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State and Federal Contraceptive Coverage Requirements: Implications for Women and Employers

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Contraceptive Coverage under the Affordable Care Act (ACA) has made access to the full range of contraceptive methods affordable to millions of women. Since it was first issued in 2012, this provision has been controversial and has been the focus of two major cases that have reached the Supreme Court. Following the Hobby Lobby ruling, the Obama Administration took the stand that almost all women had an entitlement to the contraceptive benefit and developed an "accommodation" to assure they would still get coverage, even if their employer had religious objections to contraception. The Trump Administration, in contrast, has prioritized the rights of employers, and in October 2017, issued regulations that significantly broadened the exemption to nearly any employer with a religious or moral objection. The new regulations have been challenged by 8 states and have been blocked from being implemented pending the outcome of the litigation.

Before the ACA was passed, many states had enacted contraceptive equity laws that required plans to treat contraceptives in the same way they covered other services. In addition, since the ACA was passed, a number of states have enacted laws that basically codify in state legislation the ACA benefit rules (requiring all plans to cover, without cost-sharing each of the 18 FDA approved contraceptive methods). This issue brief provides an update on the status of the continuing litigation on the federal contraceptive requirement and explains the interplay between the federal and state contraceptive coverage laws and the implications for employers and women.

Background on State and Federal Contraceptive Coverage Requirements

Before the ACA, coverage for prescription contraceptives was generally widespread in the private and public sectors, but not universal, and certainly not free of cost-sharing. In 2000, a ruling by the Employment Equal Opportunity Commission found that employers that covered preventive prescription drugs and services but did not cover prescription contraceptives were in violation of the Civil Rights Act.[1] Currently, 30 states and DC[2] require insurance plans to cover contraceptives, with a wide range of coverage and cost-sharing requirements, and exemptions among these mandates (**Appendix A)**. State laws, however, do not have authority over all plans; they only apply to state regulated (fully-insured) plans, but not self-funded plans under ERISA where 60% of covered workers are insured.[3]

The ACA is the first law to set preventive coverage requirements for health insurance across all markets – individual, small group, large group and self-insured plans. Starting in 2012, all new private plans were required to cover, without cost-sharing, the full range of contraceptive services and supplies approved by the Food and Drug Administration (FDA) as prescribed for women. Only employers that were classified as a "house of worship" were exempted from this requirement. While a number of states had contraceptive equity laws that required plans to cover some or all methods, cost-sharing typically applied. Fully-insured plans must comply with both state and federal laws. For some health services, the federal law may require a higher level of benefits, and for other services the state law may require a higher level of benefits.

How Would the New Federal Regulations Change the Contraceptive Coverage Exemptions for Employers?

Since they were announced in 2011, the ACA contraceptive coverage rules have evolved through litigation and new regulations (**Table 1**). Most employers are required to include the coverage in their plans. Limited categories of employers are eligible for an *exemption* under the Obama Administration regulations (**Table 2**). Houses of worship can choose to be exempt from the requirement if they have religious objections. Workers and dependents of exempt employers do not have coverage for either some or all FDA approved contraceptive methods. Religiously-affiliated nonprofits and closely held for-profit corporations[4] can opt out of providing contraceptive coverage by electing an *accommodation*, but are not eligible for an exemption. In these cases, women workers and dependents covered by an employer electing an accommodation get contraceptive coverage, but it is the insurer, not the employer, who pays for the contraceptive coverage.

Table 1: Who Regulates Health Insurance Plans

Type of Plan	Who assumes the risk?	Who is the regulator and which laws apply?
Fully-Insured Plan	Insurer collects premiums and assumes the risk of providing covered services	State insurance regulators – state AND federal regulations apply
Self-Insured ERISA plan	Employer assumes the risk of providing covered services and usually contracts with a third party administrator (TPA) to manage the claims payment process.	Department of Labor under the Employer Retirement Income Security Act (ERISA)- only federal regulations apply

Some nonprofits, including the Little Sisters of the Poor, have continued to challenge the accommodation as requiring them to be complicit in the provision of contraceptives which they believe to be sinful. These cases made their way through the federal courts and were heard by the Supreme Court. In May 2016, the Supreme Court remanded *Zubik v. Burwell,* sending 7 cases brought by religious nonprofits objecting to the contraceptive coverage accommodation back to the respective Federal Courts of Appeal. These lawsuits were not resolved at the time of the November 2016 presidential election. The Trump Administration has not continued to defend these lawsuits, and has settled with most of the litigants.

