



TRUMP-PENCE ACTIONS GUT THE ACA BIRTH CONTROL BENEFIT, THREATENING WOMEN'S HEALTH AND ECONOMIC SECURITY

On October 6, 2017, the Trump-Pence Administration issued two new rules that allow virtually any employer or university claiming religious or moral objections to refuse to comply with the Affordable Care Act's requirement that insurance plans cover birth control.¹ The rules are illegal and discriminatory and threaten the health and economic security of individuals nationwide. A range of states and organizations, including the National Women's Law Center, has challenged these rules in courts across the country.²

Fortunately, two federal courts have blocked these harmful rules while the lawsuits proceed, and the rules are not currently in effect. But the Trump-Pence Administration continues to defend the rules in court, and also has entered into secret settlement agreements in an attempt to end run around courts blocking the rules. These illegal settlement agreements allow objecting entities to deny employees and students contraceptive coverage, leaving individuals without the coverage they are guaranteed by law.

The Trump-Pence Rules Allow Virtually Any Employer or University to Refuse to Provide Birth Control Coverage

The Trump-Pence Administration issued two separate rules. One exempts virtually any employer from providing birth control coverage because of religious objections – this includes non-profit organizations, for-profit companies, and “any other nongovernmental employer.”³ The second rule grants an exemption for employers other than publicly traded for-profit employers if they object based on “moral” reasons.⁴

The rules also exempt insurance companies and institutions of higher education from providing coverage for either religious or “moral” reasons.⁵

These broad exemptions undermine the ACA birth control benefit by allowing virtually any employer or university to opt out of it. One of the federal courts blocking the rules emphasized their “remarkable breadth,” calling them “the proverbial exception that swallows the rule.”⁶ As another federal court blocking the rules explained, “for a substantial number of women, the 2017 [rules] transform contraceptive coverage from a legal entitlement to an essentially gratuitous benefit wholly subject to their employer’s discretion.”⁷

The Trump-Pence Rules Are Illegal, and Two Federal Courts Have Blocked Them

The rules are not only dangerous to women and families, they are illegal. The Affordable Care Act does not allow the Trump-Pence Administration to grant the exemptions from the birth control coverage requirement contained in these rules, nor does any other law.

The rules unlawfully discriminate against women in violation of the Constitution by impeding access to women’s health care while leaving men’s health care untouched and requiring women to pay more for basic health care than men.

The rules create cost and other barriers to accessing birth control that infringe on women’s fundamental liberty right to make decisions about their own bodies, which includes the decision to use birth control.

The religious and moral exemptions also violate the constitutional prohibition on government entanglement with religion by improperly advancing a particular set of religious beliefs, all at the expense of women and families.

Moreover, the Trump-Pence Administration issued these unlawful rules without first giving the public an opportunity to give input, in further violation of the law.



Multiple lawsuits have been brought in federal courts across the country challenging the legality of the rules, including challenges by the states of Pennsylvania, Massachusetts, Washington, California, Delaware, Maryland, New York, and Virginia.⁸ Two federal courts—one in Pennsylvania and another in California—have blocked the rules from going into effect while the lawsuits are being decided.⁹ The Trump-Pence Administration is currently appealing those decisions.¹⁰

The Trump-Pence Administration Has Been Entering into Illegal Settlement Agreements Allowing Entities to Deny Birth Control Coverage

Just one week after issuing the unlawful rules, the Trump-Pence Administration entered a settlement agreement with seventy-four employers and universities who had challenged the birth control benefit, including the University of Notre Dame, giving them the right to deny insurance coverage of birth control to their employees, students, and their dependents. In this settlement agreement, the Trump-Pence Administration promised those employers and universities that they would never have to comply with the ACA birth control benefit or with any regulations that might be issued in the future by new Administrations requiring insurance coverage of birth control.

FOIA requests have revealed at least 18 other employers and colleges that have entered similar settlement agreements with the Trump-Pence Administration to avoid complying with the ACA birth control benefit.

These settlement agreements illegally sign away the rights of third parties and are unlawful for all the same reasons the Trump-Pence rules are unlawful. They violate the ACA, they discriminate against women and infringe on women's fundamental liberty right to make decisions about their bodies in violation of the Constitution, and they violate the constitutional prohibition on government entanglement with religion by promoting the religious beliefs of employers and universities at the expense of women. The National Women's Law Center is challenging the legality of the Trump-Pence Administration's settlement agreement with Notre Dame in court on behalf of Notre Dame students who are being denied birth control coverage.

The Trump-Pence Rules and Unlawful Settlements Will Reverse the Gains of the ACA Birth Control Benefit, Harming Women's Health, Equality, and Economic Security

The Affordable Care Act's requirement that insurance plans cover birth control for women without out-of-pocket costs has made a real difference to women's health, economic security, and equality. As a result of the ACA birth control benefit, over 62 million women now have coverage of

birth control without out-of-pocket costs.¹¹ More women than ever before have been able to use prescription birth control thanks to the ACA, resulting in improved health and economic security for women and families.

