REPRODUCTIVE RIGHTS & HEALTH

THE AFFORDABLE CARE ACT'S BIRTH CONTROL BENEFIT: PROGRESS ON IMPLEMENTATION AND CONTINUING CHALLENGES

Introduction

Birth control use is nearly universal among women of reproductive age in the United States and is a key part of preventive health care for women.[1] Access to birth control provides health benefits for women and children, improves women's ability to control whether and when they have a child, and fosters women's ability to participate in education and the workforce on an equal footing with men.[2] Yet, the cost of birth control – particularly the higher up-front costs of the more effective, longer-acting birth control methods – is often a barrier to women accessing the birth control they need.[3]

The federal health care law, the Patient Protection and Affordable Care Act (ACA) requires insurance plans to cover all Food and Drug Administration (FDA)-approved methods of birth control for women without out-of-pocket costs (the "birth control benefit"). This was included in the law to remove the cost barriers that can prevent women from accessing the care that they need, and has been a great success. Since the ACA's birth control benefit went into effect in 2012, over 55 million women now have coverage of birth control and other preventive services without out-of-pocket costs.[4] One analysis found that the ACA's birth control benefit saved women $1.4 billion on birth control pills alone in 2013.[5] As of spring 2014, two-thirds of women using oral birth control and nearly three quarters of women using the vaginal contraceptive ring were no longer paying out-of-pocket for these methods.[6] An additional study found that 87% of insured women would have no out-of-pocket costs for coverage of a hormonal intrauterine device (IUD).[7] Furthermore, initial studies have indicated that since the birth control benefit went into effect, more women are using their insurance coverage when obtaining birth control.[8]

Implementation of the birth control benefit has caused significant improvements in birth control coverage and access for many women, however there have been reports of problems with proper implementation of the birth control benefit. Several reports released in spring 2015, including the National Women's Law Center's (the Law Center) *State of Birth Control Coverage: Health Plan Violations of the Affordable Care Act*, indicated some problems with compliance.[9] In part in response to the reports of violations of the birth control benefit, the federal government issued guidance in May 2015 clarifying details about the benefit to ensure that plans and issuers provide the coverage required by the law.[10]

This guidance has been instrumental in ensuring compliance with the law. Since its release, many plans have updated their coverage to bring it into compliance with the law. But reports of violations of the birth control benefit continue, which require correction by insurance companies and further attention from the federal government and states that enforce the law.[11] To that end, this report provides additional recommended actions that insurance companies, the federal government, and state regulators can take to ensure women get the birth control coverage guaranteed to them by the ACA.

The Affordable Care Act's Birth Control Benefit and Implementing Regulations and Guidance

Under § 1001 of the ACA, which amends § 2713 of the Public Health Service Act, all non-grandfathered group health plans and health insurance issuers offering group or individual coverage must provide coverage of birth control with no cost-sharing, such as deductibles, co-payments, and co-insurance.[12] The requirement also applies to populations newly covered through the Medicaid expansion.[13] Plans cannot limit this coverage based on an individual's sex assigned at birth, gender identity, or gender recorded by the plan.[14]

This provision requires all new plans to cover, without cost-sharing, "all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[15] Plans may use reasonable medical management techniques, like charging out-of-pocket costs for a brand name drug while covering a generic without costs, within a birth control method category. However, plans must have an exceptions process in place to waive cost-sharing if the specific birth control product prescribed for a woman typically has cost-sharing under her plan.[16]

The CoverHer Hotline

The Law Center has been collecting stories from women since the ACA's birth control benefit first went into effect in August 2012 through its CoverHer hotline and associated website (www.coverher.org). Through CoverHer, the Law Center assists women who are having trouble securing coverage for birth control without out-of-pocket costs. CoverHer provides resources that help women understand the birth control coverage requirement, as well as information and resources to assist women in filing appeals with their insurance company and filing complaints with the government agency that regulates their plan. To date, nearly 5,300 individuals have contacted CoverHer, and over 36,000 individuals have accessed the related online resources.

All hotline calls are confidential. Not every person who contacts the hotline discloses their location. Records for specific women's experiences referenced in this document are on file with the Law Center.

