RFRA currently applies as a general limitation on federal actions, Congress may amend its scope or exempt future statutes from complying with RFRA. Under the long-standing legal principle of entrenchment, a legislative enactment cannot bind a future Congress. That is, Congress cannot entrench a legislative action by providing that it may not be repealed or altered. *See Fletcher v. Peck*, 10 U.S. 87, 135 (1810) (Chief Justice Marshall).

Because RFRA essentially reinstated the heightened scrutiny applied prior to *Smith*, a case decided before *Smith* may provide insight into how a court might evaluate an exemption to the requirements for contraceptive coverage. In *United States v. Lee*, an Amish man claimed that paying FICA taxes violated his belief in an obligation to provide similar assistance for church members.⁴⁷ Lee argued that his religion prohibited him from accepting such benefits from the state or paying taxes to fund the social security system. Similar to arguments asserted by groups opposing requirements to provide contraceptive coverage, Lee argued that because he and several employees objected to the benefits received by his payment of FICA taxes, he should be exempt from paying the employer's share of the taxes.

Although the Court recognized a burden on Lee's religious belief, it noted that the burden was not sufficient to find a violation of Lee's free exercise rights, explaining that such burdens may be justified if they "accomplish an overriding governmental interest."⁴⁸ The Court assessed the government's interest in the social security system as "very high," noting that it was a "comprehensive insurance system with a variety of benefits available to all participants" and that "mandatory participation is indispensable to the fiscal vitality of the social security system."⁴⁹ The Court held that the burden was justified by the governmental interest in "maintaining a sound tax system."⁵⁰

The Court then considered whether providing an accommodation for religious objectors would interfere with that interest, noting the difficulties of providing "myriad exceptions flowing from a wide variety of religious beliefs."⁵¹ Because various religious objections may be difficult to administer in such a large system, the Court explained that the narrow exception provided by Congress for self-employed individuals was a sufficient accommodation. That exemption allowed individuals who were self-employed and held religious beliefs that opposed the acceptance of benefits offered by the social security program to avoid paying taxes toward the program because such individuals would not be participating in the program.⁵² Self-employed *individuals* with religious objections could be easily and fairly distinguished from *all employees* of an employer with religious objections.⁵³ The Court recognized Congress' ability to expand that accommodation through additional legislation, but held that the existing exemption was sufficient to avoid interfering with the government's interest in maintaining a functional tax system.⁵⁴

Under a RFRA analysis, like that used in *Lee*, a court considering a legal challenge to the federal contraceptive coverage requirement must find a compelling governmental interest for the action alleged to violate religious exercise. If the court identifies a compelling interest, the government may regulate that activity. However, the regulation must be implemented in a manner that would

⁴⁷ 455 U.S. 252.

⁴⁸ *Id.* at 257.

⁴⁹ *Id.* at 259.

⁵⁰ *Id.* at 259-60.

⁵¹ *Id.* at 260.

⁵² See 26 U.S.C. §1402(g)(1).

⁵³ See *id.* at 261.

⁵⁴ *Id.* at 260-61 ("When followers of a particular sect enter commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.") The Court's decision indicates that extension of an exemption for religious employers with employees who cannot be "readily identifiable" as also having objections is a matter left for the discretion of Congress.

burden religion as narrowly as possible while achieving the government's interest. Thus, the reinstatement of the compelling interest test generally means that religious groups may have more success arguing for protection from legal requirements that conflict with their religion, though courts have still indicated that the scope of such exemptions may be limited.

Public Health and Gender Equity as Compelling Interests

Among the stated goals and benefits of the preventive services requirements at issue are the improvement of public health and the equitable distribution of costs for preventive services.⁵⁵ Courts have recognized each of these interests as compelling when faced with free exercise challenges to requirements with similar goals.

The Supreme Court has long upheld laws that promote public policies relating to public health as a valid exercise of protecting the welfare of the people.⁵⁶ Courts have recognized a compelling state interest in statutes preventing the spread of disease, and the Supreme Court has explained that “the right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”⁵⁷ Although the Court's decision to hold the interest of public health above the interest of individuals to freely exercise their religious belief was made before the Court applied strict scrutiny to religious exercise cases, it nonetheless provides an indication of the nature of the government's interest in public health regulation. In a decision that did apply heightened constitutional review, the Court has also held that the government's interest in tax programs used to fund health care programs outweighs individuals' interests in exercising their religion freely.⁵⁸ The Court's treatment of public health as an interest paramount to individual religious practice indicates a recognition of public health as a compelling state interest.

In challenges to state legislation mandating coverage of contraceptives with similar goals as the federal rules, courts have also recognized the significance of the government's interest in gender equity. The California Supreme Court recognized the state's interest in eliminating gender discrimination as compelling when faced with a legal challenge to a state requirement for coverage of contraceptives. The court explained that the purpose of the legislation at issue in the case was to eliminate the economic inequity existing between the out-of-pocket health care costs of men and women, resulting from the cost of contraceptives and unintended pregnancies.⁵⁹ The

⁵⁵ See 75 *Federal Register* 41, 731-733:

The Departments anticipate that four types of benefits will result from these interim final regulations. First, individuals will experience improved health as a result of reduced transmission, prevention or delayed onset, and earlier treatment of disease. Second, healthier workers and children will be more productive with fewer missed days of work or school. Third, some of the recommended preventive services will result in savings due to lower health care costs. Fourth, the cost of preventive services will be distributed more equitably.

⁵⁶ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (seminal case regarding state's authority to institute a mandatory vaccination program as a part of its police powers). See CRS Report RL34708, *Religious Exemptions for Mandatory Health Care Programs: A Legal Analysis*, by Cynthia Brougher.

⁵⁷ *Prince*, 321 U.S. at 166-67.

⁵⁸ *Lee*, 455 U.S. at 260-61.

⁵⁹ *Catholic Charities of Sacramento*, 85 P.3d at 92.

New York Court of Appeals also noted the state's interest in gender equity and providing women better health care resulting from a requirement for contraceptive coverage.⁶⁰

Accommodating Religious Exercise to Achieve the Government's Interest

Even if the government has a compelling interest in requiring coverage of contraceptives, it must use the least restrictive means to achieve that interest in order for the requirement to be upheld consistent with RFRA. That is, the government must make the burden on religious exercise as narrow as possible. This test may be met by providing alternative means of compliance with the legislation, such as an exemption. Allowing individuals who object to the program on religious grounds and would not receive benefits from the program to opt out of coverage would satisfy both the individual's free exercise of religion and the government's interest in protecting public health at large.