Birth control is critical to women's health and economic and social equality. It enables women to decide if and when to have children. It prevents unintended pregnancy, which can have serious negative consequences for women and their children.¹² Birth control is highly effective in preventing and treating a wide array of often severe medical conditions; it decreases the risk of certain cancers, manages menstrual disorders, and treats other diseases.¹³ The ability to prevent, plan, and space pregnancies is critical to women's ability to move forward with their education and career. Studies show that birth control is directly linked to women's increased educational and professional opportunities, and increased lifetime earnings.¹⁴ Access to birth control allows women to make decisions that affect a broad spectrum of issues: their health, their education and livelihoods, and the health of their families.

But prior to the ACA's birth control benefit, cost often kept women from obtaining the most appropriate birth control method for them. For example, the up-front cost of an IUD was nearly a month's salary for someone working full-time at minimum wage,¹⁵ and the average cost of a full year's worth of birth control pills was the equivalent of 51 hours of work.¹⁶ Studies show that the costs associated with birth control, even when small, lead women to forgo it completely, choose less effective methods, or use it inconsistently or incorrectly.¹⁷ This increases the risk of unintended pregnancy and the associated harm to women's wellbeing.¹⁸

By allowing employers and universities to take critical birth control coverage away from employees and students, the Trump-Pence Administration threatens to reverse the gains made by the ACA birth control benefit and jeopardize women's health, equality, and economic security.

The Trump-Pence Rules Will Be Most Harmful to Those Who Already Face Barriers to Care

The harms from the Trump-Pence rules will fall most heavily on people in low-wage jobs—who are disproportionately people of color—and young people. These individuals have the fewest resources to pay out-of-pocket for birth control and absorb the costs of an unintended pregnancy.

And by taking away birth control coverage that individuals should be getting through an employer or school, the Trump-Pence Administration is imposing logistical, informational, and administrative barriers to accessing birth control. Many people who lose birth control coverage will be forced to go outside of their existing insurance systems and network of health care providers, losing continuity of care.



Navigating the health care system without insurance is time- and resource-intensive, requiring access to phone, internet, and transportation, as well as language comprehension, predictable work schedules, and free time. Having to navigate the health care system is daunting for anyone, but particularly for people with limited English proficiency, people of color, transgender men, and others who already face multiple barriers to accessing reproductive health care, including language barriers, cultural incompetence, implicit bias, and discrimination.

Other Birth Control Protections Will Help Some Women, But Cannot Replace the ACA Birth Control Benefit

Despite the Trump-Pence rules and illegal settlement agreements allowing employers and universities to refuse to comply with the ACA's birth control benefit, other federal and state protections for birth control coverage remain. But dismantling the birth control benefit sends women back to a patchwork system of coverage requirements that can be difficult to understand and navigate.

For example, federal and state non-discrimination law—Title VII and state laws that similarly protect against sex discrimination in employment—will still require employers to provide birth control coverage if they otherwise provide comprehensive preventive care and prescription drug coverage.¹⁹ However, people reliant on insurance provided by small businesses not covered by those laws could be at risk of losing birth control coverage if the ACA birth control benefit is taken away by the Trump-Pence Administration's rules or agreements. Additionally, laws in 29 states require health plans to cover birth control when they cover prescription drugs, and those laws will still provide an important source of birth control coverage. But those laws do not reach "self-funded" plans, which cover over 60 percent of insured workers.²⁰ And except for laws in twelve states – California, Delaware, District of Columbia, Illinois, Maine, Maryland, Massachusetts, Nevada, New York, Oregon, Vermont, and Washington – those laws do not explicitly prohibit cost-sharing.

In other words, nothing can replace the ACA's birth control benefit, which guaranteed an across-the-board, nationwide requirement that all insurance plans cover all Food and Drug Administration (FDA)-approved birth control methods and related education and counseling without any out-of-pocket costs.

The Trump-Pence Administration rules and secret, illegal agreements take the country back to a place where a woman's access to insurance coverage of birth control is no longer guaranteed, but rather depends on her boss's religious or moral beliefs. But an employer's beliefs should not be able to override a woman's own religious or moral views and her health care needs. Women deserve insurance coverage of birth control, no matter where they work or go to school.



