Healthcare Reform Update
on Contraceptive Mandate

The contraceptive mandate requires employer plans to include coverage for contraceptives without any cost-sharing requirements on behalf of participants. Contraceptives include, but are not limited to, sterilizations, oral contraceptives, devices and related education and counseling services. The primary enforcement mechanism of this requirement is a tax penalty imposed on employers that fail to provide the coverage for the required contraceptives. The penalty is fairly stiff at $100 per day for each individual to whom the failure to provide contraceptive coverage relates. If the plan is subject to the Employee Retirement Income Security Act (ERISA), it will also be a violation of that Act, but many plans sponsored by church-affiliated organizations are exempt from ERISA as "church plans." For employers providing medical benefits to their employees through these plans, the penalty is "only" the $100 per day penalty.

The final regulations implementing the mandate issued in July 2013, contained a narrow exemption for several types of "religious employers," namely, churches, integrated auxiliaries of churches and the exclusively religious activities of a religious order. It can be difficult to determine when an organization is an integrated auxiliary, and may even require an examination of the funding sources and establish whether it serves the general public.

What is clear; however, is there are certain organizations, such as colleges, universities, hospitals and perhaps even elderly care facilities and other social services agencies that are not integrated auxiliaries or otherwise exempt from the mandate.

For these *other* religious organizations that are not exempt from the mandate, the final regulations provide an "accommodation," which relies on the insurance company (in the case of an insured plan) or the third party administrator (TPA) (in the case of a self-insured plan) to provide or arrange for contraception coverage. In order to qualify for the accommodation, an employer must file a form with the insurance company (or the TPA in the case of a self-insured plan) known as the EBSA Form 700. This form basically says the employer objects to providing contraceptive coverage on the basis of religious beliefs and the insurance company or TPA receiving this form must provide or arrange for the required coverage. Many employers don't have a problem with this accommodation because they feel that once they send the form to either their insurer or TPA, they are far enough removed from the process of providing contraceptives. However, many other organizations do object to the accommodation because they feel they are facilitating the provision of contraceptive coverage by providing this particular form.

Litigation Involving For-Profit Companies

To date, for-profit organizations have filed 48 lawsuits challenging the contraceptive mandate. So far, these cases have focused primarily on getting an injunction to avoid the $100 per day penalty until the underlying issue is ultimately decided by the courts. Injunctions have been granted in 34 cases, and denied in six cases, with other cases pending or dismissed on procedural grounds.

For-profits are not eligible for the accommodation. They argue that having to provide contraceptive coverage in their employee benefit plans in order to avoid these onerous penalties violates a federal act called the Religious Freedom Restoration Act, as well as the Establishment, Free Exercise and the Free Speech clauses of the First Amendment. Whether or not objecting organizations are required to provide this coverage will probably be ultimately decided by the United States Supreme Court. The United States Supreme Court has accepted two cases and consolidated them for argument – the *Hobby Lobby Stores* and the *Conestoga Wood Specialties* cases. On March 25, 2014, the Supreme Court heard oral arguments in these cases, and is expected to issue its decision by the end of June.

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Most relevant for Christian Brothers Services (CBS) are eight cases filed by the following organizations involving a narrower group of nonprofits, cases involving non-ERISA "church plans":

- Catholic Diocese of Beaumont
- East Texas Baptist University
- Little Sisters of the Poor (Christian Brothers Services)
- Michigan Catholic Conference
- Reaching Souls International (Southern Baptists)
- Roman Catholic Archbishop of Washington, D.C.
- Roman Catholic Archdiocese of New York
- Southern Nazarene University

Injunctions have been issued in each of the above cases.

Two of the above cases are class action lawsuits, those brought by Reaching Souls International and the Little Sisters of the Poor. Both involve large, multiple employer plans covering hundreds of organizations. These cases are looking for relief for all employers in the plan, not just for the lead plaintiffs. The Little Sisters of the Poor (Christian Brothers Services) obtained an injunction from the United States Supreme Court on New Year's Eve, the day before employers in the Christian Brothers Employee Benefit Trust that were not exempt from the contraceptive mandate as "religious employer" would have become subject to the $100 per day penalty, unless they completed and delivered a EBSA Form.

The Trustees of the Christian Brothers Employee Benefit Trust are committed to challenging this mandate to the fullest extent possible for the members of the Trust. Further, CBS is dedicated to providing you with current and up-to-date information on the contraceptive mandate, as well as all aspects of the Affordable Care Act. On October 30, 2014, at 1:00 p.m. Central time, we will be hosting a webinar entitled, "*Healthcare Reform Update.*" In addition, we have published a white paper entitled, "*Remaining Faithful: Adhering to Catholic Tenets While Abiding by the Affordable Care Act (ACA),*" which can be found at cbservices.org/remainingfaithfulwp. ☼

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