Determining whether an accommodation is necessary may depend on the nature of the requirement and the burden it imposes on the objecting individual or organization. For example, it may be argued that unless the insurance plan itself conflicts with the employer's religious beliefs (e.g., like the Amish employer in *Lee*), the employer is not substantially burdened to trigger free exercise protections because requiring coverage of certain health services does not require that the employer or employee's seek or accept the benefits of that coverage. In other words, if the religious employer's objection is to the use of contraceptives, the requirement to offer a particular health plan that would cover contraceptives does not force the employer or its employees to acquire or use contraceptives in violation of religious beliefs. On the other hand, if the religious employer objects to facilitating access to contraceptives, a court would likely defer to the employer's understanding of its religious tenets to recognize a substantial burden and proceed with the compelling interest analysis.

It is certainly possible for courts to determine that no exemption may be made to certain government mandates, and courts have upheld mandates related to public health without exemptions for conflicting religious beliefs. For example, in the context of some state vaccination requirements, religious exemptions have not been required under the Free Exercise Clause. Relying on the Supreme Court's implication that public health concerns outweigh the right to exercise one's religion without interference, some state supreme courts have held that mandatory vaccination programs are not a violation of religious freedom.⁶¹

Although exemptions have not been required in all instances, the Supreme Court has explained that, under RFRA, an exemption may be required if the government cannot show that uniform application of a particular requirement is necessary to avoid "seriously [compromising] its ability to administer the program."⁶² Under this standard, a court may find that an accommodation is possible without undermining the program, but that the exemption may need to be drawn narrowly. Consider, for example, the distinction the Court drew regarding religious exemptions under social security tax requirements. The Court held that a broad exemption extending to any employer with a religious objection was not required because such an exemption would undermine the government's ability to maintain the social security system by excluding all of that

⁶⁰ *Catholic Charities of Albany*, 859 N.E.2d at 464.

⁶¹ *See, e.g., Cude v. State*, 237 Ark. 927 (1964).

⁶² *Gonzales v. O Centro Espirita Beneficente Unaio Do Vegetal*, 546 U.S. 418, 435-437 (2006).

employer's employees, regardless of their religious beliefs. However, it recognized the viability of a narrow exemption applied only to the self-employed because those individuals could be easily identified and excluded from the system without detrimental effect because they also would not be drawing on the benefits.

Although RFRA's requirements do not apply to state laws, state courts nonetheless considered the elements of strict scrutiny analysis when deciding related issues under state law. One court that considered contraceptive coverage requirements similar to the federal rules indicated that a narrowly drawn exception essentially limited to churches and church associations is adequate to accommodate religious burdens in this context. The California Supreme Court explained that "any broader exemption increases the number of women affected by discrimination in the provision of health care benefits," the avoidance of which it had recognized as a compelling interest.⁶³

Noting that the organization challenging the requirement employed many individuals who did not share the religious beliefs of the organization, the New York Court of Appeals suggested that religious organizations could not expect broad accommodations from such requirements. The court stated that because legislation frequently affects employment relationships, "when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employee's legitimate interests in doing what their own beliefs permit."⁶⁴

Constitutional Concerns with Defining Religious Exemptions

Under religious exercise protections, courts have clearly stated that even in instances where a religious exemption may not be constitutionally or statutorily required, Congress may include or broaden such an exemption at its discretion.⁶⁵ However, it is noteworthy that a religious exemption may be challenged as a violation of the Establishment Clause if it treats individuals or organizations differently based on their religious belief. The Establishment Clause prohibits preferential treatment of one religion over another or preferential treatment of religion generally over nonreligion.⁶⁶ Allowing an exemption based on religion may be construed as special treatment for religious adherents, particularly in cases in which the legal provisions limit the scope of the exemption to members of only specific religions or to only religious beliefs (that is, excluding philosophical beliefs).⁶⁷

Exemptions that are specifically available only to certain religions have been construed in some cases as a violation of the Establishment Clause.⁶⁸ The Supreme Court has held that legislation that provides protection or exemption for a specific religious group violates the Establishment

⁶³ *Catholic Charities of Sacramento*, 85 P.3d at 94.

⁶⁴ *Catholic Charities of Albany*, 859 N.E.2d at 468.

⁶⁵ See, e.g., *Smith*, 494 U.S. at 890. See also *Gonzales*, 546 U.S. 418.

⁶⁶ *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). See also *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 216-217 (1963); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

⁶⁷ See, e.g., *Boone v. Boozman*, 217 F.Supp.2d 938 (E.D. Ark. 2002). For example, in the context of mandatory vaccinations, the Supreme Court of Mississippi has held that requiring certain individuals to be vaccinated while still exposing them to exempted individuals is unconstitutional. *Brown v. Stone*, 376 So.2d 218 (Sup. Ct. Miss. 1979).

⁶⁸ See *Sherr v. Northport-East Northport Union Free School District*, 672 F. Supp. 81, 89-90 (E.D.N.Y. 1987).

Clause, which forbids preferential treatment based on religion.⁶⁹ If a law benefits a religious group, the religious group alleged to be favored by the law must be one of many religious groups eligible for similar treatment or the special treatment must be made through a series of benefits offered separately to multiple groups.⁷⁰

At the same time, a generally available religious exemption may be construed as a violation of the Establishment Clause because it provides preferential treatment to individuals with religious beliefs, but does not permit individuals who might object on nonreligious philosophical grounds to claim the exemption.⁷¹ However, the mere fact that an exemption addresses religion will not automatically make that law unconstitutional, and a number of generally available religious exemptions have been upheld.⁷² The Supreme Court has upheld religious exemptions to government programs, where the exemptions were enacted to prevent government interference with religious exercise.⁷³ For example, Title VII of the Civil Rights Act prohibits discrimination based on religion in employment but also provides an exemption from that prohibition for certain religious organizations, yet the Supreme Court found that the law did not violate the Establishment Clause.⁷⁴

In the context of a religious exemption to contraceptive coverage requirements, state courts have upheld exemptions for which some, but not all, religious entities are eligible under the Establishment Clause. One court declared that “legislative accommodation to religious believers is a long-standing practice completely consistent with First Amendment principles.”⁷⁵ Another court noted that a number of laws specifically referencing religion, for the purpose of exempting certain religious organizations from legal requirements that would infringe upon their religion, have nonetheless been upheld as constitutional.⁷⁶

Potential Consequences for Non-Compliance with Requirements for Contraceptive Coverage

Employers that object to contraceptives coverage requirements and do not qualify for an exemption may refuse to offer the required coverage. While ACA does not expressly include

⁶⁹ See *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (invalidating the creation of a school district for one particular religious group).

⁷⁰ *Id.* at 703-704.

⁷¹ See, e.g., *McCarthy v. Boozman*, 212 F.Supp. 2d 945 (W.D. Ark. 2002).