MAY 2015 CLARIFYING GUIDANCE

The federal government issued guidance in May 2015 clarifying details about the benefit to ensure that plans and issuers provide the coverage as required by the law. The May 2015 guidance made clear that to cover all FDA-approved birth control methods, plans must cover at least one form of birth control in each of the 18 birth control methods for women identified by the FDA's Office of Women's Health Birth Control Guide.[17] Plans cannot exclude methods entirely or only cover generic birth control. Additionally, the guidance clarified that plans must cover without cost-sharing: clinical services needed in relation to a birth control method;[18] follow-up services and services to manage side effects from the birth control; counseling and education; and, removal of birth control devices.[19]

The May 2015 guidance also made clear that if a plan uses medical management techniques within a birth control method, the plan must have an exceptions process in place to waive cost-sharing if the specific birth control product prescribed for a woman typically has cost-sharing under her plan.[20] As part of this cost-sharing exceptions process, plans must defer to the provider's determination that a specific birth control product is right for a woman and that the provider's determination can include factors such as severity of side effects, differences in permanence and reversibility of the birth control, and ability to adhere to appropriate use of the birth control.[21] Additionally, the May 2015 guidance clarified that plans must provide coverage of preventive services, such as birth control, for all enrollees, including dependent children when the plan offers coverage to those dependents.[22] Insurance companies were given until the first health plan year after July 10, 2015 to bring their plans into compliance.

The May 2015 Guidance Prompted Many Insurance Companies to Come into Compliance with the Birth Control Benefit

The May 2015 guidance had a major impact on insurance companies' coverage of birth control. In the year since the State of Birth Control Coverage report and the critical clarifications in the May 2015 guidance, the Law Center has received many reports from women who are now getting coverage of birth control methods that previously had not been covered. Two of the major noncompliance trends highlighted in the State of Birth Control Coverage report are now much less commonly reported to the Law Center: plans excluding a specific birth control method and plans limiting their coverage to generic birth control.

Some insurance companies brought their coverage into compliance prior to the required date.[23] Several women who had been fighting their insurance companies for coverage of the vaginal contraceptive ring prior to the May 2015 guidance reported successfully getting their birth control without out-of-pocket costs shortly after the guidance was issued. Some other plans waited until the first health plan year to implement the changes, however, often consumers were able to get detailed information about this coverage prior to it going into effect. For example, one woman who had been paying out-of-pocket for the vaginal contraceptive ring found out in November 2015 that coverage without cost-sharing would begin in January 2016.

Some Compliance Problems Continue

Despite plans fixing coverage violations in response to the federal guidance, some women continue to pay out-of-pocket for birth control because their health plan is not complying with all aspects of the birth control benefit. Specifically, the Law Center hears from women whose plans: are not providing coverage without out-of-pocket costs for the services associated with birth control; do not have a birth control cost-

sharing exceptions process or one that complies with the law; and, impose age limits on coverage.

Plans fail to cover services associated with birth control without out-of-pocket costs.

Out-of-pocket costs for services associated with birth control continue to be a problem for many women who contact the Law Center. This is despite multiple clear statements in federal guidance that these services must be covered without cost-sharing.[24] Women regularly report to the CoverHer hotline that their plans have refused to cover services such as follow-up visits and necessary tests without out-of-pocket costs. In particular, some insurance companies still require cost-sharing for visits and tests that are part of provision of long-acting reversible contraceptives (LARCs), IUDs and implants. These are the most effective birth control methods available, but prior to the ACA, were often out of reach for many women because of their higher upfront costs, including visits to a health care provider and testing.[25] For example, one woman who contacted the Law Center had been charged for both a pregnancy test and ultrasound related to her IUD. Another woman in Iowa received a $730 bill for ultrasounds when her IUD had to be replaced.

If a plan denies coverage without out-of-pocket costs for these types of services, it can put a woman at risk for complications, particularly in time-sensitive situations. For example, if she is unable to have a follow-up appointment after her IUD insertion to confirm it has been placed correctly. Furthermore, when plans impermissibly impose costs on the services necessary to obtain birth control, they recreate the cost barriers that existed prior to the ACA. As a result, while a woman may have coverage of the specific birth control method her health care provider prescribes, cost can make it out of reach. It is possible that some women face these out-of-pocket costs because the services are billed in a way that does not indicate they are preventive and require coverage without out-of-pocket costs to the health plan.

Plans fail to have a birth control cost-sharing exceptions process or their cost-sharing exceptions process violates the law.

The CoverHer hotline continues to hear from women who face out-of-pocket costs because their health plans do not have the required birth control cost-sharing exceptions process in place or have a process that does not comply with the law. Even when women know the ACA's requirement for such a process, they often cannot find any information about it in plan documents, formularies, or websites, or from customer service representatives, and are thus unable to access it at all.