The Trump Administration's Interim Final Regulations were issued on October 6, 2017 and took effect the date they were issued without an opportunity for public notice and comment, as normally required under the Administrative Procedure Act. Under the October 2017 regulations, there would no longer be a guaranteed right of contraceptive coverage for female employees and dependents or students. These regulations greatly expand the number of employers that are eligible for an *exemption* to all nonprofit and closely held for-profit employers with objections to contraceptive coverage based on *religious beliefs* or *moral convictions*, including private institutions of higher education that issue student health plans. In addition, publicly traded for-profit companies with objections based on religious beliefs would also qualify for an exemption. **Table 2** presents the changes to the contraceptive rule from the Obama Administration to those included in the new Interim Final regulations issued by the Trump Administration. Any employer eligible for an exemption could instead opt for an accommodation by notifying their insurer, third party administrator, or the government. If an employer opts for an accommodation, then their workers and dependents would still have contraceptive coverage without cost-sharing. It is not clear how many employers would choose an accommodation rather than an exemption.

Timeline of Recent Contraceptive Coverage Regulations & Litigation

Oct. 6, 2017: Trump Administration issues new regulations expanding exemption without the usual notice and comment period.

Nov.– Dec. 2017: 4 lawsuits were filed by states challenging the regulations as violating the 1st and 5th Amendments of the Constitution and contending the Trump Administration did not follow the Administrative Procedure Act.

Dec. 2017: Federal District Courts in PA and CA courts issue preliminary injunctions blocking implementation of new regulations pending outcome of the litigation.

Jan.– Feb. 2018: Trump Administration appealed PA case to 3rd Circuit Court of Appeal; Trump Administration and the nonprofits granted party status (Little Sisters of the Poor & March for Life) appealed CA case to 9th Circuit Court of Appeal.

March 2018: Federal court in MA dismissed the case, ruling that MA lacks standing.

Four nonprofit advocacy groups and 8 states (CA, DE, VA, MD, NY, PA, MA, & WA) have filed lawsuits challenging the new regulations. The federal court in Massachusetts ruled that the state of Massachusetts lacks "standing" because the state cannot show that it will likely suffer future injury from the regulations and dismissed the case. In the cases lead by California and Pennsylvania, the federal courts have issued preliminary injunctions blocking the enforcement of these regulations pending the outcome of the litigation. These decisions have been appealed to the 3rd Circuit (PA) and 9th Circuit Courts of Appeal (CA, DE, VA, MD, NY).[5] The Supreme Court will likely ultimately hear these cases, which would mark the third round of litigation involving the contraceptive coverage provision reaching the high court.

Table 2: Summary of Changes in the Contraceptive Coverage Regulations for Objecting Entities

	Obama Administration Currently Effective	Trump Administration Issued October 6, 2017- Blocked by Courts December 2017

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What types of contraceptives must plans cover without cost-sharing?	• At least one of each of the 18 FDA approved contraceptive methods for women, as prescribed, along with counseling and related services must be covered without cost-sharing.	• No change.
Are any employers "exempt" from the contraceptive mandate?	• Religious institutions defined as "houses of worship." • Grandfathered plans. • No notice to employees is required. Women workers and female dependents must pay for their own contraceptives.	• Religious institutions defined as "houses of worship." • Grandfathered plans. • Nonprofit or for-profit employers (including publicly traded companies), insurers, or private colleges or universities that issue student insurance plans with a *religious* objection to contraceptive coverage. • Nonprofit or closely held for-profit employers, insurers, or private colleges or universities that issue student insurance plans with a *moral* objection to contraceptive coverage. • Notice is only required if the plan previously included contraceptive coverage. Women workers and female dependents must pay for their own contraceptives.
Who pays for contraceptive coverage for employees of organizations receiving an exemption?	• The cost of contraceptives is borne by women workers and female dependents. • There is no guarantee of contraceptive coverage for employees of an exempt organization. • The employer may choose to cover some methods, but has no obligation to cover all 18 FDA methods without cost-sharing.	• No change.
What type of employers may seek an "accommodation" to avoid paying for contraceptives in their plans?	• Closely held for-profit corporations and religiously affiliated nonprofits with religious objections to contraception can opt out of providing and paying for contraceptive coverage. • Notice must be provided to either their insurer, third party administrator, or the federal government of their objection. • Women workers and female dependents receive no cost contraceptive coverage.	• Any entity (except for houses of worship) eligible for an exemption can choose the accommodation instead of the exemption. • Notice must be provided to either their insurer, third party administrator, or the federal government of their objection. • Women workers and female dependents receive no cost contraceptive coverage.

