

Analysis of the Obama Administration's Updated Contraception Rule

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It is most unfortunate that a regulation intended to ensure privately-insured Americans access to preventive care without the burden of cost sharing has unleashed a political maelstrom, including claims that the Obama administration is engaged in a “war on religion.” The regulation, published on February 15, 2012 implements section 2713 of the Public Health Services Act. Section 2713, enacted through the Affordable Care Act, requires group health plans and health insurers to cover various preventive services (such as vaccinations and screening and counseling services) and to do so without cost sharing. Congress adopted this provision based on evidence that access to preventive services without cost sharing (copayments, coinsurance, or deductibles) results in greater use of those services. This in turn results in better health. Access also saves money because avoidable conditions are prevented and treatable conditions are detected earlier.

Section 2713 provides specifically that insurers must cover women’s “preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration . . . “.

Among the preventive services recommended by HRSA are:

All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. <http://www.hrsa.gov/womensguidelines/>

HRSA recommended that contraceptive services be covered on the basis of a consensus report by the Institute of Medicine <http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx> finding health benefits for both women and babies in planned pregnancies. All group plans and issuers that do not have grandfathered status must implement this coverage for plan or policy years beginning after August 1, 2012.

Insurance coverage of contraceptives is common in the United States. Twenty-eight states have laws requiring health insurers to cover contraceptives. Studies cited in the preamble to the regulation found that over 80 percent of insurers and large employers already cover contraceptives. Several court decisions have held that an employer’s failure to provide contraceptive coverage is illegal sex discrimination.

Nevertheless, some religious groups, notably the Catholic Church, teach that contraception is wrong. These religious groups employ thousands of Americans and provide them with employee health benefits. Thus the agencies implementing the ACA attempted to reach an accommodation between the public health objective of increasing access to preventive services and the goal of protecting religious freedom.

The first response of the administration to this issue was to exclude “religious employers” from the contraceptive coverage requirement, defining the term to mean churches and their integrated auxiliaries, conventions, and associations and religious orders that have inculcation of religious values as their purpose and primarily serve and employ persons who share their religious tenets. Churches and other organizations that fit in this category do not have to provide coverage for contraception at all.

This exception did not, however, cover religious hospitals, universities, or charities, some of which objected to contraceptive coverage. But these institutions often employ women who do not hold to the religious beliefs (or follow all of the teachings of) their employer, and excusing all of these employers from compliance would deprive these employees of access to contraceptive services.

The Administration, therefore, created a second exception through guidance. This exception establishes a safe harbor for one year (until August 1, 2013) from enforcement of the regulations to protect non-profit organizations with a religious objection to covering contraceptive services. During this moratorium, the agencies will propose a permanent rule that will require insurers to offer insurance to these religious employers without contraceptive coverage. But the insurers will have to offer free contraceptive coverage without cost-sharing for any employees of these religious employers who want it. Insurers will be able to offer contraceptive coverage for free because, according to studies cited by the government, contraceptives cost substantially less than pregnancies. The free coverage is not, therefore, an “accounting gimmick” under which employers in fact pay for coverage against their beliefs, but coverage will in fact be paid for by the insurers out of savings that they realize by offering contraceptive coverage. This second exception leaves outstanding only the issue of coverage of contraceptives by self-insured religious employers, which is still under consideration.

This rule is not a “war on religion,” but is rather an attempt to accommodate a serious public health need and a sincerely held religious and moral conviction. The regulation does not require anyone to use contraception nor does it require any religious organization that objects to contraception to pay for it. It neither prohibits nor requires a religious belief or practice.

Accommodation of religious belief and “neutral laws of general applicability” is not an easy task. I am a religious conscientious objector and object to the requirement that I must pay taxes to support war. Yet I do not consider the federal government to be at war with religion, even though it makes no accommodation for my religious beliefs, much less the accommodation that it affords those who object to contraception.

For two centuries that United States has been conducting an experiment virtually unprecedented in human history—a government that neither establishes nor forbids any religious beliefs. Sometimes, as with respect to laws prohibiting polygamy in the nineteenth century or my objection to war taxes, it has offered no quarter to minority beliefs. In other situations, as with the implementing of the preventive services requirement, the government has gone a great distance to accommodate minority beliefs,

while at the same time trying to accommodate the needs of the majority. As a member of a religious group that has always been in the minority, and is likely to stay there, I rejoice in this ongoing experiment. President Obama, himself a professed Christian, is not at war with religion, his administration is rather trying to find a peaceful solution to one of the many conflicts over religious values that characterize our diverse nation.