⁷² Under Establishment Clause analysis, a government action must meet the tripartite *Lemon* test to be constitutional. The law must (1) have a secular purpose; (2) have a neutral primary effect; and (3) not lead to excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). While the first two prongs of the test are self-explanatory, the third prong prohibits “an intimate and continuing relationship” between government and religion as the result of the law. *Id.* at 621-22. The continuing viability of *Lemon* has been unclear as the Court has raised questions regarding its adequacy in analyzing these issues. See, e.g., *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

⁷³ The Court in *Locke v. Davey*, 540 U.S. 712 (2004), recognized that some government actions that allow free exercise consequently raise questions of establishment, noting that there was room for “play in the joints” in this intersection of the religion clauses.

⁷⁴ See *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

⁷⁵ *Catholic Charities of Albany*, 859 N.E.2d at 469.

⁷⁶ *Catholic Charities of Sacramento*, 85 P.3d at 83-84.

enforcement tools, such as judicial review or penalties, that may be imposed for violating the preventive health services requirement, this requirement was added to the PHSA and incorporated into ERISA and the IRC, and it seems that enforcement may be carried out through mechanisms in those statutes. Furthermore, employers who do not cover contraceptives may face potential liability under Title VII of the Civil Rights Act of 1964, as some courts have indicated that denying coverage may constitute sex discrimination.⁷⁷

Enforcement of the Preventive Health Services Requirement Under ERISA, the PHSA and the IRC

The requirement to provide preventive health services, along with many other insurance market reforms in ACA, applies to group health plans, broadly defined as plans established or maintained by an employer and that provide medical care.⁷⁸ In general, group health plans can be insured (i.e., purchased from an insurance carrier) or self-insured (funded directly by an employer).⁷⁹ These ACA requirements also apply to “health insurance issuers,” health insurers that issue a policy or contract to provide group or individual health insurance coverage.⁸⁰ However, several of ACA’s insurance market reforms, including the preventive health services requirements, do not apply to “grandfathered health plans,” which are existing group health plans or health insurance coverage (including coverage from the individual health insurance market) in which a person was enrolled on the date of enactment of ACA (i.e., March 23, 2010).⁸¹ As discussed above, with respect to the preventive health services requirements in ACA, health plans and health insurance coverage established or maintained by a “religious employer” could be exempt from providing contraceptive services, and certain organizations with religious objections to contraceptive coverage are not to be subject to an enforcement action under a temporary enforcement safe harbor. Aside from these exceptions, if a group health plan or health insurance issuer is subject to the insurance market reforms in Title I of ACA, it appears that the penalties discussed below could be potentially applied if health coverage was not provided in line with federal requirements.⁸²

⁷⁷ 42 U.S.C. §2000e *et seq.* See *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266 (W.D. Wash. 2001); *In re Union Pacific Railroad*, 479 F.3d 936 (8th Cir. 2007).

⁷⁸ See, e.g., 42 U.S.C. §300gg-91(a)(1).

⁷⁹ Under self-insured (or self-funded) plans, an employer acts as the insurer itself and pays the health care claims of the plan participants. While self-insured plans may use an insurance company or other third party to administer the plan, the employer bears the risk associated with providing health coverage. For more information on self-insured health plans, see CRS Report R41069, *Self-Insured Health Insurance Coverage*, by (name redacted).

⁸⁰ A health insurance issuer is defined as an insurance company, insurance service, or insurance organization that is licensed to engage in the business of insurance in a state and which is subject to state law that regulates insurance. 42 U.S.C. §300gg-91(b)(2).

⁸¹ For a general discussion of grandfathered health plans, see CRS Report R41166, *Grandfathered Health Plans Under the Patient Protection and Affordable Care Act (ACA)*, by (name redacted).

⁸² It should be noted that certain types of private insurance coverage that provide limited or supplementary health insurance benefits are not subject to the health insurance requirements of the IRC, the PHSA and ERISA. For example, these statutes carve out four categories of excepted benefits. See, e.g., 29 U.S.C. §1191b(c). First are benefits that are not subject to these federal health insurance standards, including coverage for accident or disability income insurance, or automobile medical payment insurance, coverage for on-site medical clinics, and other insurance coverage under which the benefits for medical care are secondary or incidental to other insurance benefits. Second, certain benefits are excepted if they are offered “separately” and are not an integral part of the plan (e.g., a separate premium or contribution may be required). These benefits include “limited scope” dental or vision benefits and long-term care or nursing home benefits. Third, certain benefits that are offered “independently,” such as coverage only for a specified (continued...)

Neither the preventive health services requirement itself nor several of the other insurance reforms in Title I of ACA expressly include a means for enforcing these new health insurance standards,⁸³ although these new standards were added to Title XXVII of the PHSa and incorporated into Part 7 of the ERISA and Chapter 100 of the IRC.⁸⁴ Thus, if these new health insurance standards are not followed, it appears that enforcement may be carried out through mechanisms (such as judicial review and other penalties) that existed prior to ACA in these three federal statutes.

The type of penalty that may be applied to a particular health plan or health insurance issuer and the entity responsible for imposing it would depend upon whether the plan is subject to ERISA, the PHSa, or the IRC. These three laws apply federal health insurance standards to different types of private-sector health coverage. In general, Part 7 of ERISA is administered by the Department of Labor and regulates health coverage provided by employers in the private sector. ERISA applies to insured and self-insured group health plans, as well as insurance issuers providing group health coverage. However, ERISA does not generally apply to governmental⁸⁵ or church plans.⁸⁶

Title XXVII of the PHSa, administered by HHS, applies to self-insured governmental plans, health insurance issuers providing group health coverage, and coverage in the individual market. The IRC, as administered by the Department of the Treasury, covers employment-based group health plans, including church plans, but does not apply to health insurance issuers.⁸⁷ While the

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disease or indemnity insurance. Fourth, certain plans that provide supplemental coverage to other plans (e.g., Medicare and Tricare) are considered excepted benefits. It appears plans such as these are not subject to the new ACA provisions.

⁸³ However, one exception is section 2715(f) of the PHSa, created by section 1001 of ACA, which provides that if health insurance issuers and certain group health plans willfully fail to provide a summary of benefits and coverage as required by the section, they will be subject to a fine of not more than \$1,000 for each failure. *See* 42 U.S.C. §300gg-15(f)(2). Another exception is section 2718 of the PHSa, created by section 1001 of ACA, relating to minimum loss ratio requirements. This section provides that the Secretary of HHS “shall promulgate regulations for enforcing the provisions of this section and may provide for appropriate penalties.” 42 U.S.C. §300gg-18.

⁸⁴ Section 1563 of ACA provides that the new PHSa requirements apply to group health plans, and health insurance issuers providing health insurance coverage under ERISA and the IRC as if they were included in the statutes; and to the extent that a provision of those statutes conflicts with a provision added by ACA, the provisions of ACA apply. P.L. 111-148, §1563(e)-(f). It should be noted that, perhaps because of a technical error, there is more than one Section 1563 contained in ACA. The Section 1563 relevant to this discussion is entitled “Conforming Amendments.”

