UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
NORTHERN DIVISION

SHARPE HOLDINGS, INC., et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	)	Case No. 2:12-cv-00092-DDN

PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING EXEMPTIONS TO THE CONTRACEPTIVE MANDATE

The Court, in its Order and Memorandum granting the Plaintiffs' motion for a temporary restraining order, noted as follows:

> Plaintiffs point to the fact that the Act does not require employers with fewer than 50 employees to provide employee health insurance and that the ACA mandate does not apply to grandfathered plans. While these factual assertions by the plaintiffs are not gainsaid by defendant, their impact on plaintiffs' ultimate entitlement to relief requires further hearing and consideration.

Memorandum and Order Granting Temporary Restraining Order, Doc. 20, Dec. 31, 2012. This supplemental memorandum and its exhibits are intended to provide a more detailed evidentiary basis for Plaintiffs' exemption allegations.

The Grandfathering Exemption

Of the various exemptions, the "grandfathering" exemption may be the most discussed. *See* 75 Fed. Reg. 41726, 41731 (Jul. 19, 2010), attached as Exhibit 1 and incorporated by reference. In 2010, Defendants estimated that 193 million individuals would be affected by the grandfathering exemption. *See Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient*

Protection and Affordable Care Act, 75 Fed. Reg. 34538, 34550 (June 17, 2010), attached as Exhibit 2 and incorporated by reference. There are certain requirements for maintaining grandfathered status, but as long as these requirements are met, the exemption is indefinite. *See* 26 C.F.R. § 54.9815-1251T.

Despite the lack of any sort of sunset provision in the grandfathering exemption, Defendants claim that "the effect of grandfathering is not really a permanent 'exemption,' but rather, over the long term, a transition in the marketplace . . ." Government Memorandum, Doc. 14, p. 22. In 2010, the Defendants estimated, based on several assumptions, that "31 percent of small employers and 18 percent of large employers would make changes that would require them to relinquish grandfather status in 2011." Exhibit 2, at 34551-52. Even with this prediction, the Department of Health and Human Services ("HHS") estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." Exhibit 1, at 41732.

The Defendants estimated "that 66 percent of small employer plans and 45 percent of large employer plans will relinquish their grandfather status by the end of 2013."[1] Exhibit 2, at 34552. According to the Defendants, there are 133.1 million participants in large employer plans and 43.2 million participants in small employer plans. *Id*. at 34550. Accepting the Defendants' projections as true, and assuming that the employers that relinquish grandfathering status are of average size compared to others in their small or large plan categories, over 88 million individuals will still be participants in grandfathered plans in 2014.

The government's characterization of the grandfathering exemption as "transitional" is undermined not only by the massive number of individuals who have remained and will remain in exempt plans, but also by statements of the Defendants as to the exemption's permanence.

[1] The government's projections are less detailed regarding individually purchased policies, which cover 16.7 million individuals. *Id*. at 34550.

The Affordable Care Act ("ACA") website, www.healthreform.gov, states that the ACA "preserves the ability of the American people to keep their current plan if they like it" and "allows plans that existed on March 23, 2010 to innovate and contain costs by allowing insurers and employers to make routine changes without losing grandfather status." *Questions and Answers: Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered" Health Plan*s, available at http://www.healthreform.gov/about/grandfathering.html, attached as Exhibit 3 and incorporated by reference. Plans will lose their grandfathered status only "if they choose to significantly cut benefits or increase out-of-pocket spending for consumers." *Id*. The website goes on:

> Grandfathered plans will have the flexibility to make changes in order to remain active and vibrant just so long as they don't dramatically reduce people's benefits or increase their cost-sharing. Among other things, plans will be able to:
> - Raise premiums to reasonably keep pace with health care costs;
> - Make some changes in the benefits that they offer;
> - Increase deductibles and other out-of-pocket costs within limits; and
> - Continue to enroll new employees and new family members.

Id. The government's official, public website grants assurance and comfort to owners of grandfathered plans,[2] but its representatives in court take a different tone now that the venue and incentives have changed.[3]

Interestingly, numerous provisions of the ACA apply even to grandfathered health plans: the prohibition on pre-existing condition exclusions (group health plans only), the prohibition on excessive waiting periods (both group and individual health plans), the prohibition on lifetime (both) and annual benefit limits (group only), the prohibition on rescissions (both), and the

[2] The ACA itself also refers to a plan's grandfathering status as a "right." *See* 42 U.S.C. § 18011.
[3] The court in *Newland v. Sebelius,* No. 1:12-CV-1123-JLK, 2012 WL 3069154 (D. Colo. 2012) deemed "[t]he government's attempt to characterize grandfathering as 'phased implementation'" "unavailing" due to the facially indefinite nature of the exemption. *Id*. at *7 n. 11. The government's claim of a compelling interest was damaged in that the ACA "specifically exempted grandfathered health plans from complying with the preventive care coverage mandate" even though grandfathered plans had to comply with other aspects of the ACA. *Id*. (citing 42 U.S.C. § 18011(a)(3–4)).

extension of dependent care coverage (both), to name a few. Exhibit 2, at 34542. These benefits were considered important enough that even grandfathered plans had to provide them; grandfathered plans' coverage for contraception, meanwhile, is specifically exempted. 42 U.S.C. § 18011(a)(3–4).