Table 2: Summary of Changes in the Contraceptive Coverage Regulations for Objecting Entities		
	Obama Administration Currently Effective	**Trump Administration Issued October 6, 2017- Blocked by Courts December 2017**
Who pays for contraceptive coverage for employees of organizations receiving an accommodation?	• Insurance companies of firms obtaining an accommodation must pay for contraceptive coverage. • Third-party administrators (TPA) of self-funded health plans must cover the costs of contraceptives for employees. The costs of the benefit are offset by reductions in the fees the TPA pays to participate in the federal exchange.	• No change.
When can entities change from an accommodation to an exemption?	• N/A	• When an employer or private college or university currently using the accommodation opts for an exemption, the revocation of contraceptive coverage will be effective on the first day of the first plan year that begins 30 days after the date of the revocation or 60-day notice may be given in a summary of benefits statement. • The issuer or third party administrator is responsible for providing the notice to the beneficiaries.

How Does the ACA Contraceptive Coverage Requirement Interact with State Laws Regulating Fully-Insured Plans?

As discussed earlier, federal law applies to all plans while state law applies to only individual plans and fully-insured group plans. Currently, 30 states and DC require insurance plans to cover contraceptives, with a wide range of coverage and cost-sharing requirements, and exemptions among these mandates.[6] Eleven of these states and DC[7] have requirements that build on the federal requirement for no cost-sharing for all FDA approved contraceptive methods for women (CA, DE, IL, MA[8], MD, ME[9], NV, NY, OR[10], VT, WA[11]). Some of these states have gone beyond the ACA requirements mandating coverage of covering vasectomies or over-the-counter contraceptives. Most allow for fewer exemptions than currently permitted under federal law. In these states, employers with fully-insured plans must comply with the higher state standard.

While federal law is more expansive in benefit scope than most state laws, the Trump Administration regulations allow more types of employers to be exempt than is permitted by most state laws. Therefore, employers eligible for a federal exemption under the proposed regulations would still have to comply with their state law and provide the level of contraceptive coverage that is required in their state. In some states, these benefit requirements are more limited than those required by the ACA. Nineteen states with contraceptive coverage laws allow cost-sharing and may not require coverage of all FDA approved methods. In these states, some employers with religious or moral objections who offer their workers a fully-insured plan would need to comply with this narrower state benefit requirement, even though the employer would be eligible for an exemption under federal law. As a result, a woman's coverage will depend on her employer, the type of plan her employer has, and the state in which she resides.

To illustrate the complicated intersection of state and federal law, it is helpful to compare how the contraceptive coverage exemption to the ACA requirement would play out for objecting employers with fully-insured plans in two states: California, a state with an expansive contraceptive coverage law, and Iowa, a state with a minimal contraceptive equity law and no exemption (**Table 3).** If the Trump Administration's proposed regulations are implemented, all women enrolled in a fully-insured plan in California will continue to be entitled to coverage of all FDA approved methods without cost-sharing, unless their employer is a house of worship. Only the exemptions offered by the state would be available to objecting employers (with fully-insured plans). Because state law does not apply to self-insured plans, the federal rule would allow employers with those plans to qualify for the broader exemption.

Exemptions Allowed Under State Contraceptive Coverage Laws

- Eight States (CO, GA, IA MT, NH, VT, WA and WI) do not allow any exemptions.
- Only three states (IL, MO and WV) allow for an employer with a moral objection to be exempt.
- All the other states with a contraceptive coverage requirement have allowed exemptions for narrowly defined religious employers, typically houses of worship or employers affiliated with a religious group that primarily employ people of the same faith.

In contrast, Iowa's law only requires plans to include contraceptive drugs and devices if the plan provides benefits for other outpatient drugs and devices. Unlike the federal and California requirements, plans in Iowa may charge cost-sharing for contraceptives. However, the state law has no religious or moral exemptions. Therefore, a woman enrolled in a fully-insured employer plan that includes outpatient drugs and devices would be guaranteed contraceptive coverage regardless of her employer's objections to contraception, but could be charged cost-sharing.