⁸⁵ A “governmental plan,” generally means a plan established or maintained for its employees by federal, state, or local governments. *See* 29 U.S.C. §1002(32) and 42 U.S.C. §300gg-91(d)(8).

⁸⁶ Section 3 of ERISA provides that a “church plan” means “a plan established and maintained ... for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code...” 29 U.S.C. §1002(33)(A). This section also states that “[a] plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.” 29 U.S.C. §1002(33)(C). It should be noted that this report does not address distinctions between church plans and plans established or maintained by “religious employers” pursuant to the final rules implementing the preventive health services requirements.

⁸⁷ However, it should be noted that IRC section 9815, which incorporates the private health insurance reforms into the Internal Revenue Code, states that “the provisions of part A of title XXVII of the Public Health Service Act (as amended by the Patient Protection and Affordable Care Act) shall apply to group health plans, *and health insurance issuers* providing health insurance coverage in connection with group health plans, as if included in this subchapter....” It is unclear how this language affects the application of the IRC to health insurance issuers, and this report will not (continued...)

enforcement mechanisms are different under each of the three statutes, the Secretaries of HHS, Labor, and the Treasury have shared interpretive and enforcement authority.⁸⁸

ERISA

The provisions of ACA were incorporated by reference into Part 7 of ERISA. The Secretary of Labor may take enforcement action against employers that offer group health plans which violate ERISA, but may not enforce ERISA's requirements against health insurance issuers.⁸⁹ Section 502(a) of ERISA provides that the Secretary may bring a civil action to enjoin any act or practice that violates ERISA, or to obtain "other appropriate equitable relief" to rectify an ERISA violation or enforce the act's requirements.⁹⁰

In addition, section 502(a) of ERISA authorizes various civil actions that may be brought by a participant or beneficiary of a plan against group health plans and health insurance issuers. This section also provides for and limits the remedies (i.e., relief) available to a successful plaintiff. Among the claims that may be brought under section 502(a) of ERISA, section 502(a)(1)(B) authorizes a plaintiff (i.e., a participant or a beneficiary in an ERISA plan) to bring an action against the plan to recover benefits under the terms of the plan, or to enforce or clarify the plaintiff's rights under the terms of the plan.⁹¹ Under this section, if a plaintiff's claim for benefits is improperly denied, the plaintiff may sue to recover the unpaid benefit. Since ACA did not amend section 502 of ERISA, presumably the section would authorize review of claims arising out of a violation of the incorporated ACA provisions. Accordingly, if a group health plan or health insurance issuer failed to provide contraceptive services pursuant to guidelines authorized by ACA, it seems possible, for example, that a plan participant could be able to bring a claim for that benefit.

PHSA

In general, the private health insurance requirements of Title XXVII of the PHSA, as amended by ACA, apply to health insurance issuers and to non-federal self-funded governmental group plans.⁹² Prior to ACA, state and local governments could elect to exempt their plans from certain requirements of the PHSA, subject to certain exceptions.⁹³ However, this election is not applicable to the provisions added to the PHSA by ACA, and thus these plans are subject to ACA's federal health insurance standards.⁹⁴

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address this issue.

⁸⁸ See P.L. 104-191, §104; see also Notice of Signing of a Memorandum of Understanding among the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services, 64 *Federal Register* 70,164, December 15, 1999.

⁸⁹ 29 U.S.C. §1132(b)(3).

⁹⁰ 29 U.S.C. §1132(a)(5). Under section 502(a)(3) of ERISA, similar claims may be brought by plan participants, beneficiaries, and plan fiduciaries. See 29 U.S.C. §1132(a)(3).

⁹¹ 29 U.S.C. §1132(a)(1)(B).

⁹² 42 U.S.C. §300gg-21(a)(1).

⁹³ 42 U.S.C. §300gg-21(a)(2)(A).

⁹⁴ However, HHS has indicated that self-funded state and local governmental plans may still make an election to opt out of some of the requirements of Title XXVII of the PHSA created prior to ACA (e.g., the mental health parity (continued...))

Enforcement of the PHSA requirements is different for health insurance issuers than for governmental plans. The Secretary of HHS is the primary enforcer of the PHSA requirements with respect to non-federal governmental plans. But, with respect to health insurance issuers, states are the primary enforcers of the private health insurance requirements.⁹⁵ The PHSA provides that “[i]n the case of a determination by the Secretary [of HHS] that a State has failed to substantially enforce a provision (or provisions) in this part with respect to health insurance issuers in the State, the Secretary shall enforce such provision (or provisions) ... insofar as they relate to the issuance, sale, renewal, and offering of health insurance coverage in connection with group health plans or individual health insurance coverage in such State.”⁹⁶ It appears that failure to provide contraceptive services may be seen as a failure to comply with the requirements of the PHSA and may trigger these enforcement mechanisms.

Health insurance issuers and governmental plans that fail to comply with the PHSA requirements may be subject to a maximum penalty of \$100 per day for each individual with respect to which such a failure occurs.⁹⁷ Similar to the IRC, certain minimum penalty amounts may apply to a plan or employer if the violation is not corrected within a specified period, or if a violation is considered to be more than de minimis. In determining the amount of the penalty, the Secretary must take into account the entity’s previous record of compliance with the PHSA provisions. In addition, a penalty may not be imposed for a violation if it is established to the Secretary’s satisfaction that none of the entities knew (or if exercising reasonable diligence would have known) that the violation existed. If the violation was due to reasonable cause and not willful neglect, a penalty would not be imposed if the violation were corrected within 30 days of discovery.

IRC

Under the IRC, failure to meet the group health plan requirements is enforced through the imposition of an excise tax.⁹⁸ For single-employer plans, employers are generally responsible for paying this excise tax. Under multiemployer plans, the tax is imposed on the plan.⁹⁹ A group health plan that fails to comply with the pertinent requirements in the IRC may be subject to a tax of \$100 for each day in the noncompliance period¹⁰⁰ with respect to each individual to whom such failure relates. However, if failures are not corrected before a notice of examination for tax liability is sent to the employer, and these failures occur or continue during the period under examination, the penalty will not be less than the lesser of \$2,500 or the regular tax amount described above. Where violations are considered to be more than de minimis, the amount will not be less than \$15,000. Limitations on a tax may be applicable under certain circumstances (e.g., if the failure was due to reasonable cause and not to willful neglect, and is corrected within

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requirements). See HHS memorandum from Steve Larson dated 9/21/10, *Amendments to the HIPAA opt-out provision (formerly section 2721(b)(2) of the Public Health Service Act) made by the Affordable Care Act*, available at http://www.hhs.gov/ociio/regulations/opt_out_memo.pdf.

