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The contraceptive mandate and religious rights

By John K. DiMugno, Esq., *Insurance Research Group*

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(March 29, 2019) - John K. DiMugno of Insurance Research Group discusses the contraceptive mandate under the Affordable Care Act, the response of the Obama and Trump administrations to the mandate, and recent court decisions blocking regulations that would have weakened the contraceptive mandate.

Regulations requiring health plans to cover contraceptives without cost sharing or deductibles under the Affordable Care Act's preventive care mandate have generated more litigation than any other aspect of the ACA.

The lawsuits do not question the authority of the federal government to include contraceptives as a mandatory preventive care benefit in at least some health plans. They instead challenge which health plans are entitled to an exemption from the contraceptive mandate on religious or moral grounds.

BACKGROUND

The controversy over contraceptives stems from a provision in the ACA known as the Women's Health Amendment, which includes within the definition of covered preventive services additional services for women as set forth in guidelines issued by the Health Resources and Services Administration.[1]

The HRSA determined, based on a recommendation of the Institute of Medicine, that contraceptive services are essential for women's health — a finding that opponents of the mandate did not contest.

The HRSA rule, therefore, includes contraceptives within the definition of preventive services for health plans beginning on or after Aug. 1, 2012.[2]

The rule defines contraceptives to include the full range of Food and Drug Administration approved contraceptives, including intrauterine devices and "emergency contraceptives" that are described as "abortifacients" because they cause the demise of a fertilized embryo.

The contraceptive coverage mandate, like other laws designed to promote general welfare, conflicts with the religious beliefs of some Americans, who believe that birth control is immoral, and a larger group of Americans who believe that the regulation's definition of covered contraceptives to include abortifacients violates the sanctity of human life.

The Obama administration attempted to accommodate these religious beliefs by making the contraceptive coverage mandate inapplicable to "religious employers." However, the administration's regulation defined "religious employer" narrowly to include only nonprofit houses of worship and religious orders.

The "religious employer" exemption did not apply to religious hospitals, universities or charities, let alone private employers that have strong religious objections to the use of birth control even though their businesses have no religious affiliation or purpose.

> The Trump Administration has proposed significant regulatory changes that could undermine the contraceptive mandate.

The failure of the original HRSA guidelines to excuse these employers from the contraceptive mandate led to accusations that the Obama administration was waging a "war on religion" and caused the administration to look for a way to accommodate "religious organizations." These are religiously affiliated, nonprofit employers, such as universities, hospitals and charities, that do not qualify as "religious employers." They carry out secular functions and employ individuals who do not share the beliefs of the organization.

The Obama administration's approach excused these "religious organizations" from paying for contraceptive coverage while requiring their insurers to cover contraceptives with the savings from not having to pay for unplanned pregnancies.

This approach allows a faith-based nonprofit to self-certify it qualifies as a religious organization. An organization that purchases health insurance can provide its certification to the insurer.

The insurer can then ensure that the coverage to which the organization objects is not included in the group policy issued to the organization. The insurer, however, would be required to enroll plan participants and beneficiaries in a separate health insurance policy covering no contraceptives, at no cost to the employer or the participants and beneficiaries.

The insurer would itself bear the cost of coverage, which should be offset by the savings from the improvements in women's health

and reduction in unwanted pregnancies resulting from the availability of contraceptive care.

BURWELL V. HOBBY LOBBY STORES INC.

The Obama-era religion exception to the contraceptive mandate did not exempt for-profit businesses whose owners object to contraceptives on religious and moral grounds. In *Burwell v. Hobby Lobby Stores Inc.*, 573 U.S. 682 (2014), Hobby Lobby Stores Inc. and Conestoga Wood Specialties Corp., two large, closely held secular, for-profit corporations, sued to prevent enforcement of the contraceptive mandate under the Religious Freedom Restoration Act of 1993.[3]

While organized for a secular purpose, both corporations are owned by people who have sincerely held religious objections to paying for contraceptives or abortifacients for their employees. Both corporations also employ thousands of people, many of whom do not share the owners' religious beliefs.

The principal purpose of RFRA was to restore the standard applied in *Sherbert v. Verner*, 374 U.S. 398 (1963), which treated religion as something the government must accommodate rather than merely as a right the government cannot attack.

Under *Sherbert* and RFRA, a neutral law of general applicability may violate a plaintiff's free exercise of religion rights if it indirectly interferes with the plaintiff's religious practices. RFRA forbids the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."

An exception exists if the government can "demonstrate that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.A. § 2000bb–1(a), (b).