Other women are told that they or their health provider should go through a prior authorization process to access coverage of the specific birth control she needs. These prior authorization processes generally do not comply with the birth control cost-sharing exceptions process because they include a plan determination of medical necessity, rather than deferring to the attending provider's determination as required by the birth control cost-sharing exceptions process.[26] Furthermore, plans narrowly define "medical necessity" for prior authorization, not including the factors required as part of the birth control cost-sharing exceptions process, which can include severity of side effects, differences in permanence and reversibility of the birth control, and ability to adhere to appropriate use of the birth control. And, even if a woman is able to obtain coverage through prior authorization, the process does not guarantee coverage without cost-sharing as required.

When a plan does not have a birth control cost-sharing exceptions process, or does not have a process that complies with the ACA requirement, a woman may not be able to get coverage for the method of birth control that she and her medical provider have determined is appropriate for her, and is required by law. The woman may be unable to afford the cost-sharing imposed by her plan, forcing her to forgo the most appropriate birth control method for her. This could lead her to forgo birth control altogether or use an inappropriate method, which could lead to less effective or less consistent use, and ultimately a greater risk of unintended pregnancy.

Plans fail to provide birth control coverage without cost-sharing for women ages 50 and over.

Many women over the age of 50 continue to need birth control to prevent pregnancies, however women age 50 and over regularly report to the Law Center that they are forced to pay out-of-pocket for it.[27] Many of these women previously had birth control coverage without out-of-pocket costs, but when they turned 50 or 51 suddenly had to pay a co-payment, had to meet a deductible, or had no coverage of their birth control. While many women in this situation continue to have out-of-pocket costs for their birth control, one woman who contacted the Law Center worked with her employer, using CoverHer resources, to get the required coverage.

The May 2015 guidance clarified that plans must cover age- and developmentally-appropriate preventive services without cost-sharing for all enrollees. The guidance used dependent children as an example, however the requirement applies equally to *all* enrollees, and this includes those who are age 50 and over. Furthermore, the ACA requires coverage of birth control without cost-sharing for *all* women with reproductive capacity.

When a health plan arbitrarily places an age restriction on birth control coverage, it increases the chances a woman will experience an unintended pregnancy, which can be particularly dangerous for a woman over 50. After age 50, pregnancy can present additional health risks, such as a higher

rate of cesarean delivery, preeclampsia, gestational diabetes, placenta previa, cardiac disease, two- to three-fold increased rate of preterm delivery, the fetus being small for gestational age, low birth weight and stillbirth.[28] Women over age 50 who continue to need birth control must have coverage, as required by the ACA, to assist them in preventing pregnancy should they not desire one.

Recommendations for Insurance Companies and Federal and State Regulators

Implementation of the birth control benefit has been largely successful, particularly after the release of the May 2015 guidance. But reports made to the Law Center's CoverHer hotline show that some insurance plans are failing to comply with the law. To make certain that every woman gets the birth control coverage guaranteed to her under the ACA, insurance companies and state and federal governments can take the recommended actions below to guarantee plans comply with the law.

Insurance Companies: Bring Coverage into Compliance

- Insurance companies should **conduct a thorough self-audit of the coverage they provide** to ensure it complies with the ACA's birth control benefit.
- Specifically, plans and issuers should ensure that they are **providing coverage of the services associated with birth control without out-of-pocket costs**, that they have a birth control cost-sharing exceptions process that complies with the ACA, and that they, or their pharmacy benefit manager, **provide coverage for women regardless of age.**
- Insurance companies should **offer up-to-date billing and coding information and training** to health care providers and their staff to make sure birth control and services associated with it are accurately coded and covered as required by the ACA.

Federal Regulators: Continue to Enforce the Law and Provide Further Guidance to Plans

- The Departments of Health and Human Services and Labor and the Treasury must **robustly enforce** the ACA's birth control requirement. The federal government can **improve its enforcement at two critical points**. First, when the Departments take on the role of reviewing plan documents, the Departments must ensure that the plans provide coverage of every FDA-approved birth control method without cost sharing. Also, where the Departments are tasked with enforcing the birth control coverage requirement, such as in states that have declared they will not enforce the ACA or for self-funded health plans, the Departments must do so.
- The Departments must step in and **issue additional guidance regarding the birth control cost-sharing exceptions process.** While the May 2015 and April 2016 guidance are helpful and reinforce prior guidance, plans have been aware of this required process for three years, yet continue to fail to comply. To ensure compliance, the Departments must **provide plans with a specific cost-sharing exceptions process to use**, including a template form or language to incorporate into existing forms.
- The Departments must **disseminate all guidance on the birth control benefit directly to issuers to make certain issuers** are aware of their obligations under the ACA.