⁹⁵ 42 U.S.C. §300gg-22(a)(1).

⁹⁶ 42 U.S.C. §300gg-22(a)(2).

⁹⁷ 42 U.S.C. §300gg-22(b)(2)(C)(i).

⁹⁸ 26 U.S.C. §4980D.

⁹⁹ 26 U.S.C. §4980D(e).

¹⁰⁰ The noncompliance period begins on the date when the failure first occurs, and ends on the date the failure is corrected. 26 U.S.C. §4980D(b)(2).

a specified timeframe). It should be noted that church plans are exempt from minimum excise tax requirements, and may have a longer time frame to correct a violation before a tax is imposed.¹⁰¹ In addition, if a failure is due to reasonable cause and not willful neglect, the Secretary has discretion to waive part or all of the tax amount to the extent that the payment of the tax would be compared to the failure at issue.¹⁰²

Potential Liability under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, national origin, or sex.¹⁰³ Certain religious employers (see discussion in section below) are exempt from the prohibition on religious discrimination.¹⁰⁴ Employers qualifying for the exemption may consider religion in employment decisions, but those employers may not discriminate on any other basis forbidden by Title VII. Thus, although a religious organization may consider an employee or applicant's religion without violating Title VII, the organization may still violate Title VII if it treats employees differently based on the individual's race, color, national origin, or sex.¹⁰⁵ Furthermore, the exemptions in Title VII appear to apply only with respect to employment decisions regarding hiring and firing of employees based on religion. Once an organization makes a decision to employ an individual, the organization may not discriminate on the basis of religion regarding the terms and conditions of employment, including compensation, benefits, privileges, etc. In other words, religious organizations that decide to hire individuals with other religious beliefs cannot later choose to discriminate against those individuals with regard to wages or other benefits that the organization provides to employees.¹⁰⁶

In 2000, the U.S. Equal Employment Opportunity Commission (EEOC) found that an employer's decision to cover certain preventive care services, but not prescription contraceptives, violated Title VII.¹⁰⁷ The EEOC explained that the employer's policy for coverage of prescription drugs and devices must be applied equally to men and women. The employer's health plan covered a

¹⁰¹ 26 U.S.C. §4980D(b)-(c).

¹⁰² 26 U.S.C. §4980D(c)(4).

¹⁰³ 42 U.S.C. §2000e et seq. See CRS Report RS22745, *Religion and the Workplace: Legal Analysis of Title VII of the Civil Rights Act of 1964 as It Applies to Religion and Religious Organizations*, by Cynthia Brougher.

¹⁰⁴ 42 U.S.C. §2000e-1(a).

¹⁰⁵ See *EEOC v. Pacific Press Publ'g. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982); EEOC Notice, N-915, September 23, 1987. In some cases, an employer may claim that it had a valid discriminatory reason for the discharge based on religion under the Title VII exemption, while the employee claims the discharge is based on some other Title VII prohibition and therefore improper. For example, in several cases, employees of religious organizations, particularly private religious schools, have been discharged after becoming pregnant. See, e.g., *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996); *Ganzy v. Allen Christian School*, 995 F.Supp. 340 (E.D. N.Y. 1997). See also *Little v. Wuerl*, 929 F.2d 944 (3rd Cir. 1991). In one of these cases, the employer claimed that the termination was based on a violation of an organization policy against extra-marital sex, stemming from the religion's teachings. The employee claimed that the action was unlawful sex discrimination based on her pregnancy. The court upheld the employee's termination, finding that the employer's decision was based on the employee's extra-marital relationship, not the fact that she was pregnant. *Boyd*, 88 F.3d at 414-15. Thus, if a court determines that an employer's action was taken in response to the resulting pregnancy, rather than because of a violation of the faith-based policy, the organization may be held in violation of Title VII's prohibition on sex discrimination. However, if the court determines the discharge was based on religious teachings, the organization can claim Title VII exemption.

¹⁰⁶ EEOC Notice, N-915, September 23, 1987.

¹⁰⁷ EEOC, Commission Decision on Coverage of Contraception (December 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

variety of comparable preventive services and excluded only prescription contraceptives. Noting that prescription contraceptives are only available for women, the EEOC found that the employer's decision to omit prescription contraceptives from coverage constituted sex discrimination.¹⁰⁸ The EEOC decision applies only to the facts of the case before the Commission, and courts that have considered the issue have reached different conclusions.¹⁰⁹

Two federal district courts held that employers that offered prescription drug plans, but failed to provide coverage for prescription contraceptives, violated the prohibition on sex discrimination under Title VII.¹¹⁰ As one court explained,

Title VII does not require employers to offer any particular type or category of benefit. However, when an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes. In light of the fact that prescription contraceptives are used only by women, [the employer's] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory.¹¹¹

However, a decision by the U.S. Court of Appeals for the Eighth Circuit reached a different conclusion. The 8th Circuit found the EEOC's decision "unpersuasive," noting that it lacked the force of law.¹¹² The court appears to have distinguished its case from the EEOC decision because the employer's health plan excluded coverage for any contraceptive services—whether prescription or not—and therefore did not impact only women, contrary to the facts in the EEOC decision. Accordingly, the court held that the employer had not violated Title VII.¹¹³

It is important to note that Title VII's application would be unaffected by the applicability of the religious exemption to the preventive health services requirement. In other words, even if a religious employer qualifies for an exemption from the requirements for contraceptive coverage under ACA and even if the employer qualifies for Title VII's religious discrimination exemption, the employer must still comply with Title VII's ban on sex discrimination. However, it appears plausible that employers may avoid liability under Title VII if their health plans omit coverage for any contraceptives, rather than distinguishing between prescription and non-prescription contraceptives.

¹⁰⁸ *Id.*

¹⁰⁹ Compare *Erickson*, 141 F.Supp.2d 1266 with *In re Union Pacific Railroad*, 479 F.3d 936.

¹¹⁰ *Stocking v. AT&T Corp.*, 436 F.Supp.2d 1014 (W.D. Mo. 2006), vacated by *Stocking v. AT&T Corp.*, 2007 U.S. Dist. LEXIS 78188 (W.D. Mo. 2007); *Erickson*, 141 F.Supp.2d 1266. The *Stocking* decision was vacated in light of a later appellate decision in the same jurisdiction that reached a different conclusion. See *In re Union Pacific Railroad*, 479 F.3d 936.

¹¹¹ *Erickson*, 141 F.Supp.2d at 1272 (internal citation omitted).

¹¹² *In re Union Pacific Railroad*, 479 F.3d 936.

