Q&A
EEOC Contraception Ruling
December 15, 2000

[Background: This week, the EEOC issued a decision finding that an employer's failure to include coverage for prescription contraceptives in an employee health benefits plan, when it covers prescription drugs and other preventive services, constitutes unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act (PDA). The decision directly affects only the two plaintiffs in the underlying suits, but it is important because it provides guidance to employers on the EEOC's interpretation of Title VII, and while not binding on the courts, courts give deference to the EEOC's interpretation. News reports have noted that the decision will be used by other women to challenge their employer's exclusion of contraceptive coverage.]

Q: What is the White House reaction to the EEOC decision that many health plans must cover contraception?

A: The White House was not involved in the EEOC's issuance of the decision, which was made in response to specific cases before it. The President, however, supports expanded access to contraception; as you know, he signed into law a provision providing contraceptive coverage to all federal employees.

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The U.S. Equal Employment Opportunity Commission

FOR IMMEDIATE RELEASE
Wednesday, December 13, 2000

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EEOC ISSUES DECISION ON TWO CHARGES CHALLENGING THE DENIAL OF HEALTH INSURANCE COVERAGE FOR PRESCRIPTION CONTRACEPTIVES

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) today issued a Commission Decision finding merit in two charges of discrimination alleging violations of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act. The Commission based its decision on the grounds that the respondents in the charges excluded the cost of prescription contraceptive drugs - available only to women - from their employee health plan while covering a number of other preventive drugs, devices, and services. The plan also covers surgical sterilization for both men and women as well as Viagra.

The charging parties sought to use contraceptives both for birth control and other medical purposes.

The Commission concluded that the respondents' plan violates the Pregnancy Discrimination Act's prohibition against discrimination on the basis of pregnancy. Enacted by Congress in 1978, the law requires equal treatment of women "affected by pregnancy, childbirth, or related medical conditions" in all aspects of employment, including fringe benefits. It protects women from discrimination because they have the ability to become pregnant, and not just because they are already pregnant. The Commission also concluded that the exclusion constitutes prohibited sex discrimination since prescription contraceptives are available only for women.

Commenting on the EEOC's mandate to enforce federal laws prohibiting sex-discriminatory terms and conditions of employment, EEOC Chairwoman Ida L. Castro said, "The selective exclusion of health coverage for prescription contraceptives by this employee health plan violates the law since it covers a number of comparable prescription drugs and other services."

A Commission Decision is a formal Commission determination as to whether there is reasonable cause to believe that unlawful discrimination has occurred with respect to a specific charge or charges. Based on the confidentiality provisions of Title VII, the Commission cannot release the identities of either the charging parties or the respondents. A Question and Answer document on the decision, along with the full text of the Commission Decision, will be available shortly on the Commission's Web site at www.eeoc.gov.

This page was last modified on December 13, 2000.

For immediate release: December 14, 2000
Contact: Margot Friedman or Lela Shepard at 202-588-5180
www.nwlc.org

National Women's Law Center Hails EEOC Ruling on Contraceptive Insurance Coverage

Employers' Exclusion of Prescription Contraceptives, When Other Drugs Are Covered, Is Illegal Sex Discrimination

(Washington, D.C.) The National Women's Law Center lauded a U.S. Equal Employment Opportunity Commission decision today finding that an employer's failure to provide insurance coverage for prescription contraceptives, when it covers other prescription drugs and devices, constitutes unlawful sex discrimination under Title VII of the Civil Rights Act of 1964. NWLC led a coalition of 60 health care, women's, civil rights and other groups asking the EEOC for such a ruling in June, 1999.

"Contraceptives are a critical component of women's health care. It is not only unfair, but as the EEOC has found, it is illegal for employers to provide insurance coverage of drugs for men, like Viagra, and not cover needed prescription contraceptives for women," said Marcia D. Greenberger, NWLC Co-president. "Employers across the country should take heed of the EEOC's decision and add coverage of prescription contraceptives as required by law."