State Regulators: Enforce the Law and Provide Guidance to Plans

- **Prior to approving** any plan to be offered as insurance coverage in the state, either on the marketplace or through an employer, the state agency tasked with reviewing the plan must ensure that the plan provides coverage of services associated with birth control and has a birth control cost-sharing exceptions process. This would ensure that women would not enroll in a plan that is noncompliant with the birth control benefit. States should be doing this already.
- In the absence of federal guidance, state regulators should **provide guidance on the cost-sharing exceptions process** that includes a specific process for plans to use. This would assist insurance companies applying to offer coverage in the state, streamline the plan approval process, and would have the added benefit of ensuring health care providers only have to deal with one type of process across insurance companies.

1 Ninety-nine percent of sexually active women have used birth control at some point in their life. Kimberly Daniels et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, National Health Statistics Reports No. 62, 4 (Feb. 14, 2013), *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf.

2 *See, e.g.*, Adam Sonfield et al., Guttmacher Inst., The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children (2013), *available at* http://www.guttmacher.org/pubs/social-economic-benefits.pdf (providing an extensive review of studies that document how controlling family timing and size contribute to educational and economic advancements).

3 Brief of the Guttmacher Institute and Professor Sara Rosenbaum as Amici Curiae Supporting the Government at 16, Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014) (Nos. 13-354 & 13-356).

4 U.S. Dep't of Health and Human Srvcs., Asst. Sec. for Planning and Evaluation, The Affordable Care Act: Promoting Better Health for Women (June 14, 2016), *available at* https://aspe.hhs.gov/sites/default/files/pdf/205066/ACAWomenHealthIssueBrief.pdf.

5 Nora V. Becker and Daniel Polsky, *Women Saw Large Decrease in Out-of-Pocket Spending for Contraceptives After ACA Mandate Removed Cost Sharing*, 34 Health Affairs 1204 (July 2015) *available at* http://content.healthaffairs.org/content/34/7/1204.abstract.

6 Adam Sonfield et al., *Impact of the federal contraceptive coverage guarantee on out-of-pocket payments for contraceptives: 2014 update*, 91 Contraception 44 (2015) *available at* http://www.contraceptionjournal.org/article/S0010-7824(14)00687-8/pdf.

7 Jonathan M. Bearak et al., *Changes in out-of-pocket costs for hormonal IUDs after implementation of the Affordable Care Act: an analysis of insurance benefit inquiries*, 93 Contraception 139 (2016) *available at* http://www.contraceptionjournal.org/article/S0010-7824(15)00575-2/abstract.

8 Nat'l Women's Law Ctr., *The Affordable Care Act's Birth Control Benefit Is Working for Women* (June 2016) *available at* https://nwlc.org/resources/the-affordable-care-acts-birth-control-benefit-is-working-for-women/.

9 Nat'l Women's Law Ctr., *State of Birth Control Coverage: Health Plan Violations of the Affordable Care Act* (April 2015) *available at* https://nwlc.org/resources/state-birth-control-coverage-health-plan-violations-affordable-care-act/. Specifically, the *State of Birth Control Coverage* report highlighted three major trends in plan non-compliance. Insurance companies were: not providing coverage for *all* FDA-approved methods of birth control, or they impose out-of-pocket costs on them; limiting their coverage to generic birth control; and, failing to cover the services associated with birth control without out-of-pocket costs, including counseling or follow-up visits. In addition to these trends, the *State of Birth Control Coverage* also revealed several other common violations of the ACA's birth control benefit, such as plans not having a required cost-sharing exceptions process, failing to cover sterilization for dependents, imposing age limits on coverage, and having other policies that, in effect, deny coverage of birth control. *See also,* Kaiser Family Found., *Coverage of Contraceptive Services: A Review of Health Insurance Plans in Five States* (April 2016), *available at* http://kff.org/private-insurance/report/coverage-of-contraceptive-services-a-review-of-health-insurance-plans-in-five-states/; Northwest Health Law Advocates & NARAL Pro-Choice Washington, Contraceptive Coverage in Washington State's Qualified Health Plans (April 2015), *available at* http://www.nohla.org/infoAnalysis/advPolicy/ContCov2015.php; *and*, EverThrive Illinois & U. of Chi. Sect. of Family Planning and Contraceptive Research, Coverage of Contraception and Abortion in Illinois' Qualified Health Plans (June 2015) *available at* http://familyplanning.uchicago.edu/policy/publications-resources/coverage-family-planning-services.shtml.