The high court concluded that the contraceptive mandate placed a substantial burden on the plaintiffs' religious freedoms in light of the penalties each would face if it refused to comply. In finding that a less restrictive means existed for promoting the state's compelling interest in protecting the health of women, the court observed that the administration need merely extend to closely held for-profit corporations the same accommodation the agencies already extend to nonprofit religious organizations.

The companies would not have to pay for contraceptive coverage themselves. Instead, the coverage could be provided by their insurers or third-party administrators without cost to the employers.

OBAMA'S REGULATORY RESPONSE

The Obama administration responded to *Hobby Lobby by* "amend[ing] the definition of an eligible organization [for purposes of the accommodation] to include a closely held for-profit entity that has a religious objection to providing coverage for some or all of the contraceptive services otherwise required to be covered."[4]

The administration's revised regulation also provided "an alternative process" for eligible organizations to self-certify.

TRUMP WEAKENS THE MANDATE

In 2017 the Trump administration proposed significant regulatory changes to the framework for exempting health plans from the contraceptive mandate. The regulations would dramatically expand the religious exemption and create a new moral exemption[5] that could undermine the mandate.

The religious exemption broadens the scope of the Obama-era religious exemption to encompass any nonprofit or for-profit entity, whether closely held or publicly traded.[6]

The moral exemption makes the exemption available to "additional entities," including for-profit entities that are not publicly traded, that object based on "sincerely held moral convictions." The objection does not need to be based on religious grounds.[7]

Finally, the regulations make the self-certification process optional.[8] Entities that stop providing contraceptive care are no longer required "to file notices or certifications of their exemption."[9]

COURT BLOCKS REGULATIONS

The regulations were scheduled to go into effect January [14]. Prior to that date, Democratic attorneys general filed federal lawsuits in California and Pennsylvania to block enforcement of the Trump administration's revisions.

Finding a sufficiently high probability that the states will prevail on the merits, Judge Haywood Gilliam of the Northern District of California[10] and Judge Wendy Beetlestone of the Eastern District of Pennsylvania[11] issued preliminary injunctions.

Judge Gilliam's injunction applies nationwide, while Judge Beetlestone's injunction applies only in the states that are parties to the lawsuit before her. In the meantime, the Obama-era religious exemption and accommodation remain in effect.

RELIGIOUS EXCEPTION IS INCONSISTENT WITH APA

The plaintiff states argued that the Trump religious mandate "cannot be reconciled with the text and purpose of the ACA, which seeks to promote access to women's healthcare, not limit it." Both Judge Gilliam and Judge Beetlestone agreed.

To explain why, both judges addressed three of the federal government's contentions:

- The contraceptive mandate is not actually a "mandate" at all, but rather a policy determination wholly subject to the agencies' discretion.
- The changes codified in the religious exemption were mandated by RFRA
- Even if the agencies were not required under RFRA to adopt the religious exemption, they nonetheless had discretion to do so.

CONTRACEPTIVE MANDATE IS REQUIRED BY STATUTE

Judge Gilliam held that the federal government does not have free reign to exempt anyone it wishes from the ACA's contraceptive mandate. The ACA's use of the phrase "as provided for in comprehensive guidelines" does not, in Judge Gilliam's view, confer unbridled discretion on federal agencies to exempt anyone from providing coverage.

He said that, to his knowledge, every court decision to address the issue of contraceptive coverage presumes that at least some insurers and plans must cover contraceptives without cost-sharing. The federal government admitted as much in its position before the Supreme Court in *Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

Judge Beetlestone elaborated on Judge Gilliam's textual analysis of the ACA. She noted that Congress has already answered who must provide preventive care coverage: any "group health plan" or "health insurance issuer offering group or individual insurance coverage." "To permit the agencies to disrupt this mandate," she observed, "contradicts the plain command of the text."[12]

She reasoned that the defendants read too much into the phrase "as provided for in comprehensive guidelines supported by [HRSA]." The defendants focused on the words "comprehensive guidelines" in arguing that HRSA had authority to create broad exemptions to the contraceptive mandate.

Disagreeing, Judge Beetlestone observed that "the delicate term support undermines this contention: it strains credulity to say that by granting HRSA the authority to 'support' guidelines on 'preventive care,' Congress necessarily delegated to HRSA the authority to subvert the 'preventive care' coverage mandate through the blanket exemptions set out in the final rules."[13]

Finally, Judge Beetlestone noted that the Women's Health Amendment created a single exemption from the ACA's statutory mandate to cover women's preventive care, for "grandfathered health plans."[14] The proper inference to draw from Congress' creation of a single exemption, she reasoned, is that Congress did not intend for HRSA to create additional exemptions.