Greenberger explained that Title VII, which incorporates the Pregnancy Discrimination Act of 1978, prohibits sex discrimination in employment, including discrimination on the basis of " pregnancy, childbirth, or related medical conditions." The EEOC confirmed NWLC's position that this law bars employers covered by Title VII – which includes employers with at least 15 employees – from excluding prescription contraceptives from their employees' health plans when other prescription drugs and devices are covered.

"This ruling is powerful because the EEOC is the agency charged with enforcing and interpreting Title VII's prohibitions on sex discrimination and we expect the courts to defer to the EEOC's opinion when this issue comes before them," Greenberger said. NWLC is Of Counsel to the legal team representing the plaintiff in a lawsuit pending in federal court in Seattle, *Erickson v. Bartell Drug Co.*, which is the first suit to assert that an employer's exclusion of prescription contraceptives in its employee health plan violates Title VII.

The EEOC decision, which is available at www.eeoc.gov is a response to charges filed with the agency by two nurses who claim that the company that employs them is engaging in an unlawful employment practice because of its failure to cover prescription contraceptives when it covers other prescription drugs. The EEOC's decision finds that "reasonable cause" exists to believe

that this is a violation of Title VII. The charges have been returned to an EEOC district office, where they were filed, to try to resolve the charges through conciliation. Failing successful conciliation, the charging parties or the EEOC, or both, could pursue the claims in federal court.

As NWLC's 1999 request to the EEOC noted, a very high proportion of large-group health insurance plans cover prescription drugs and devices in general but exclude coverage of prescription contraceptives. A 1994 study by the Alan Guttmacher Institute (AGI) found that roughly half of typical large-group plans (49%) do not routinely cover any contraceptive method. Sixty-six percent of plans that cover prescription drugs in general do not routinely cover oral contraceptives, the most commonly used reversible method of birth control in the United States.

Meanwhile, health care professionals consider contraception to be an important component of health care for women and a critical contributor to improved maternal and child health. Public opinion polls demonstrate that a substantial majority of Americans share the view that exclusion of contraceptive coverage is inequitable. A June 1998 survey by the Kaiser Family Foundation found that 75% of those polled "strongly" or "somewhat strongly" favored requiring insurers to provide contraceptives as part of prescription coverage.

In addition to requesting EEOC policy guidance on this issue and litigating the *Erickson v. Bartell* case, NWLC is also advocating for new state and federal legislation to require all insurers to cover prescription contraceptives in plans that cover other prescription drugs. In August, NWLC launched a first-of-its-kind report card, *Making the Grade on Women's Health: A National and State-by-State Report Card*, which provides a comprehensive analysis of women's health across the country and is currently being used to measure and strengthen women's health care policies, including contraceptive coverage policies, in the states and nationally.

The full text of NWLC's request to the EEOC is available at www.nwlc.org in the employment and health sections or by calling 202-588-5180.

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Background on EEOC Decision on Contraceptive Coverage
December 2000

- The EEOC is today issuing a ruling finding that an employer's failure to include insurance coverage for prescription contraceptives in an employee health benefits plan, when it covers other prescription drugs and devices, constitutes unlawful sex discrimination under Title VII of the Civil Rights Act of 1964.

- The EEOC's Decision is a response to charges filed with the agency by two female nurses claiming that their employer is engaging in an unlawful employment practice because contraceptive coverage is excluded from their health insurance although other prescription drugs and devices are covered.

- This statement of EEOC policy is a major victory for those seeking to expand access to family planning and combat sex discrimination in the workplace. It provides exactly what was requested in June 1999 when the National Women's Law Center, joined by 60 other women's, health, and civil rights groups, wrote to the EEOC asking it to issue a policy guidance confirming that Title VII bars employers from excluding prescription contraceptive coverage from their employee health benefits when other prescription drugs are covered. The Commission decided to issue its policy guidance in the form of a response to specific charges that were subsequently filed at the agency raising this issue.