¹¹³ *Id.*

Legislative Options to Address Exemptions for Religious Employers

H.R. 3897/S. 2043: The Religious Freedom Restoration Act of 2012

Bills that would exempt individuals and entities with religious objections from the coverage of contraceptive and sterilization services have been introduced in the House and Senate. The proposed legislation would amend section 2713 of the Public Health Service Act to exempt individuals and entities from requirements related to contraceptive or sterilization service if those individuals and entities have a religious objection to such services. The bill states

No guideline or regulation issued pursuant to subsection (a)(4), or any other provision of the Patient Protection and Affordable Health Care Act, or the amendments made by that Act (P.L. 110-148), shall—

(A) require any individual or entity to offer, provide, or purchase coverage for a contraceptive or sterilization service, or related education or counseling, to which that individual or entity is opposed on the basis of religious belief; or

(B) require any individual or entity opposed by reason of religious belief to provide coverage of a contraceptive or sterilization service or to engage in government-mandated speech regarding such service.¹¹⁴

The proposed exemption provided in the bill is very broad. It would apply to individuals and entities, regardless of their affiliation with a religious institution, the purpose or mission for which they are organized, or the religious nature of the business or operations of the entity. Religious exemptions already existing in federal law for religious organizations generally require that organizations seeking exemption demonstrate at least some of these characteristics in order to qualify.¹¹⁵

The breadth of the exemption, as discussed earlier in this report, is a matter of congressional discretion. It seems that the groups apparently omitted from the current rule's exempted employers, that is, universities and hospitals, would be covered by this exemption. On the other hand, an exemption with few parameters may allow an unintended range of employers to avoid compliance with the coverage requirements. As courts have noted, a broad exemption may allow the religious beliefs of an employer to be imposed on employees who do not share those beliefs.¹¹⁶ It should also be noted that widely applicable exemptions may be seen to undermine the goals of the original legislation.

¹¹⁴ H.R. 3897, 112th Cong. §3 (2012); S. 2043, 112th Cong. §3 (2012).

¹¹⁵ For example, when applying the religious exemption for discrimination in employment under Title VII, courts have considered the purpose of the organization, the ownership or affiliation of the organization, the extent of religious practices within the organization, and the religious nature of products or services provided by the organization. *See* *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217, 226-27 (3rd Cir. 2007) (providing a summary discussion of circuit courts' interpretations of organizations qualifying for exemption under Title VII).

¹¹⁶ *See, e.g., Lee*, 455 U.S. at 261 ("Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees). *See also Catholic Charities of Albany*, 859 N.E.2d 459.

H.R. 1179/S. 1467: The Respect for Rights of Conscience Act of 2011

The Respect for Rights of Conscience Act¹¹⁷ would amend ACA to exempt health plans from the mandatory preventive services coverage rule with respect to any item or service, if covering that item or service would violate the religious beliefs or moral convictions of the group health plan issuer, group health plan sponsor, or any other entity offering the plan. It does not appear that this exemption would be limited to only those religious employers that meet explicitly enumerated criteria, as is currently required. For example, if the Respect for Rights of Conscience Act were enacted, it is likely that a hospital or university affiliated with a church would be exempt from covering prescription contraceptives if such coverage conflicted with the teachings of that church, even though the hospital or university would not qualify as a religious employer under the final rules of the Departments.

In the case of health plans on the individual market, plans would also be exempt if coverage of the relevant items or services would be contrary to the religious beliefs or moral convictions of the purchaser or beneficiary of the health plan. For example, if a self-employed individual who had no objection to prescription contraceptives sought an individual policy to cover herself and her family, the health plan would still not be required to cover prescription contraceptives if such coverage were contrary to the religious beliefs or moral convictions of another member of her family covered under the policy. However, this provision would only be applicable to plans offered in the individual market. Consequently, a plan offering group coverage would not appear to be exempt from covering a particular item or service solely because an individual covered by the plan had religious or moral objections to the coverage of that particular item or service; to be considered exempt, the group health plan would also need to show that the issuer, plan sponsor, or other entity offering the plan objected to covering the item or service.

The Respect for Rights of Conscience Act would also affect coverage requirements imposed as part of the essential health benefits (EHB) package, designated by the Secretary of HHS.¹¹⁸ Beginning in 2014, current law requires health insurance issuers to ensure that coverage offered in the individual or small group market includes coverage of all EHBs.¹¹⁹ Additionally, plans must cover all EHBs in order to be sold through the American Health Benefit Exchanges, and to be eligible for the premium subsidies offered to households with incomes below 400% of the federal poverty level.¹²⁰ If enacted, the Respect for Rights of Conscience Act would permit health plans to avoid any coverage requirement imposed as an EHB, if providing coverage of the item or service would be contrary to the religious beliefs or moral convictions of the health plan, the sponsor of the health plan, or another entity offering the plan. As with the final rules, health plans in the individual market would also be able to decline to cover items or services to which the purchaser or beneficiary of the plan objects.

¹¹⁷ H.R. 1179, 112th Cong. (2011); S. 1467, 112th Cong. (2011). These two bills are identical to H.R. 6570 from the 111th Congress.

¹¹⁸ 42 U.S.C. §18022(b)(1). At a minimum, the EHB package is to include services and items within the following categories: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and pediatric services, including oral and vision care. *Id.*

¹¹⁹ 42 U.S.C. §300gg-6(a).

¹²⁰ 42 U.S.C. §18021(a)(1)(B).

In addition to the protections for health plans described above, the Respect for Rights of Conscience Act includes conscience protections for health care providers. Specifically, it would prohibit any provision in Title I of ACA from being construed to require a health care provider to provide, participate in, or refer for any specific item or service that is contrary to the provider's religious beliefs or moral convictions.

The Respect for Rights of Conscience Act would also provide an explicit private right of action to enforce the rights of refusal that would be created by the bill. The federal courts would be given jurisdiction to hear such actions, and to award all forms of legal or equitable relief, specifically including temporary or permanent injunctive relief, declaratory relief, damages, costs, and attorneys' fees. Suits may be brought by the Attorney General of the United States, or any other person having standing to complain of a violation.

As discussed above, a refusing health plan would not be subject to penalties for failing to provide EHBs or required preventive services under the final rules. However, the Respect for Rights of Conscience Act does allow some financial consequences to fall on refusing health plans. Specifically, if a health plan declines to cover a required service, based on a religious or moral objection, the Secretary of HHS may issue regulations or other guidance to ensure that such plans maintain an aggregate actuarial value that is at least equivalent to health plans that do not exclude coverage of those items. Under such authority, the Secretary of HHS might require that a health plan that refused to cover prescription contraceptives reduce the deductibles or co-pays applicable to services that are covered in order to provide the same actuarial value as plans that cover prescription contraceptives.