Table 3: Comparison of Federal Law to Two States: Scope of Benefits and Exemptions

	Applies to	Scope of Benefits	Exemptions	Accommodation
ACA – Current regulations	All plans	Must cover all FDA approved contraceptives with no cost-sharing; must cover at least one contraceptive within each method category	House of worship	Closely held for-profit employers and religiously affiliated nonprofit employers
ACA – Proposed Trump Administration regulations	All plans	Must cover all FDA approved contraceptives with no cost-sharing; must cover at least one contraceptive within each method category	Any employer with a religious objection and any employer except publicly traded companies with a moral objection	Optional for any employer eligible for an exemption
California	Individual market plans, fully-insured group plans, Medicaid managed care plans	Must cover all FDA approved contraceptives with no cost-sharing; must cover each therapeutically unique contraceptive	House of worship	None
Iowa	Fully-insured group plans	Equity law – no prohibition on cost-sharing, tiering and formulary permitted	None	None

Conclusion

The outcome of the litigation challenging the Trump Administration's new regulations is not clear. Currently, the federal government is blocked from enforcing the new regulations. The new regulations would substantially expand the exemption to nonprofit and for-profit employers, as well as to private colleges or universities with religious or moral objections to contraceptive coverage. If the new regulations become effective, for women enrolled in fully-insured employer plans, the scope of their contraceptive benefits would depend on the coverage policies and exemptions established by state laws. Employers who qualify for the exemption under federal law would still need to comply with the state contraceptive requirement. Depending on the state law, employers may still have to provide no-cost coverage for some or all methods of contraception or a narrower set of contraceptive benefits. For women covered by fully-insured plans issued for employers with religious or moral exemptions, their choice of contraceptive methods would be determined by the scope of benefits and exemptions allowed by state law where they live.

Appendix Table 1: Exemptions Permitted Under State Laws for Employers with Objections to Contraceptive Coverage						
			Religious			Moral
State	Applies to Individual or Group Market Plans	No Exemption (8 states)	House of Worship	Religiously affiliated non-profit	Other	
Arizona[12]	Group		X		X	
Arkansas	Both		X	X		
California (no cost-sharing)	Both		X			
Colorado	Both	X				
Connecticut[13]	Both		X	X		
District of Columbia (no cost-sharing; effective April 17, 2018)	Both		X	^	^	
Delaware (no cost-sharing)	Group		X		X	
Georgia	Both	X				
Hawaii	Group		X	X		
Illinois (no cost-sharing)	Both		X	X	X†	X†
Iowa	Both	X				
Maine (no cost-sharing; effective January 2019)	Both		X	X		
Maryland (no cost-sharing)	Both		X		X	
Massachusetts (no cost-sharing; effective May 2018)	Both		X	X#		
Michigan	Group		X	X		
Missouri	Both		X	X	X¥	X¥
Montana	Group	X				
Nevada (no cost-sharing)	Both	X	X€			
New Hampshire[14]	Group	X				
New Jersey[15]	Both		X	X		
New Mexico[16]	Both		X		X	
New York (no cost-sharing)	Group		X	X‡		
North Carolina	Both		X	X		
Oregon (no cost-sharing; effective January 2019)	Both		X			
Rhode Island[17]	Both		X	X		
Texas	Both		X		X	
Vermont (no cost-sharing)	Both	X				

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State	Applies to Individual or Group Market Plans	No Exemption (8 states)	House of Worship	Religiously affiliated non-profit	Other	Moral
Washington **(no cost-sharing; effective January 2019)**	Both	X				
West Virginia	Both		X*	X	X	X
Wisconsin	Group	X				

