

11-1-2017

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Contentious Contraception: The Controversial History of the ACA's Birth Control Mandate

By Hannah Anderson*

When the Affordable Care Act (“ACA”) was enacted into law under the Obama administration in 2010, it included provisions requiring employer-provided health insurance policies to cover preventive health care.¹ Under this provision, employers were required to provide coverage for care that included things like immunizations and “preventive care and screenings” for women and children.² However, in 2012, the Obama administration further defined “preventive care” as it related to women. At that time, the Department of Health and Human Services (“HHS”) issued guidelines specifying what must be included under “preventive care.” Notably, HHS defined “preventive care” to include all “Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”³ In effect, these guidelines made it so that employers providing health insurance coverage were required to cover birth control and other contraceptive methods used by their female employees. These guidelines, already considered controversial as they related to the ACA, quickly gained notoriety for “reach[ing] into the life of religious organizations” and for seemingly dismissing religious-based objections to providing contraceptive services to employees.⁴

In response to these contentious guidelines, several companies and religious groups sued, prompting the Obama administration to carve out an “accommodation” for all faith-based organizations – including

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¹ Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 300gg-13 (2012).

² *Id.*

³ DEP'T OF HEALTH AND HUM. SERV., WOMEN'S PREVENTIVE SERVICES GUIDELINES (2012), <https://www.hrsa.gov/womens-guidelines/index.html>.

⁴ Barbara Bradley Hagerty, *Bishops Stand Strong Against Birth Control Mandate*, NPR (Feb. 9, 2012, 4:28 PM), <http://www.npr.org/2012/02/09/146638094/bishops-stand-strong-against-birth-control-mandate>.

churches, hospitals, universities, and other religious-based non-profits.⁵ This exemption attempted to strike a balance between an initiative the White House considered paramount to women across the United States and an initiative that many organizations heralded as preserving religious freedom. Following an employer's decision to opt out of the mandate over religious objections, the Obama administration would arrange to have the employer's insurance companies provide coverage directly, without any involvement by the employer.⁶ President Obama, speaking on the accommodation, noted dually that all women should have the ability to control their own health and that there was "another principle at stake" – religious liberty as protected by the United States Constitution.⁷ While some religious organizations were appeased by the Obama administration's compromise, a number of organizations continued to move forward with their lawsuits, angered by what they perceived to be an attack on their religious ideals and liberty.

In 2014, the Supreme Court decided some of the remaining legal qualms surrounding the birth control mandate and exception when it addressed whether family-owned and closely held companies such as Hobby Lobby were also exempted from the contraception mandate.⁸ The owners of Hobby Lobby are evangelical Christians whose religious beliefs led them to challenge the mandate because it forced them to choose between following the law and adhering to the idea that contraception is in conflict with their religious beliefs.⁹ In reaching its decision, the Supreme Court noted that the owners of the closely held for-profit corporation Hobby

⁵ David Gibson, *Obama Birth Control: Religious Groups Exempted from Contraception Rule*, HuffPost (Feb. 11, 2012, 2:36 PM), http://www.huffingtonpost.com/2012/02/11/obama-birth-control-religious-groups-exempted_n_1269587.html.

⁶ Alison Kodjak, *Trump Guts Requirement That Employer Health Plans Pay for Birth Control*, NPR (Oct. 6, 2017, 11:15 AM), <http://www.npr.org/sections/health-shots/2017/10/06/555970210/trump-ends-requirement-that-employer-health-plans-pay-for-birth-control>.

⁷ David Gibson, *Obama Birth Control: Religious Groups Exempted from Contraception Rule*, HuffPost (Feb. 11, 2012, 2:36 PM), http://www.huffingtonpost.com/2012/02/11/obama-birth-control-religious-groups-exempted_n_1269587.html.

⁸ *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 1 (U.S. Jun. 30, 2014).

⁹ Alison Kodjak, *Trump Guts Requirement That Employer Health Plans Pay for Birth Control*, NPR (Oct. 6, 2017, 11:15 AM), <http://www.npr.org/sections/health-shots/2017/10/06/555970210/trump-ends-requirement-that-employer-health-plans-pay-for-birth-control>.

Lobby “have sincere Christian beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptive drugs.”¹⁰ Thus, the Court held that closely held corporations are permitted to opt out of the ACA’s contraception mandate when they object on religious grounds.¹¹ This decision was a significant blow to the Obama administration’s admitted goal of providing women with the coverage often necessary to obtain affordable contraception. While this decision certainly limited the extent to which the contraception mandate applied to certain employers, this expansive application would be slashed dramatically under the Trump administration’s recent decision to roll back the mandate.