- The Commission Decision, which will be available on the EEOC's web site at www.eeoc.gov (probably with an explanatory Q & A), will confirm that Title VII prohibits the exclusion of contraceptive coverage in these circumstances, and find "reasonable cause" to believe that the company employing these two women is engaging in an unlawful employment practice in violation of Title VII. As a consequence of this ruling, the charges will be returned to the EEOC district office where they were filed, to try to resolve them through conciliation. Failing successful conciliation, the charging parties or the EEOC, or both, could pursue the claims in federal court.

- The identities of the parties involved are not public at this stage of EEOC proceedings. The EEOC Decision therefore will describe the charges and discuss the legal issues without identifying the parties.

- The EEOC decision is important because it puts employers on notice of their legal obligation to include contraceptive coverage in their employees' health plans, and alerts employees to their legal rights to this coverage. In addition, because the EEOC is the agency charged with enforcing and interpreting Title VII's prohibitions on sex discrimination, the courts should defer to the EEOC's position when the issue comes before them.

- So far, one case raising these issues has been filed in federal court: *Erickson v. Bartell Drug Co.*, pending in federal district court in Seattle. The plaintiff in that case, Jennifer

Erickson, is represented by attorneys with Planned Parenthood of Western Washington and Planned Parenthood Federation of America; the National Women's Law Center is Of Counsel.

- Title VII of the Civil Rights Act of 1964 prohibits sex discrimination by employers with 15 or more employees, including in the health insurance plans these employers provide to their employees. Title VII incorporates the Pregnancy Discrimination Act of 1978, which prohibits discrimination in employment on the basis of "pregnancy, childbirth or related medical conditions."

- This victory is an important step in ensuring that women have access to quality, affordable contraceptives. However, we must continue to move forward in other arenas as well, so that all women -- not only those working for employers covered by Title VII -- have access to these necessary drugs. Congress should pass the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), which would require all private insurance plans that provide prescription drug coverage to provide prescription contraceptive coverage. Eleven states have passed similar laws, and bills are pending in almost two-thirds of the states. In addition, Congress should increase funding for the Title X family planning program, which provides critical reproductive health services to 4.4 million low-income women annually.

The U.S. Equal Employment Opportunity Commission

Decision

Summary of Charge

The Charging Parties, female employees of Respondents, allege that Respondents have engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (Title VII). Specifically, Charging Parties challenge Respondents' failure to offer insurance coverage for the cost of prescription contraceptive drugs and devices.

Jurisdiction

Respondents are employers within the meaning of Section 701(b) of the Act. All other jurisdictional requirements have also been met.

Summary of Investigation

Charging Party A, a registered nurse, began working for Respondent A in 1997. Under its health insurance plan, Respondent A covers numerous medical treatments and services, including prescription drugs; vaccinations; preventive medical care for children and adults, including pap smears and routine mammograms for women; and preventive dental care. Respondent A also covers the cost of surgical means of contraception, namely vasectomies and tubal ligations. However, Respondent A's plan excludes coverage for prescription contraceptive drugs and devices, whether they are used for birth control or for other medical purposes.

Charging Party A wishes to use oral contraceptives for birth control purposes. Based on her medical history, Charging Party A also wishes to use oral contraceptives to alleviate the symptoms of dysmenorrhea and pre-menstrual syndrome and to prevent the development of ovarian cancer.

Charging Party B, a registered nurse, began her employment with Respondent B on May 1, 1999. Respondent B is commonly owned with Respondent A, and offers to its employees the same health insurance policy that Respondent A offers to its employees. As a result, Charging Party B is subject to the same exclusions from health coverage as Charging Party A. Charging Party B wishes to use Depo Provera, an injectible prescription contraceptive, for birth control purposes.

