

CONTRACEPTIVE COVERAGE: A MULTI-TRACK APPROACH

Despite the fact that access to contraception is critical to preventing unintended pregnancies and enhancing women's health, health insurance plans continue to exclude coverage of contraceptive drugs and devices even while they include coverage of other prescription drugs and devices.

Advocates for women's health and equity are pursuing a multi-track approach to ensure that women receive access to needed contraceptives. At the federal level, this effort includes enforcing Title VII of the Civil Rights Act of 1964¹ as well as seeking passage of a new federal law requiring that insurance plans covering prescription drugs include coverage of FDA-approved prescription contraceptives. At the state level, efforts include both legislative and administrative approaches to gaining contraceptive coverage. These approaches are complementary, and all are necessary.

Federal and State Approaches to Contraceptive Coverage

Contraceptive Coverage for Federal Employees. The federal government is one of the largest employers in the nation, with 1.2 million women enrolled in its health benefits program.² Congress has enacted legislation requiring all health insurance plans available to federal employees to include coverage of prescription contraceptives if other prescription drugs are covered.³ This success set a standard for other health insurance plans, and signaled to political leaders that contraceptive coverage is a basic, necessary health care provision demanded by American women.

Title VII of the Civil Rights Act. Title VII of the Civil Rights Act of 1964, and the Pregnancy Discrimination Act of 1978 that Title VII incorporates, prohibit sex discrimination (including pregnancy discrimination) by employers with 15 or more employees, including in the health insurance benefits these employers provide to their employees. Employers that provide health insurance that covers prescription drugs and devices but excludes prescription contraceptives are in violation of Title VII's prohibition against sex discrimination. In December 2000, the Equal Employment Opportunity Commission (EEOC), which enforces Title VII, issued a ruling confirming that such exclusion of contraceptive coverage is a Title VII violation.⁴ On June 12, 2001, in *Erickson v. Bartell Drug Co.*, a federal court for the first time ruled that an employer offering otherwise comprehensive health insurance to its employees, but failing to cover prescription contraceptives, was violating Title VII.⁵ Recently, under the particular factual circumstances in the case and in our view in error, a divided panel of the Eighth Circuit Court of Appeals decided otherwise, implicating the Title VII right to contraceptive coverage for

individuals in those states.⁶

Federal Legislation Mandating Contraceptive Coverage. A proposed federal law, called the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), which would require all private insurance plans that provide prescription drug coverage to include prescription contraceptive coverage, was first introduced in Congress in 1997. Since then, the bill has been introduced numerous times, most recently in 2009 as part of the Prevention First Act (S. 21 and H.R. 463), which contains a number of measures designed to reduce unintended pregnancy. Although federal contraceptive coverage legislation has received broad, bipartisan support, a bill has yet to pass.

State Legislative and Administrative Approaches. Twenty-five states have enacted legislation specifically requiring private insurance coverage of contraceptives. The states are: Arizona,⁷ Arkansas,⁸ California,⁹ Connecticut,¹⁰ Delaware,¹¹ Georgia,¹² Hawaii,¹³ Illinois,¹⁴ Iowa,¹⁵ Maine,¹⁶ Maryland,¹⁷ Massachusetts,¹⁸ Missouri,¹⁹ Nevada,²⁰ New Hampshire,²¹ New Jersey,²² New Mexico,²³ New York,²⁴ North Carolina,²⁵ Oregon,²⁶ Rhode Island,²⁷ Vermont,²⁸ Washington,²⁹ Wisconsin,³⁰ and West Virginia.³¹ Contraceptive coverage legislation also has been introduced in other states.³² State advocates also are working with the offices of state Insurance Commissioners to require private insurers to cover prescription contraceptives if they cover other prescription medicines. In addition, many states have state laws against sex discrimination in employment, which should be interpreted, just as Title VII is interpreted by the EEOC, to prohibit employers from excluding prescription contraceptives from their employee health benefits if other prescription drugs are included. This has already happened in three states: Michigan, Montana, and Wisconsin (before Wisconsin enacted contraceptive coverage legislation in 2009).³³

Why All of These Approaches Are Necessary

The EEOC's Ruling and Litigation Under Title VII Will Help Ensure Compliance with Existing Federal Anti-Discrimination Law. The rulings by the EEOC and a federal court confirming that the exclusion of contraceptive coverage is a violation of Title VII, the federal law prohibiting sex discrimination in employment, should prompt many employers to add contraceptive coverage to their employee health benefits. Employers who are not in compliance with Title VII risk private lawsuits like the *Erickson* case as well as EEOC enforcement action. Employers found in violation of Title VII face liability for compensatory and punitive damages.

Enactment of EPICC and Similar State Laws Is Needed to Reach Millions of Additional Women. An estimated 10.3 million Americans obtain health insurance from private insurance other than employer-provided plans.³⁴ This includes people who are: self-employed; employed by employers who offer no health insurance; part-time, temporary, and contract workers; early retirees too young for Medicare; and unemployed or disabled but not eligible for public insurance. Women are disproportionately represented in several of these categories, such as

part-time, temporary, and contract workers. Moreover, those who do receive health insurance through their employment are not all covered by Title VII of the Civil Rights Act; Title VII applies only to employers with 15 or more employees – less than a fifth of all U.S. employers – and some 14 million workers are employed by entities that fall beneath this threshold.³⁵ Requiring contraceptive coverage through enforcement of Title VII thus will not benefit these people. EPICC and similar state laws, on the other hand, will apply to all private insurance plans and require them to provide equitable contraceptive coverage.