10 U.S. Dep't of Health and Human Srvcs., U.S. Dep't of Labor, and U.S. Treasury, FAQs on Affordable Care Act Implementation (Part XXVI) (May 11, 2015), *available at* http://www.dol.gov/ebsa/faqs/faq-aca26.html.

11 Reports of violations of the ACA birth control benefit on file with the Law Center.

12 42 U.S.C. § 18116 (2012).

13 Health Insurance Issuer Standards Under the Affordable Care Act, Including Standards Related to Exchanges, 45 C.F.R. § 156.115(a)(4) (2015) (explicating including the preventive services in § 2713 of the Public Health Service Act in the essential health benefits, which must be covered for all those with coverage through the Medicaid expansion).

14 U.S. Dep't of Health and Human Srvcs., "FAQs (Part XXVI)."

15 U.S. Dep't of Health and Human Srvcs., Health Resources Srvcs. Admin., Women's Preventive Services Guidelines (Aug. 1, 2011) *available at* http://www.hrsa.gov/womensguidelines/.

16 U.S. Dep't of Health and Human Srvcs., U.S. Dep't of Labor, and U.S. Treasury, FAQs on Affordable Care Act Implementation (Part XII) (Feb. 20, 2013), *available at* https://www.dol.gov/ebsa/faqs/faq-aca12.html.

17 U.S. Dep't of Health and Human Srvcs., "FAQs (Part XXVI)."

18 *Id*.

19 U.S. Dep't of Health and Human Srvcs., "FAQs (Part XII)" and U.S. Dep't of Health and Human Srvcs. Health Resources Srvcs. Admin., Women's Preventive Services Guidelines (Aug. 1, 2011) *available at* http://www.hrsa.gov/womensguidelines/.

20 U.S. Dep't of Health and Human Srvcs., "FAQs (Part XII)" and U.S. Dep't of Health and Human Srvcs., "FAQs (Part XXVI)."

21 U.S. Dep't of Health and Human Srvcs., "FAQs (Part XXVI)." Further guidance on the cost-sharing exceptions process in April 2016 reaffirmed the requirements described in the May 2015 guidance. The April 2016 guidance also indicated that plans *may* create a standardized cost-sharing exceptions form and that the Medicare Part D Coverage Determination Request Form could serve as a model for the exceptions process. U.S. Dep't of Health and Human Srvcs., U.S. Dep't of Labor, and U.S. Treasury, FAQs on Affordable Care Act Implementation (Part XXXI) (April 20, 2016), *available at* https://www.dol.gov/ebsa/faqs/faq-aca31.html.

22 U.S. Dep't of Health and Human Srvcs., "FAQs (Part XXVI)."

23 Documents supplied by CoverHer contacts indicating coverage coming into compliance prior to the first health plan year after July 10, 2015, on file with the Law Center.

24 The government has specified that "services related to follow-up and management of side effects, counseling for continued adherence, and device removal" must be covered without out-of-pocket costs under the birth control benefit and that coverage "must also include the clinical services, including patient education and counseling, needed for provision of the contraceptive method." U.S. Dep't of Health and Human Srvcs., "FAQs (Part XII)" and U.S. Dep't of Health and Human Srvcs., "FAQs (Part XXVI)."

25 Stacie B. Dusetzina et al., *Cost of Contraceptive Methods to Privately Insured Women in the United States*, 23 Women's Health Issues e69, e70 (2013). Without insurance coverage, IUDs can cost between $500 and $1000 upfront, which can be nearly a month's salary for a woman working a minimum wage job. Planned Parenthood IUD webpage, http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm (last visited April 17, 2015), *and* Brief of the Guttmacher Institute and Professor Sara Rosenbaum, supra note 10.

26 Prior authorization documents on file with the Law Center.

27 The average age of menopause, when a woman is no longer able to become pregnant, is 51.U.S. Dep't of Health & Human Srvcs, Nat'l Inst. of Health, *Menopause*: Time for a Change (Jan. 2008), *available at* http://www.nia.nih.gov/health/publication/menopause-time-change/introduction-menopause. Five percent of women don't begin menopause until after they are 55. McKinlay SM, Brambilla DJ, Posner JG. The normal menopause transition. Maturitas. 2008 Sep-Oct;61(1-2):4-16. In addition, ovulation has been confirmed to occur in women well into their 50s indicating that conception remains possible. Novak, ER. Ovulation After Fifty. Obstetrics & Gynecology. 36(6):903-910, December 1970.

28 Salihu H, et al. Childbearing Beyond Maternal Age 50 and Fetal Outcomes in the United States. Obstetrics & Gynecology. 102(5, Part 1):1006-1014, November 2003.