Charging Parties both allege that Respondents' failure to offer coverage for prescription contraceptive drugs and devices constitutes discrimination on the bases of sex and pregnancy in violation of Title VII. Respondents deny that the exclusion of prescription contraceptives, which on its face does not distinguish between men and women, is discriminatory.

Discussion

Based on current medical knowledge, individuals who wish to avoid conception may choose from a range

of contraceptive alternatives. These alternatives include surgical procedures, like vasectomies and tubal ligations; non-prescription birth control, like condoms; and prescription contraceptive drugs and devices, like birth control pills, diaphragms, intra-uterine devices, and Norplant implants. Prescription contraceptives are available only to women.

Oral contraceptives are also widely recognized as effective in treating certain medical conditions that exclusively affect women, such as dysmenorrhea (menstrual cramps) and pre-menstrual syndrome.[1] Contraceptives are also sometimes prescribed to prevent the development of ovarian cancer. Respondents' insurance plan excludes contraceptives "regardless of intended use."[2]

The Commission concludes that Respondents' exclusion of prescription contraceptives violates Title VII, as amended by the Pregnancy Discrimination Act,[3] whether the contraceptives are used for birth control or for other medical purposes.

I. Exclusion of Prescription Contraceptives Used for Birth Control Purposes

A. The Pregnancy Discrimination Act Applies to Prescription Contraception

To clarify its long-standing intent with regard to Title VII, Congress enacted the Pregnancy Discrimination Act (PDA) to explicitly require equal treatment of women "affected by pregnancy, childbirth, or related medical conditions" in all aspects of employment, including the receipt of fringe benefits.[4] This language bars employers from treating women who are pregnant or affected by related medical conditions differently from others who are similarly able or unable to work. It also prohibits employers from singling out pregnancy or related medical conditions in their benefit plans.

As the Supreme Court has made clear, the PDA's prohibitions cover a woman's potential for pregnancy, as well as pregnancy itself. Recognizing that the PDA prohibits "discrimination on the basis of a woman's ability to become pregnant," the Court concluded that an employment policy that excluded women capable of bearing children from certain jobs was an impermissible classification because it was based on the potential for pregnancy. As the Court held, "[u]nder the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination."[5] Under the Court's analysis, the fact that it is women, rather than men, who have the ability to become pregnant cannot be used to penalize them in any way, including in the terms and conditions of their employment.

Contraception is a means by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives. Under the PDA, for example, Respondents could not discharge an employee from her job because she uses contraceptives. So, too, Respondents may not discriminate in their health insurance plan by denying benefits for prescription contraceptives when they provide benefits for comparable drugs and devices.

This conclusion is supported by additional language in the PDA that specifically exempts employers from any obligation to offer health benefits for abortion in most circumstances.[6] Congress understood that absent an explicit exemption, the PDA would require coverage of medical expenses resulting from a woman's decision to terminate a pregnancy.

The same analysis applies to the question of whether the PDA covers prescription contraceptives. As just discussed, the PDA's prohibition of discrimination in connection with a woman's ability to become pregnant necessarily includes the denial of benefits for contraception. Had Congress meant to limit the

applicability of the PDA to contraception, therefore, it would have enacted a statutory exemption similar to the abortion exemption. Such an exemption, of course, does not exist for contraceptives.

Further, construing the PDA to cover contraception implements Congress' clearly expressed intent in enacting the PDA. Congress wanted to equalize employment opportunities for men and women, and to address discrimination against female employees that was based on assumptions that they would become pregnant.[7] Congress thus prohibited discrimination against women based on "the whole range of matters concerning the childbearing process,"[8] and gave women "the right ... to be financially and legally protected before, during, and after [their] pregnancies."[9] It was only by extending such protection that Congress could ensure that women would not be disadvantaged in the workplace either because of their pregnancies or because of their ability to bear children.

In sum, the Commission concludes that the PDA covers contraception based on its plain language, the Supreme Court's interpretation of the statute, and Congress' clearly expressed legislative intent.