- 1 Religious Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47,792 (Oct. 13, 2017) (“Religious Exemption Rule”); Moral Exemptions and Accommodations for Coverage of Certain Preventative Services Under the Affordable Care Act, 82 Fed. Reg. 47,838 (Oct. 13, 2017) (“Moral Exemption Rule”) (together the “Rules”). These Rules were issued and went into effect on October 6, 2017 and were published in the Federal Register on October 13.
- 2 *Irish 4 Reproductive Health et al. v. Azar*, Case No. 3:18-cv-00491 (N.D. Ind.); *ACLU et al. v. Wright et al.*, Case No. 4:17-cv-05772 (N.D. Cal.); *California et al. v. Hargan et al.*, Case No. 4:17-cv-05783-HSG (N.D. Cal.), Nos. 18-15255, 18-15144, 18-15166 (9th Cir.); *Jessica Campbell v. Trump et al.*, Case No. 1:17-cv-02455-PAB (D. Colo.); *Massachusetts v. Health and Human Services et al.*, Case No. 1:17-cv-11930 (D. Mass.), No. 18-1514 (1st Cir.); *Washington v. Trump et al.*, Case No. 2:17-cv-01510 (W.D. Wash.); *Medical Students for Choice, et al. v. Wright et al.*, Case No. 1:17-cv-02096-RBW (D.D.C.); *Pennsylvania v. Trump et al.*, Case No. 2:17-cv-04540 (E.D. Penn.), Nos. 18-1253, 17-3752 (3d Cir.); and *Mary Shiraef et al. v. Hargan et al.*, Case No. 3:17-cv-00817 (N.D. Ind.).
- 3 Religious Exemption Rule, *supra*, note 1.
- 4 Moral Exemption Rule, *supra*, note 1.
- 5 See Rules, *supra*, note 1.
- 6 *Pennsylvania v. Trump*, 281 F. Supp. 3d 553, 577 (E.D. Pa. 2017).
- 7 *California v. Health & Human Servs.*, 281 F. Supp. 3d 806, 830 (N.D. Cal. 2017).
- 8 See *supra*, note 2.
- 9 *California*, 281 F. Supp. 3d at 813-14; *Pennsylvania*, 281 F. Supp. 3d at 560.
- 10 *California et al. v. Azar et al.*, No. 18-15255 (9th Cir.); *Pennsylvania v. Trump et al.*, Nos. 18-1253 (3d Cir.).
- 11 See Nat’l Women’s Law Center, New Data Estimate 62.4 Million Women Have Coverage of Birth Control without Out-of-Pocket Costs (Sept. 2017), available at <https://nwlc.org/resources/new-data-estimate-62-4-million-women-have-coverage-of-birth-control-without-out-of-pocket-costs/>.
- 12 Inst. of Med., *Clinical Preventive Services for Women, Closing the Gaps*, at 103-104 (July 19, 2011).
- 13 *Id.* at 107.
- 14 See, e.g., Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 *CONTRACEPTION* 465, 467 (2013); 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>; Heinrich H. Hock, *The Pill and the College Attainment of American Women and Men* 19 (Fla. St. Univ., Working Paper 2007); Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 *J. POL. ECON.* 730, 749 (2002).
- 15 *Id.* at 35; see also Adam Sonfield, *Contraceptive Coverage at the U.S. Supreme Court: Countering the Rhetoric with Evidence*, 17 *GUTTMACHER POL’Y REV.*, no. 1, Winter 2014, at 5, available at <http://www.guttmacher.org/pubs/gpr/17/1/gpr170102.pdf>.
- 16 Brief of the National Women’s Law Center and 68 Other Organizations as Amici Curiae Supporting Respondents at 16, *Zubik v. Burwell*, 136 S.Ct. 1557 (May 16, 2016).
- 17 See, e.g., Guttmacher Inst., *A Real-Time Look at the Impact of the Recession on Women’s Family Planning and Pregnancy Decisions* 5 (Sept. 2009), <http://www.guttmacher.org/pubs/RecessionFP.pdf> (finding that to save money, women forewent contraception, skipped birth control pills, delayed filling prescriptions, went off the pill for at least a month, or purchased fewer birth control packs at once).
- 18 See, e.g., Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage for Contraception*, 1 *GUTTMACHER REP. ON PUB. POL’Y* 5, 6 (1998); see also W. Canestaro et al., *Implications of Employer Coverage of Contraception: Cost-Effectiveness Analysis of Contraception Coverage Under an Employer Mandate*, 95 *CONTRACEPTION* 77, 83, 85 (2017) (finding that denying contraceptive coverage resulted in 33 more pregnancies per 1000 women).
- 19 U.S. Equal Employment Opportunity Commission on Coverage of Contraception (Dec. 14, 2000), available at <https://www.eeoc.gov/policy/docs/decision-contraception.html>; Letter from Wisconsin Attorney General Peggy A. Lautenschlager to state Senator Gwendolynne Moore, October 17, 2003; Letter from Wisconsin Attorney General Peggy A. Lautenschlager to Secretary, Helene Nelson, Wisconsin Department of Health and Family Services, August 16, 2004 (finding that contraceptive coverage is required by state anti-discrimination law); Opinion issued by Montana Attorney General Mike McGrath, Vol. 51, No. 16, March 28, 2006, available at <http://www.doj.mt.gov/resources/opinions2006/51-016.pdf> (same); Michigan Civil Rights Commission, *Declaratory Ruling on Contraceptive Equity*, August 21, 2006, available at http://www.michigan.gov/documents/Declaratory_Ruling_7-26-06_169371_7.pdf (same).
- 20 Kaiser Family Found., *2018 Employer Health Benefits Survey* 12 (Oct. 3, 2018), available at <http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018>.