NOTES: AZ defines religious employers non-profit organizations described in section 6033(a)(3)(A)(i) or (iii) **OR** an entity whose articles of incorporation clearly state that it is a religiously motivated organization and whose religious beliefs are central to the organizations operating principles.
AR, HI, & NC define religious employers as a nonprofit that is organized for religious purpose, primarily employs person who share the religious tenets of the entity, and serves primarily persons who share the religious tenets of the entity.
CA, NY, & OR define religious employers as non-profit organizations described in section 6033(a)(3)(A)(i) or (iii).
CT, MA, ME, NJ, RI define religious employers as “qualified church-controlled organizations” as defined in 26 USC 3121.
DE, MD, NM, & TX state statutes do not define what is considered a religious employer.
^Mirroring the current federal regulations, DC allows for religiously affiliated nonprofits and closely held for-profits to request an accommodation which requires the group health insurer issuer to provide separate payments for contraceptive products and services without imposing any fee or cost-sharing to the employer or policy holders.
† IL allows any employer with a moral or religious objection to have an exemption.
# MA only allows houses of worship and church controlled organizations to be eligible for an exemption.
¥MO allows any entity with a moral or religious objection to have an exemption.
€NV does not exempt any employers but allows religious insurers to exclude contraceptive coverage.
‡ NY requires the insurer to offer a rider to policy holders so that women will have contraceptive coverage
*WV defines religious an entity whose sincerely held religious beliefs or sincerely held moral convictions are central to the employer's operating principles, and the entity is an organization listed under 26 U.S.C. 501 (c)(3), 26 U.S.C. 3121, or listed in the Official Catholic Directory published by P.J. Kennedy and Sons

Endnotes

[1] U.S. Equal Employment Opportunity Commission. December 14, 2000. *Decision- Contraception*.

[2] DC's law becomes effective April 17, 2018.

[3] Kaiser Family Foundation and Health Research Educational Trust, 2017 Employer Health Benefits Survey.

[4] After the Supreme Court ruling in Burwell v. Hobby Lobby, the Obama administration issued new regulations, extending the accommodation to closely held for profit corporation. The regulations define closely held corporation as an entity that 1) is not a nonprofit, 2) has no publicly traded ownership interests, and 3) has more than 50 percent of the value of its ownership interest owned directly or indirectly by five or fewer individuals. 45 CFR §147.131 (b)(4)

[5] The Little Sisters of the Poor (LSOP), a religiously-affiliated nursing home that challenged the accommodation under the Obama Administration regulations, requested party status as an intervenor in both the PA and CA cases. The California Northern District Court granted the LSOP party status, the Pennsylvania Eastern District Court denied the LSOP request for party status. The LSOP have appealed the Pennsylvania Eastern District Court decision to deny them party status. The California Northern District Court also granted March for Life Education and Defense Fund, a nonprofit with moral objections to some contraceptive methods, party status. As parties in the case, the LSOP and March for Life Education and Defense Fund have appealed the California Northern District Court decision issuing the preliminary injunction.

[6] Kaiser Family Foundation analysis of state laws, and Insurance Coverage of Contraceptives, State Policies in Brief, as of March 1, 2018, Guttmacher Institute.

[7] DC's law becomes effective April 17, 2018.

[8] Massachusetts's law becomes effective May 2018.

[9] Maine's law becomes effective January 2019.

[10] Oregon's law becomes effective January 2019.

[11] Washington's law becomes effective January 2019.

[12] Ariz. Rev. Stat. Ann. § 20-826Y, Ariz. Rev. Stat. Ann. § 20-1057.08A(1)–(2), Ariz. Rev. Stat. Ann. § 20-1402L(1)–(2), Ariz. Rev. Stat. Ann. §20-1404U(1)–(2), Ariz. Rev. Stat. Ann.§ 20-2329A(1)–(2).

[13] Conn. Gen. Stat. Ann. § 38A-503e, Conn. Gen. Stat. Ann. § 38A-530e

[14] NH Rev. Stat. sec. 420-B:8-gg, NH Rev. Stat. sec. 415:18-I, NH Rev. Stat. sec. 420A:17-c

[15] NJ Stat. Ann. § 17:48-6ee, NJ Stat. Ann. § 17:48a-7bb, NJ Stat. Ann. § 17:48E-35.29, NJ Stat. Ann. § 17:48F-13.2, NJ Stat. Ann § 17B:26-2.1y, NJ Stat. Ann. § 17B:27-46.1ee, NJ Stat. Ann. § 17B:27A-7.12, NJ Stat. Ann. § 17B:27A-19.15, NJ Stat. Ann. § 26:2J-4.30, NJ Stat. Ann. § 52:14-17.29j

[16] NM Stat § 59A-22-42, NM Stat. Ann. § 59A-46-44

[17] RI Gen. Laws § 27-19-48(b)–(d), RI Gen. Laws § 27-18-57(b)–(e), RI Gen. Laws § 27-20-43(b)–(d), RI Gen. Laws § 27-41-59(b)–(d)