Selected Examples of Existing Legislative Language for Religious Exemptions

A number of religious exemptions have been enacted to legislative mandates, both in the context of state requirements for contraceptive coverage and other unrelated contexts. These may be useful in Congress' consideration of whether to grant a statutory exemption to the preventive health services requirements.

Federal Laws

Section 1402(g)(1) of the IRC provides an exemption from self-employment income tax for individuals with certain religious objections to insurance coverage. It also provides the basis for the exemption from the individual coverage requirement in the ACA.¹²¹ The section 1402(g)(1) exemption applies if the individual seeking exemption:

is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance

¹²¹ ACA exempts any individual who has been certified to be "a member of a recognized religious sect or division thereof described in section 1402(g)(1) [of the Internal Revenue Code of 1986] and an adherent of established tenets or teaching of such sect or division as described in such section." *See* 26 U.S.C. §5000A(d)(2)(A).

which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care....¹²²

Alternatively, section 702 of Title VII of the Civil Rights Act of 1964 provides an exemption from the prohibition against religious discrimination in employment decisions. It has been replicated in other nondiscrimination legislation, for example, the Americans with Disabilities Act.¹²³ Section 702 applies to:

A religious corporation, association, educational institution, or society with respect to the employment [i.e. hiring and retention] of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.¹²⁴

However, the terms religious corporation, association, educational institution, or society are not defined, and there is no definitive standard in judicial decisions to determine whether an organization qualifies for the exemption.¹²⁵ The Supreme Court declined to review a case that would have provided an opportunity to announce a uniform standard in 2011.¹²⁶ However, lower courts have considered several factors when deciding whether an organization qualifies for the exemption: (1) the purpose or mission of the organization; (2) the ownership, affiliation, or source of financial support of the organization; (3) requirements placed upon staff and members of the organization (faculty and students if the organization is a school); and (4) the extent of religious practices in or the religious nature of products and services offered by the organization.¹²⁷

These examples are generally available exemptions, such that any member of any religious organization with the beliefs described in the provision would qualify, and do not state specific religious groups with which objectors must be associated. The Supreme Court has held that these models are constitutionally permissible.¹²⁸

State Contraceptive Coverage Laws

Twenty-eight states have enacted laws which have been interpreted to require insurers to cover contraceptives in the same way as other prescription drugs may be covered. These states have adopted varying approaches to define the scope of entities that may be exempt from the mandates based on religious or moral objections. **Table 1** provides a description of the definition used in each state with a contraceptive mandate.¹²⁹

¹²² 26 U.S.C. §1402(g)(1).

¹²³ See 42 U.S.C. §12112.

¹²⁴ 42 U.S.C. §2000e-1(a).

¹²⁵ See *Spencer v. World Vision, Inc.*, 619 F.3d 1109 (9th Cir. 2010) (three-judge panel issued three opinions, each applying a different standard), amended at 633 F.3d 723 (9th Cir. 2011).

¹²⁶ *Spencer v. World Vision, Inc.*, 181 L.Ed.2d 25 (2011).

¹²⁷ See *LeBoon*, 503 F.3d at 226-27 (providing a summary discussion of circuit courts' interpretations of organizations that qualify under Title VII's exemption).

¹²⁸ See *Lee*, 455 U.S. 252; *Corp. of Presiding Bishop*, 483 U.S. 327.

¹²⁹ For more information on state contraceptive mandates, see also NAT'L WOMEN'S LAW CENTER, *Contraceptive Equity Laws in Your State*, November 30, 2010, available at <http://www.nwlc.org/resource/contraceptive-equity-laws-your-state-know-your-rights-use-your-rights-consumer-guide-0>; NAT'L CONF. STATE LEGISLATURES, *Insurance Coverage for Contraception Laws*, August 2011, available at <http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx>; and GUTTMACHER INST., *Insurance Coverage of Contraceptives*, February (continued...)

These definitions can be separated into four general categories, although there are variations among the states within each category. First, nine of the 28 states with some form of a contraceptive mandate provide no explicit exemption based on religious or moral objections. However, in many instances, the mandate may be avoided by refraining from offering prescription drug coverage generally, or by seeking regulation under ERISA.¹³⁰

Second, eight of the remaining 19 states that do exempt some religious entities define the scope of exempt religious entities using some variation of a multi-pronged test, requiring some or all of the following criteria to be met:

1. The entity's purpose must be the inculcation of religious values;
2. The entity primarily must employ members of the same religion;
3. The entity primarily must serve members of the same religion; and
4. The entity must be a church, an integrated auxiliary of a church, a convention or association of churches, or engaged in the exclusively religious activities of any religious order under section 6033 of the IRC.

This multi-pronged definition resembles the definition adopted in the final rules, which requires all four prongs to be satisfied. Three of these eight states, California, New York, and Oregon, also require all four prongs to be met in order to qualify as exempt from the respective state contraceptive coverage mandate on the grounds of a religious objection. The remaining five states (Arizona, Arkansas, Hawaii, Michigan, and North Carolina) only require two or three of these criteria, in different combinations, to be met. For example, Arizona does not require an entity's purpose to be the inculcation of religious values in order to be exempt, while North Carolina does not require exempt entities to serve primarily members of the same religion.

In the third category are six states (Connecticut, New Jersey, Maine, Massachusetts, Rhode Island, and West Virginia) which use definitions that incorporate the definition of "church" under the Federal Income Contributions Act (FICA).¹³¹ The FICA definition includes churches, conventions or associations of churches, or elementary or secondary schools which are controlled, operated, or principally supported by a church or by a convention or association of churches.¹³²

Finally, five states (Delaware, Maryland, Missouri, Nevada, and New Mexico) provide an exemption for religious employers or entities, but do not further define what a religious entity is or provide a specific test to be used.

(...continued)

2, 2012, available at http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

¹³⁰ As mentioned above, church plans, defined under ERISA as plans established and maintained for its employees by a church or by a convention or association of churches that are exempt from tax under section 501 of the IRC, are generally exempt from the act's requirements. However, these plans may elect to be subject to federal law pursuant to section 410(d) of the IRC. In the past, the Department of Labor has taken the position that this election can only be made by pension plans. See Dep't of Labor, Advisory Letter No. 95-07A, available at <http://www.dol.gov/ebsa/programs/ori/advisory95/97-07a.htm>. However, some courts have found that this election may be made by health plans as well. See, e.g., *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004).

¹³¹ I.R.C. §3121(w)(3).

¹³² *Id.*

Table I. Definition of Religious Entities for Purposes of Religious Exemptions to State Contraceptive Coverage Requirements

(States without contraceptive coverage requirements are not listed.)