On October 6, 2017, the Trump administration made headlines for rolling back the mandate that the Obama administration had proffered as part of a “compelling interest” to protect women’s health.¹² As part of this measure, HHS issued two rules expanding the exemption afforded to certain employers from providing contraceptive coverage through their employees’ health plans.¹³ Each of these rules increased the accessibility of the exemption to non-governmental employers objecting on either religious or moral grounds.¹⁴ In the rule addressing religious objections, the HHS expanded the Obama-era exemption so that a non-exhaustive list of entities could avoid providing coverage. This “illustrative, non-exhaustive list” includes, but is not limited to: churches and religious orders, non-profit organizations, closely held for-profit entities (such as Hobby Lobby), for-profit entities that are not closely held, and other non-governmental employers.¹⁵ This is remarkably different from the exemptions afforded to employers by the Obama administration for two reasons. First, the Obama administration offered exemptions to a much more limited number of employers. To “religious employers” – namely houses of worship – exemptions were freely available and these

¹⁰ *Burwell*, No. 13-354, slip op. at 2.

¹¹ *Id.* at 49.

¹² Sarah N. Lynch & Caroline Humer, *Trump Undermines U.S. Birth Control Coverage Requirement*, REUTERS (Oct. 6, 2017, 10:19 AM), <https://www.reuters.com/article/us-usa-trump-religion/trump-undermines-u-s-birth-control-coverage-requirement-idUSKBN1CB1XZ>

¹³ 45 C.F.R. § 147 (2017); 45 C.F.R. § 147 (2017).

¹⁴ *Id.*

¹⁵ *Id.* at 64.

employers were under no obligation to provide coverage where it conflicted with their religious beliefs.¹⁶ To placate non-profit religious organizations such as hospitals, universities, and charities, the Obama administration also offered the aforementioned “accommodation,” thereby circumventing the organization’s participation in coverage adverse to their religious beliefs.¹⁷ In contrast, the Trump administration’s decision to expand the exemption will make it available to far more employers. Second, the Trump administration has created a completely new avenue for employers to base their objections by giving them the option of avoiding coverage when they do so based on “seriously held moral convictions.”¹⁸ Furthermore, the Trump administration has gone so far as to assert that the government does not have a compelling interest in increasing women’s access to contraceptives.¹⁹ While the Trump administration, admittedly, has retained the ability for an employer to elect to operate under the Obama administration’s “accommodation” structure, there is no compelling reason for any employer to voluntarily choose this avenue, as the Trump administration has merely made it an option, and a weak one at that.

The Trump administration’s decision to roll back the contraceptive mandate has received significant backlash in the short amount of time since the rules were announced. Democrats especially have challenged the decision, arguing the Trump administration reached “a new low with this appalling decision”²⁰ and that the new policy constitutes a “direct attack on women’s rights.”²¹ As the rules are enforced and true statistics on the number of women affected are obtained, the Trump administration faces a

¹⁶ Robert Pear, *Contraceptives Stay Covered in Health Law*, N.Y. TIMES (June 28, 2013), <http://www.nytimes.com/2013/06/29/us/politics/final-rule-issued-for-contraceptive-coverage.html?rref=collection%2Ftimestopic%2FHealth%20Care%20Reform%20and%20Contraception>.

¹⁷ *Id.*

¹⁸ 45 C.F.R. § 147 (2017).

¹⁹ *Id.* at 33.

²⁰ Sarah N. Lynch & Caroline Humer, *Trump Undermines U.S. Birth Control Coverage Requirement*, REUTERS (Oct. 6, 2017, 10:19 AM), <https://www.reuters.com/article/us-usa-trump-religion/trump-undermines-u-s-birth-control-coverage-requirement-idUSKBN1CB1XZ>.

²¹ Robert Pear, Rebecca R. Ruiz, & Laurie Goodstein, *Trump Administration Rolls Back Birth Control Mandate*, N.Y. TIMES (Oct. 6, 2017), <https://www.nytimes.com/2017/10/06/us/politics/trump-contraception-birth-control.html>.

growing list of lawsuits brought by entities such as the ACLU and various state attorneys general.²² These lawsuits could have lasting legal implications as the adverse parties argue the Trump administration's decision violates the Establishment Clause, provisions of the Civil Rights Act, and possibly even the Equal Protection Clause of the Fifth Amendment.²³ While only time will tell how these lawsuits will be decided, it seems as though the Trump administration is no closer to realizing their goal of "bring[ing] to a close the more than 5 years of litigation over...the mandate."²⁴

Edited by Luke Jackson

²² Gene Johnson, *Washington State Sues Over New Trump Birth-Control Rules*, ABC NEWS (Oct. 9, 2017, 7:31 PM), <http://abcnews.go.com/US/wireStory/washington-state-sues-trump-birth-control-rules-50379953>.

²³ Brandon Carter, *Washington AG Files Lawsuit Against Trump for Rollback of Birth Control Mandate*, THE HILL (Oct. 9, 2017, 7:39 PM), <http://thehill.com/homenews/state-watch/354635-washington-ag-files-lawsuit-against-trump-for-rollback-of-birth-control>.

²⁴ 45 C.F.R. § 147.__(2017) (at page 33).