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Proposed Rule on Coverage of Contraceptives Perpetuates Discrimination
April 8, 2013

*Comments on Notice of Proposed Rulemaking (NPRM) on Coverage of Certain Preventive Benefits Under the Affordable Care Act, **File code CMS-9968-P**, published in the Federal Register on Feb. 6, 2013 (Vol. 76, No. 25), issued by the Department of the Treasury, Department of Labor, and Department of Health and Human Services.*

The Affordable Care Act requires insurance plans to cover preventive health care services including contraception without the additional expense of out-of-pocket co-payments and deductibles. This builds on the recommendations of the scientists and other experts at the independent Institute of Medicine to the Department of Health and Human Services (HHS), designating contraception as a preventive service that helps keep women healthy and should be covered without a co-pay or deductible. In fact, nearly 99% of all women have relied on contraception at some point in their lives, but more than half of all women between the ages of 18 and 34 have struggled to afford it. Inadequate access to contraception is a key reason why 50% of pregnancies in the U.S. are unintended.

The regulation proposed in this NPRM would grant a wide range of religiously-affiliated employers the right to deny their employees coverage for contraception on the same terms as any other preventive health care benefit. The NPRM thus codifies special treatment for opponents of contraception, while discriminating against women.

The Departments issuing the NPRM define two types of religious employers, and request comments on several issues. Nonprofit churches would be **exempt** from covering contraception. Other religiously affiliated employers would enjoy an **accommodation**, requiring them to notify employees about individual coverage for contraception without co-payments and deductibles, but the employer would be shielded from paying directly for that particular benefit.

The Departments ask whether the proposed definitions unduly expand the universe of exempt employers, whether the proposed procedures are the best way to accomplish the goals of providing coverage and accommodating the employers' views, and whether the proposed accommodations are as effective as possible at assuring that employees nevertheless receive coverage. But there are other essential considerations.

It would allow women's choices to be governed by their bosses' beliefs about sex and reproduction.

Equally importantly, these proposed concessions stigmatize birth control, discouraging access.

This latest proposed rule would leave at least 1.1 million employees at Catholic hospitals, charities, primary schools and secondary schools, along with more than 930,000 students at Catholic universities and colleges, wondering whether they will receive the same access to contraception as everyone else.

In opposition to the exemption

The NPRM elaborates on the Administration's proposal of 2012 to entirely **exempt** churches, synagogues and mosques from the requirement to cover contraception for their employees. However, it retreats from the definitions proposed in 2012, which asserted, in part, that employees of these institutions could be presumed to share the same faith as their religious employer, and its tenets. By the accounts of the institutions themselves, as reported in the Federal Register (p. 8459), they "may not know the religious belief of those they serve or hire, and ... employment discrimination laws may prohibit them from inquiring about the religious beliefs of their employees." As already noted, abstinence from contraception is neither a shared belief nor a shared practice the vast majority of Americans regardless of religious affiliation.

The Departments ask whether the remaining definition, referring to the tax code, unduly expands the universe of employers who would have the right to an exemption. It might.

More pertinent, the new definition makes it crystal clear that the determination to exempt religious employers from the coverage requirement violates their employees' autonomy and right to equal treatment, and privileges the discriminatory, minority views of certain religious employers.

Religious employers should not enjoy the legal right to deny or interfere with coverage for contraception. To the extent that they do now, it is time to stop providing some with the privilege to deny others their rights.

In opposition to the accommodation

The NPRM also defines another category of religiously-affiliated institutions such as schools and hospitals, which are to be offered an **accommodation** requiring their employees to receive contraceptive coverage, while shielding the employers from the allegedly contaminating activities of financial transactions associated with effectuating such coverage.

Extending legal protection for segregating contraception coverage puts employees' rights at the mercy of their employers' discriminatory views. Every person who depends on health insurance through employment has the right to personal autonomy, and to equal treatment under the law. The financial relationship between a person and her employer should not compromise her rights or autonomy. The fact that religious institutions, when acting as employers, distribute funds earned by employees to pay for health benefits does not grant them the power to impose their doctrinal beliefs upon those employees, or to put those employees at risk for less effective coverage. In fact. the funds were earned by and belong the employees, who should direct their disposition.

Requiring employers to notify employees about their benefits, but not to transfer funds to pay for those benefits, is a complication without a fundamental purpose. The employer would be required to cooperate with actions to inform employees that the coverage is available. The arrangement would have to involve the employer, though to a minor extent, while placing a potentially cumbersome barrier to employees receiving the benefit of coverage.

Additional regulations will be needed to determine how affected employees can gain access to individual contraception coverage through a convoluted system relying on insurers and other third parties. Inevitably, some women will lose out.

Opposition by religious employers to covering contraception is discriminatory and violates their employees' 14th Amendment rights to personhood and autonomy.

Opposition to contraception is discriminatory, and contradicts public health principles regarding sexual health. Imposing that opposition on employees, particularly on those who do not share that view, abridges their rights to autonomy. It is the wrong choice.

For these reasons, legal precedents by and large do not support exemptions from contraceptive coverage for religious employers. However, any legal precedents that may suggest separate treatment for the financial assets of religious institutions should not be perpetuated.

Polling by the National Latina Institute for Reproductive Health found that women and men of all races and religions spoke out overwhelmingly in the recent election, through votes and in opinion polls, rejecting attacks on reproductive health care.

On Jan. 21, 2013, President Obama in his inaugural address paid respects to Seneca Falls, Selma, and Stonewall, key fights for the rights of women, African Americans, and LGBTQI people. This recognition should be backed by policies that respect all of our rights.

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