B. The PDA Requires Coverage of Prescription Contraceptives in this Case

The PDA requires that expenses related to pregnancy, childbirth, or related medical conditions be treated the same as expenses related to other medical conditions.[10] Because Respondents have failed to provide such equal treatment in this case, they are liable for discrimination under the PDA.

Contraception is a means to prevent, and to control the timing of, the medical condition of pregnancy. In evaluating whether Respondents have provided equal insurance coverage for prescription contraceptives, therefore, the Commission looks to Respondents' coverage of other prescription drugs and devices, or other types of services, that are used to prevent the occurrence of other medical conditions. In Respondents' plan, such drugs, devices, and services include:

- vaccinations;
- drugs to prevent development of medical conditions, such as those to lower or maintain blood pressure or cholesterol levels;
- anorectics (weight loss drugs) for those 18 years of age and under;
- preventive care for children and adults, including physical examinations; laboratory services in connection with such examinations; x-rays; and other screening tests, like pap smears and routine mammograms; and
- preventive dental care (including oral examinations, tooth cleaning, bite wing x-rays, and fluoride treatments).[11]

Respondents have made three arguments to justify their exclusion. First, Respondents allege that their plan covers treatment of medical conditions only if "there is something abnormal about [the employee's] mental or physical health,"[12] and thus that the above-listed drugs and services are not appropriate comparators for evaluating Respondents' coverage of contraceptives. However, this argument reflects a misunderstanding about the nature of pregnancy. It is widely recognized in the medical community that pregnancy is a medical condition that poses risks to, and consequences for, a woman.[13]

In addition, Respondents' argument is also belied by the explicit terms of their health plan, which is not, in fact, restricted to coverage of "abnormal" conditions. First, Respondents cover contraception through surgical forms of sterilization - vasectomies and tubal ligations -- without requiring any showing of the

reasons individuals are undergoing the procedures. More broadly, Respondents cover numerous treatments and services that are designed to maintain current health and prevent the occurrence of future medical conditions, whether or not there is something "abnormal" about the employee's current health status. It is appropriate, for example, to compare Respondents' coverage of vaccinations or physical examinations to that of contraceptives, because both serve the same preventive purposes. Because Respondents have treated contraception differently from preventive treatments and services for other medical conditions, they have discriminated on the basis of pregnancy.(14)

Respondents also claim that Charging Parties' claims are preempted by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1144(a), 1191.(15) This claim is without merit. ERISA preempts certain *state* laws that regulate insurance, but explicitly exempts federal law from preemption.(16) Moreover, the fact that ERISA does not require health plans to "provide specific benefits" does not mean that other statutes - namely Title VII - do not impose such requirements where necessary to avoid or correct discrimination.

Finally, Respondents state that they have excluded contraception for "strictly financial reasons."(17) Respondents' motivation is, however, legally irrelevant. Although Congress clearly anticipated that an employer's insurance costs would likely increase once the PDA required employers to cover pregnancy and related medical conditions,(18) it wrote no cost defense into the law.(19)

II. Exclusion of Prescription Contraceptives Used for Birth Control and/or Other Medical Purposes

The analysis set forth above applies to Charging Parties' claims that Respondents' exclusion unlawfully interferes with their ability to use prescription contraceptives for birth control purposes. Charging Party A has further claimed that Respondents' exclusion applies not only to her use of contraceptives for birth control purposes, but also to her use of contraceptives to treat dysmenorrhea and menstrual cramps. Respondents have violated Title VII's basic nondiscrimination principles regardless of the purpose of Charging Parties' use of contraceptives.