States with Contraceptive Coverage Requirements	Scope of Entities Covered Under Religious Exemption
Arizona	A “religious employer” means an entity that (a) primarily employs persons who share the religious tenets of the entity; (b) primarily serves persons who share the religious tenets of the entity; and (c) is a nonprofit organization as described in §6033(a)(3)(A)(i) or (iii) of the IRC. ARIZ. REV. STAT. §20-826.AA.3.
Arkansas	A “religious employer” means an entity that (a) is organized and operated for religious purposes and has received a section 501(c)(3) designation from the Internal Revenue Service; (b) has as a primary purpose the inculcation of religious values; and (c) employs primarily persons who share its religious tenets. ARK. CODE ANN. §23-79-1102(3).
California	A “religious employer” is an entity that (a) has the inculcation of religious values as its purpose; (b) primarily employs persons who share the religious tenets of the entity; (c) serves primarily persons who share the religious tenets of the entity; and (d) is a nonprofit organization pursuant to §6033(a)(3)(A)(i) or (iii) of the IRC. CAL. INS. CODE §10123.196(d)(1).
Colorado	No applicable exception found.
Connecticut	A “religious employer” means an employer that is a “qualified church-controlled organization” as defined in §3121 of the IRC or a church-affiliated organization. CONN. GEN. STAT. §38a-530e(f).
Delaware	An insurer shall exclude coverage of prescription contraceptives for “religious employers.” No definition for a “religious employer” is provided. 18 DEL. CODE §3559(d).
Georgia	No applicable exception found.
Hawaii	A “religious employer” is an entity that (a) has the inculcation of religious values as its purpose; (b) primarily employs persons who share the religious tenets of the entity; (c) is not staffed by public employees; and (d) is a nonprofit organization as defined under section 501(c)(3) of the IRC. HAW. REV. STAT. §431:10A-116.7(a).
Illinois	No applicable exception found.
Iowa	No applicable exception found.
Maine	A “religious employer” is an employer that is a church, convention or association of churches or an elementary or secondary school that is controlled, operated or principally supported by a church or by a convention or association of churches as defined in §3121(w)(3)(A) of the IRC and that qualifies as a tax-exempt organization under §501(c)(3) of the IRC. 24 ME. REV. STAT. §2332-J(2).
Maryland	An insurer shall exclude coverage of prescription contraceptives for “religious employers.” No definition for a “religious employer” is provided. MD. INS. CODE ANN. §15-826(c).

States with Contraceptive Coverage Requirements	Scope of Entities Covered Under Religious Exemption
Massachusetts	Exempt religious employer is an employer that is a church or qualified church-controlled organization, as those terms are defined in §3121(w)(3)(A) and (B) of the MASS. GEN. LAWS ch 175, §47W(c).
Michigan	A “religious employer” is an entity that (a) is a nonprofit organization as defined under section 501(c)(3) of the IRC; (b) has the inculcation of religious values as its purpose; (c) primarily employs people who share the religious tenets of the entity; and (d) serves primarily persons who share the religious tenets of the entity. ^a
Missouri	An insurer may exclude coverage of prescription contraceptives for “religious employers.” No definition for a “religious employer” is provided. MO. REV. STAT. §376.1199(4)(1).
Montana	No applicable exception found.
Nevada	No exemption for religious employers, but an insurer may exclude coverage of prescription contraceptives if the insurer is affiliated with a “religious organization” and objects to the coverage. No definition for “religious organization” is provided. NEV. REV. STAT. ANN. §689B.0376(5).
New Hampshire	No applicable exception found.
New Jersey	A “religious employer” is a church, convention or association of churches or an elementary or secondary school that is controlled, operated or principally supported by a church or by a convention or association of churches as defined in §3121(w)(3)(A) of the IRC, and that qualifies as a tax-exempt organization under §501(c)(3) of the IRC.
New Mexico	A “religious entity” purchasing individual or group health insurance coverage may elect to exclude prescription contraceptive drugs or devices from the health coverage purchased. No definition of “religious entity” is provided. N.M. STAT. ANN. §59A-22-42(D).
New York	A “religious employer” is an entity that (a) has the inculcation of religious values as its purpose; (b) primarily employs persons who share the religious tenets of the entity; (c) serves primarily persons who share the religious tenets of the entity; and (d) is a nonprofit organization as described in §6033(a)(3)(A)(i) or (iii), of the IRC. N.Y. CONSOLIDATED LAWS INSURANCE §3221(l)(16)(A)(1).
North Carolina	A “religious employer” is an entity that (a) is organized and operated for religious purposes and is tax exempt under §501(c)(3) of the IRC; (b) has the inculcation of religious values as one of its primary purposes; and (c) employs primarily persons who share the religious tenets of the entity. N.C. GEN. STAT. §58-3-178(e).

States with Contraceptive Coverage Requirements	Scope of Entities Covered Under Religious Exemption
Oregon	A “religious employer” is an employer (a) whose purpose is the inculcation of religious values; (b) that primarily employs persons who share the religious tenets of the employer; (c) that primarily serves persons who share the religious tenets of the employer; and (d) that is a nonprofit organization under §6033(a)(3)(A)(i) or (iii) of the IRC. OR. REV. STAT. §743A.066(4).
Rhode Island	A “religious employer” means an employer that is a “church or a qualified church-controlled organization” as defined in §3121 of the IRC. R.I. GEN. LAWS §27-18-57(c).
Vermont	No applicable exception found.
Washington	No applicable exception found.
West Virginia	A “religious employer” is an entity whose sincerely held religious beliefs or sincerely held moral convictions are central to the employer’s operating principles, and is an organization listed under §§501(c)(3) or 3121 of the IRC, or is listed in the Official Catholic Directory published by P. J. Kennedy and Sons. W. VA. CODE §33-16E-2(5).
Wisconsin	No applicable exception found.

Source: Compiled by CRS.

Notes: Section 3121(w)(3) of the IRC defines a “church” as a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches; and defines a “qualified church-controlled organization” as any church-controlled tax-exempt organization described in §501(c)(3) of the IRC, other than an organization which (i) offers goods, services, or facilities for sale, other than on an incidental basis, to the general public, other than goods, services, or facilities which are sold at a nominal charge which is substantially less than the cost of providing such goods, services, or facilities; and (ii) normally receives more than 25 percent of its support from either (I) governmental sources, or (II) receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities, in activities which are not unrelated trades or businesses, or both.

Section 6033(a)(3)(A)(i) of the IRC applies to churches, their integrated auxiliaries, and conventions or associations of churches. Section 6033(a)(3)(A)(iii) of the IRC applies to the exclusively religious activities of any religious order.

- a. MICH. CIVIL RIGHTS COMM’N, *Declaratory Ruling on Contraceptive Equity*, August 21, 2006, available at http://www.michigan.gov/documents/Declaratory_Ruling_7-26-06_169371_7.pdf.

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