RFRA DOES NOT REQUIRE A RELIGIOUS EXEMPTION

To establish a cause of action under RFRA, a plaintiff must prove that a government action substantially burdens the exercise of religion. The federal government and intervenors argued that the religious exemption is necessary because the Obama-era accommodation to the contraceptive mandate substantially burdens the exercise of religion.

They asserted that an employer's act of notifying the government or an insurer that it is opting out of the obligation to provide coverage for contraceptive services makes it complicit in the provision of products incompatible with its religious beliefs.

> Regulatory changes set to go into effect January 14 were blocked by two federal judges.

Judges Beetlestone and Gilliam disagreed, joining nine other federal courts of appeal to rule on the question. Treating the question of whether a law substantially burdens the exercise of religion as a question of law for the court, the courts held that the mere act of registering a religious objection does not burden the exercise of religion.

THE ESTABLISHMENT CLAUSE

Judge Gilliam addressed an issue that no other court has addressed in the context of the ACA: Does the establishment clause of the First Amendment of the U.S. Constitution limit the permissible scope of a religion exception to the contraceptive mandate?

While withholding ultimate judgment on whether the Trump administration's religion exception violates the establishment clause rights of women who are deprived of coverage for contraceptives, he found sufficiently "serious questions" regarding the issue to support issuance of a preliminary injunction.

He pointed to language in U.S. Supreme Court decisions recognizing that "at some point, an accommodation [to protect the rights of some groups to practice their religion] may devolve into 'an unlawful fostering of religion.'"[15]

In the end, Judge Gilliam characterized the "intersection of RFRA, free exercise, and establishment clause jurisprudence" as "complex" and acknowledged "substantial debate" about how to assess and balance the free exercise rights of people seeking an accommodation from a federal mandate against the establishment clause rights of people seeking the benefits of the mandate.

In refusing to let the religious exemption go into effect, Judge Gilliam stressed the need for a full hearing on the merits regarding whether elevating an employer's religious rights

over its female employees' statutory right to contraceptive benefits without imposing any obligation on the employer to notify its female employees constitutes an establishment of religion within the meaning of the First Amendment.

This was particularly true, he observed, given the Trump administration's "complete reversal on the key question of whether the government has a compelling interest in providing seamless and cost-free contraceptive coverage to women under the ACA."[16]

THE MORAL EXEMPTION LIKELY VIOLATES THE ACA

The complexities plaguing the analysis of the religious exemption do not apply to the moral exemption. Congress mandated coverage for contraceptives and rejected a "conscience amendment" to the Women's Health Amendment.

Although Congress was free to allow conscientious objectors to opt out of the mandate, it did not do so. Both courts therefore held that plaintiffs are likely to prevail on their claim that the moral exemption violates the ACA.

NOTES

[1] 42 U.S.C.A. § 300gg-13(a)(4).

[2] 77 Fed. Reg. 8725.

[3] 42 U.S.C.A. § 2000bb–1 (2006).

[4] *Coverage of Certain Preventive Services Under the Affordable Care Act*, 79 Fed. Reg. 51,118, 51,121 (Aug. 27, 2014).

[5] 83 Fed. Reg. 57,536, 57,536 (Nov. 15, 2018); 83 Fed. Reg. 57,592, 57,592 (Nov. 15, 2018).

[6] 82 Fed. Reg. at 47,810.

[7] 82 Fed. Reg. at 47,862.

[8] 82 Fed. Reg at 47,808; 82 Fed. Reg. at 47,850.

[9] 82 Fed. Reg. at 47,808; 82 Fed. Reg. at 47,850.

[10] *California v. Health & Human Servs.*, 351 F. Supp. 3d 1267(N.D. Cal. 2019).

[11] *Pennsylvania v. Trump*, 351 F. Supp. 3d 791 (E.D. Pa. 2019).

[12] *Id.* at 819.

[13] *Id.*

[14] 42 U.S.C.A. § 18011(e)(3).

[15] *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) (quoting *Hobbie v. Unemployment App. Comm'n of Fla.*, 480 U.S. 136, 145 (1987)).

[16] California, 351 F. Supp. 3d at 1295.

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ABOUT THE AUTHOR

John K. DiMugno of Insurance Research Group in Cameron, California, has testified as an expert witness on a wide variety of insurance coverage and bad-faith issues for both policyholders and insurance companies. He is the author of numerous articles and is a co-author of three insurance law treatises published by Thomson Reuters. For a complete list of his publications and presentations, visit dimugnolaw.com.