Only EPICC and State Contraceptive Coverage Laws Will Ensure That Contraceptive Coverage is Offered By Insurance Providers. Title VII and the similar state laws against sex discrimination in employment apply only to employers; they do not cover insurance providers. Without laws requiring all insurance plans to include contraceptive coverage, employers could have difficulty finding insurance plans that offer this coverage. The enactment of EPICC and similar laws at the state level will ensure that contraceptive coverage will be included in all insurance plans that cover other prescription drugs.

These Approaches Reinforce One Another. Waging a multi-pronged attack on the exclusion of contraceptives from health insurance coverage underscores the importance of this issue to women and all those who care about equity in women's health care. These different approaches reinforce the message that equitable contraceptive coverage is a common sense, necessary policy, and thereby add to our momentum. Victories on any of these fronts – like the victory in assuring contraceptive coverage for federal employees and the EEOC and court rulings under Title VII – bring us closer to our goal.

¹ Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), 42 U.S.C. § 2000e *et seq.*

² Alan Guttmacher Institute, *President Bush Sends His Proposed FY 2002 Budget to Congress*, GUTTMACHER REPORT ON PUBLIC POLICY, Vol. 4, No. 2 (Apr. 2001).

³ Since 1999, Congress has required contraceptive coverage in appropriations bills funding the Federal Employee Health Benefit Plan. *See, e.g.*, Omnibus Appropriations Act, 2009, Pub. L. No. 111-9, § 728, 123 Stat. 524, 687-88 (2009); Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 656, 112 Stat. 2681, 2681-530 (1999). P.L. 106-58, 113 Stat. 430 (Sept. 29, 1999).

⁴ U.S. Equal Employment Opportunity Commission Decision (Dec. 14, 2000), *available at* <http://www.eeoc.gov/docs/decision-contraception.html>.

⁵ *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

⁶ *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007). The Eighth Circuit states are Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

⁷ ARIZ. REV. STAT. ANN. § 20-826.

⁸ ARK. CODE ANN. § 23-79-1103(a).

⁹ CAL. INS. CODE § 10123.196.

¹⁰ CONN. GEN. STAT. ANN. § 38a-503e.

¹¹ DEL. CODE ANN. tit. 18 § 3559.

¹² GA. CODE ANN. § 33-24-59.6.

¹³ HAW. REV. STAT. ANN. § 431:10A-116.6; § 431:10A-116.7; § 432:1-604.5.

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- ¹⁴ 215 ILL. COMP. STAT. ANN. 5/356z.4.
- ¹⁵ IOWA CODE ANN. § 514C.19.
- ¹⁶ ME. REV. STAT. ANN. tit. 24 § 2332-J; 24-A M.R.S.A. § 2756; 24-A M.R.S.A. § 2847-G; 24-A M.R.S.A. § 4247.
- ¹⁷ MD. CODE ANN., INS. § 15-826.
- ¹⁸ MASS. GEN. LAWS ANN. 175 § 47W; 176A § 8W; 176B § 4W; 176G § 4O.
- ¹⁹ MO. ANN. STAT. § 376.1199.
- ²⁰ NEV. REV. STAT. ANN. § 689A.0415.
- ²¹ N.H. REV. STAT. ANN. § 415:18-i; § 420-A:17-c; § 420-B:8-gg.
- ²² N.J. STAT. ANN. § 17:48-6ee(1).
- ²³ N.M. STAT. ANN. § 59A-22-42; § 59A-46-44.
- ²⁴ N.Y. INS. § 3221(1)(16).
- ²⁵ N.C. GEN. STAT. ANN. § 58-3-178; § 58-50-155.
- ²⁶ OR. REV. STAT. § 743A.066.
- ²⁷ R.I. GEN. LAWS § 27-18-57; § 27-19-48; § 27-20-43; § 27-41-59.
- ²⁸ VT. STAT. ANN. tit. 8 § 4099c.
- ²⁹ WASH. ADMIN. CODE § 284-43-822.
- ³⁰ 2009 Wis. Act 28, to be codified at WIS. STAT. ANN. § 632.895(17).
- ³¹ W. VA. CODE ANN. § 33-16E-4(a)-(b).
- ³² Guttmacher Institute, Monthly State Updates: Major Developments in 2009 (as of June 30, 2009), <http://www.guttmacher.org/statecenter/updates/index.html>.
- ³³ In Montana and Wisconsin, the state attorneys general interpreted their state laws to require contraceptive coverage. *See* Montana Attorney General Opinion Vol. No. 51, Op. No. 16, *available at* <http://www.doj.mt.gov/resources/opinions2006/51-016.pdf>; Letter from Wisconsin Attorney General Peggy A. Lautenschlager to State Senator Gwendolynne Moore, Oct. 17, 2003 (on file with the National Women's Law Center). In Michigan, the ruling came from the Michigan Civil Rights Commission, before the state enacted contraceptive coverage legislation in 2009. Michigan Civil Rights Commission, Declaratory Ruling on Contraceptive Equity, Aug. 21, 2006, *available at* http://www.michigan.gov/documents/Declaratory_Ruling_7-26-06_169371_7.pdf.
- ³⁴ Elizabeth M. Patchias & Judy Waxman, National Women's Law Center, Women and Health Coverage: The Affordability Gap, Commonwealth Fund Issue Brief, Apr. 2007, *available at* <http://www.nwlc.org/pdf/NWLCCCommonwealthHealthInsuranceIssueBrief2007.pdf>.
- ³⁵ U.S. Equal Employment Opportunity Commission unpublished data, 1990. Estimates based on the enterprise statistics prepared by the Economic Census and Surveys Division, Bureau of the Census, and employment data from the Bureau of Labor Statistics.