Small Employer Exemption

Employers with fewer than 50 full-time employees have no obligation to provide health insurance for their employees, and face no penalties for failure to do so, under the ACA, and thus have no ultimate obligation to comply with the Mandate.[4] 26 U.S.C. § 4980H(c)(2)(A). According to the Census Bureau, more than 31 million individuals were employed by firms with fewer than fifty employees in 2010. *Number of Firms, Number of Establishments, Employment, and Annual Payroll by Small Enterprise Employment Sizes for the United States, NAICS Sectors: 2010*, available at http://www2.census.gov/econ/susb/data/2010/us_naicssector_small_emplsize_2010.xls, attached as Exhibit 4 and incorporated by reference.

Religious Organization Exemption

Also exempted from the Mandate are "religious employers," as defined at 45 C.F.R. § 147.130(a)(iv)(B). To be eligible for the exemption, such employers must "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a 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." *Id*.

[4] These employers are required to comply with the Mandate only if they voluntarily choose to provide health insurance.

Plaintiffs do not know and Defendants have not stated how many plans are eligible for the religious employer exemption.[5]

Temporary Enforcement Safe Harbor

The guidelines contain what has been referred to as a "temporary safe harbor" for plans that do not qualify for the religious employer exemption but are sponsored by certain non-profit organizations with religious objections to contraceptive coverage. *See Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8725, 8726-8728 (Feb. 15, 2012), attached as Exhibit 5 and incorporated by reference. These organizations are exempt from application of the mandate until August 1, 2013, by which time HHS will allegedly have finalized new rules and regulations broadening the definition of "religious employer." 77 Fed. Reg. 16501, 16501 (Mar. 21, 2012), attached as Exhibit 6 and incorporated by reference.

Although referred to as temporary, and with a defined end date, this exemption does not appear to be going away. Wheaton College is one of several religious entities[6] that has filed suit seeking relief from the contraceptive mandate, alleging that even though the safe harbor may apply, its August 1, 2013 termination date makes the exemption little solace. *Wheaton College v. Sebelius*, 12-5273, 2012 WL 6652505 (D.C. Cir. 2012). In oral argument, the government "represented to the court that it would *never* enforce [the mandate] in its current form against the appellants or those similarly situated as regards contraceptive services." *Id*. at *1 (emphasis in

[5] The court in *Tyndale H. Publishers, Inc. v. Sebelius*, CIV.A. 12-163, 2012 WL 5817323 (D.D.C. 2012) stated that "the 191 million employees excluded from the contraceptive coverage mandate include those covered by grandfathered plans *alone*. The defendants have provided no information whatsoever about the number of employees excluded under the other exemptions or exclusions." *Id*. at *18 (emphasis in original).

[6] Among others, *see Zubik v. Sebelius*, 2012 WL 5932977 (W.D. Pa. Nov. 27, 2012); *Catholic Diocese of Nashville v. Sebelius*, 2012 WL 5879796 (M.D. Tenn. Nov.21, 2012); *Belmont Abbey College v. Sebelius*, 2012 WL 2914417 (D.D.C. 2012); *Nebraska ex rel. Bruning v. U.S. Dept. of Health and Human Svcs.*, 2012 WL 2913402 (D. Neb. 2012); *Roman Catholic Archdiocese of New York v. Sebelius*, 2012 WL 6042864 (E.D.N.Y. 2012).

original). The court took "the government at its word and will hold it to it," and "in reliance upon the Departments' binding representations," is holding the case in abeyance until the new rules and regulations broadening the religious employer definition are in effect. *Id*. at *2.

As is the case with the religious employer exemption, Plaintiffs do not know and Defendants have not stated how many plans are eligible for the safe harbor.

CONCLUSION

For the foregoing reasons, and for all the reasons previously stated, Plaintiffs respectfully renew their request that their Motion for a Preliminary Injunction be granted.

Respectfully submitted this 11th day of January, 2013.

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Certificate of Service

I hereby certify that on January 11, 2013, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Eastern District of Missouri to be served by operation of the Court's electronic filing system upon the following registered CM/ECF participants:

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