August 12, 2022

Client Alert

Agencies Issue Guidance Regarding Coverage of Family Planning Services and Emergency Contraceptives Under the Affordable Care Act After Dobbs

On July 28, 2022, the DOL, HHS, and the IRS (collectively, the "Agencies") released FAQs About Affordable Care Act Implementation Part 54, which, according to the Agencies, is intended to make it clear that, despite the Supreme Court's ruling in *Dobbs*, the ACA's preventive care mandate requires non-grandfathered group health plans and health insurance issuers to cover birth control/contraception, including emergency contraception, and family planning counseling without any cost sharing.

Background

The ACA requires non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to cover (without the imposition of any cost-sharing requirements) certain items or services, including evidence-based items and services having a rating of "A" or "B" by the United States Preventive Services Task Force (USPSTF). For women, infants, children and adolescents, non-grandfathered plans must also cover evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA). Items and services required to be provided without cost sharing include any items or services "integral to the furnishing of the recommended preventive services" as well.

The HRSA-supported Women's Preventive Services Guidelines (2019 HRSA-Supported Guidelines), recommend that adolescent and adult women have access to the full range of female-controlled FDA-approved contraceptive methods, effective family planning practices, and sterilization procedures to prevent unintended pregnancy and improve birth outcomes. As set forth in the guidelines, contraceptive care should include contraceptive counseling, initiation of contraceptive use, and follow-up care, and that instruction in fertility awareness-based methods, including the lactation amenorrhea method, should be provided for women desiring an alternative method.

On December 30, 2021, the HRSA-Supported Guidelines were updated with regard to a number of items, including breastfeeding services and supplies, well-woman preventive care visits, access to contraceptives and contraceptive counseling, screening for human immunodeficiency virus, and counseling for sexually

transmitted infections, and expand the 2019 recommendation to encompass contraceptives that are not female-controlled, such as male condoms.

Per the ACA, non-grandfathered health plans must implement any new HRSA recommendations for plans years that begin on or after 1 year from the date the recommendation or guideline is issued. For calendar year plans, this means January 1, 2023.

Guidelines Addressed in the FAQs

The recently issued FAQs provide the following:

(1) Anesthesia services integral to the furnishing of recommended preventive services must be covered without cost sharing. For example, anesthesia provided in conjunction with a tubal ligation procedure.

(2) Pursuant to the HRSA guidelines, contraceptive care for adolescent and adult women must include access to the full range of female-controlled FDA-approved contraceptive methods (as well as FDA-approved contraceptives that are not female controlled for in plan years beginning in 2023), effective family planning practices, and sterilization procedures, which includes, among many other items, birth control methods such as IUDs, oral contraceptives, contraceptive patches, rings, and sponges, female condoms, and emergency contraception. *Note: As explained in number 10 below, at least one form of contraception in the various categories must be covered by a plan or issuer.*

(3) Any contraceptive services and FDA approved, cleared, or granted contraceptive products that an individual and their attending provider have determined to be medically appropriate for the individual, even if not listed specifically in the HRSA guidelines, such as newly FDA cleared contraceptive products, must also be covered without cost sharing; however, reasonable medical management techniques may be employed by the plan or issuer if multiple, substantially similar services or products that are not included in a category described in the Guidelines are available and are medically appropriate for the individual (though at least one such service or product must be provided without cost sharing). The agencies clarify that the plan or issuer must defer to the determination of the attending provider, and make available an easily accessible, transparent, and sufficiently expedient exceptions process that is not unduly burdensome so the individual or their provider can obtain coverage for the medically necessary service or product without cost sharing.

(4) Instruction in fertility-awareness based methods, including lactation amenorrhea must also be covered without cost sharing, as they are forms of "counseling and education."

(5) Coverage for FDA-approved emergency contraceptives without cost sharing includes coverage for over the counter (OTC) emergency contraceptives. The plan or issuer must cover any OTC emergency contraceptives that are prescribed and are encouraged to cover any OTC emergency contraceptives purchased without a prescription.

(6) HRAs, health FSAs, and HSAs can also reimburse FDA-approved OTC emergency contraceptives, but only to the extent they are not paid or reimbursed by another plan or coverage (such as the employer's medical plan). If the plan sponsor does not want to reimburse OTC emergency contraceptives that are not prescribed by a physician, then they must indicate such in the plan materials.

(7) Plans and issuers may reimburse up to a 12-month supply of contraceptives at one time, though they are not required to do so.

(8) These requirements under the ACA preempt any contrary state law. Accordingly, if state law bans a particular contraceptive method, the ACA would preempt that contrary state law.

(9) Unless HRSA guidelines specify a frequency, method, treatment or setting within a specified category of contraception, plans may use reasonable medical management techniques within that specified category. The reasonableness of the medical management technique will be determined based on the relevant facts and circumstances.

(10) Plans and issuers must cover, without cost sharing, at least one form of contraception in each category that is described in the HRSA-Supported Guidelines or, for contraceptive categories not described in the HRSA-Supported Guidelines, at least one form of contraception in a group of substantially similar services or products.

(11) Plans must have an exceptions process; however, it must not be unduly burdensome for participants, beneficiaries, or enrollees. Requiring participants, beneficiaries, or enrollees to appeal adverse benefit determinations using the plan or issuer's internal claims and appeals process to seek an exception is not a reasonable medical management technique. Moreover, the process the plan uses for exceptions, including the type of information required to be provided when seeking an exception, should be transparent to participants and beneficiaries. The FAQs provide that plans can satisfy this requirement by, at a minimum, prominently displaying the exceptions process in plan documents and SPDs as well as in any other plan materials that describe how the plan covers contraceptive items and services, such as a prescription drug formulary.

Next Steps for Employers

Employers, particularly those with self-funded plans, should be mindful of these guidelines when working with their TPAs and when making plan design choices. For employers who sponsor HRAs and health FSAs, if the employer's plan covers all Code Section 213(d) expenses, employers should not need to make any changes to the plan. If the employer wishes to exclude OTC emergency contraception that is not prescribed by a medical doctor, then the employer should specify this as an exclusion in the plan materials.

About the Author. This alert was prepared for Benefits Association by Barrow Weatherhead Lent LLP, a national law firm with recognized experts on the Affordable Care Act. Contact Stacy Barrow or Nicole Quinn-Gato at sbarrow@marbarlaw.com or nquinngato@marbarlaw.com.