Respondents assert that their exclusion does not constitute sex discrimination because it does not explicitly distinguish between men and women.(20) However, prescription contraceptives are available *only* for women. As a result, Respondents' explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion. Because 100 percent of the people affected by Respondent's policy are members of the same protected group - here, women -- Respondent's policy need not specifically refer to that group in order to be facially discriminatory.(21)

Moreover, Respondents' other efforts to mount a defense are unavailing. Respondents may not rely on arguments that coverage of contraception is precluded by ERISA or may be denied based on cost concerns. Nor can Respondents successfully argue that contraception is not medically necessary, whether used for birth control or other medical purposes. *See* Section I(B), *supra.*

The inequality in treatment is apparent whether Charging Parties wish to use contraceptives to prevent conception or for other medical purposes. This is because Respondents have circumscribed the treatment options available to women, but not to men. Respondents' health plan effectively covers approved, non-experimental treatments for employees' medical conditions*unless* those treatments involve contraceptives. This is unlawful.(22)

Conclusion

There is reasonable cause to believe that Respondents have engaged in an unlawful employment practice in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, by failing to offer insurance coverage for the cost of prescription contraceptive drugs and devices. Charging Parties are entitled to reimbursement of the costs of their prescription contraceptives for the applicable back pay period. In addition, the District Office is instructed to determine whether any cognizable damages have resulted from Respondents' actions.

In order to avoid violating Title VII in the future:

- Respondents must cover the expenses of prescription contraceptives to the same extent, and on the same terms, that they cover the expenses of the types of drugs, devices, and preventive care identified above. Respondents must also offer the same coverage for contraception-related outpatient services as are offered for other outpatient services. Where a woman visits her doctor to obtain a prescription for contraceptives, she must be afforded the same coverage that would apply if she, or any other employee, had consulted a doctor for other preventive or health maintenance services. Where, on the other hand, Respondents limit coverage of comparable drugs or services (*e.g.*, by imposing maximum payable benefits), those limits may be applied to contraception as well.

- Respondents' coverage must extend to the full range of prescription contraceptive choices. Because the health needs of women may change -- and because different women may need different prescription contraceptives at different times in their lives -- Respondents must cover each of the available options for prescription contraception. Moreover, Respondents must include such coverage in each of the health plan choices that it offers to its employees. *See* 29 C.F.R. part 1604, App. Q&A 24; *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1081-82 n.10 (1983).

The charges are remanded to the field for further processing in accordance with this decision.

FOR THE COMMISSION:

12/14/00
Date

/s/
Executive Officer
Executive Secretariat

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1. *See, e.g.*, Kaunitz, *Oral Contraceptive Health Benefits: Perception v. Reality*, Contraception 1999, 59:29S-33S (January 1999); Sulak, *Oral Contraceptives: Therapeutic Uses and Quality -of-Life Benefits - Case Presentations*, Contraception 1999, 59:35S-38S (January 1999).

2. Letter from Respondents to EEOC, June 22, 2000.

3. Numerous states have also addressed policies like Respondents'. To date, thirteen states have passed legislation mandating insurance coverage of contraception where a policy covers prescription drugs or devices. *See* Cal. Ins. Code 10123.196 (California); Del. Code Ann., title 18, 3559 (Delaware); 1999 Conn. Acts 99-79 (June 3, 1999) (Connecticut); Ga. Code Ann. 33-24-59.6 (Georgia); Hawaii Rev. Stat. 431:10A-116.6, 431:10A-116.7, 432:1-604.5 (Hawaii); Iowa Code 514C.19; Me. Rev. Stat. Ann., title 24, 2332-J, Me. Rev. Stat. Ann., title 24-A, 2756, 2847-G, 4247 (Maine); Md. Code Ann., Ins., 15-826

(Maryland); Nev. Rev. Stat. Ann. 689A.0415 *et seq.* (Nevada); N.H. Rev. Stat. Ann., title 37, 415:18-i (New Hampshire); 1999 N.C. Sess. Laws 90 (June 30, 1999) (North Carolina); R.I. Gen. Laws 27-18-57, 27-19-48, 27-20-43, 27-41-59 (Rhode Island); 8 Vt. Stat. Ann. 4099c (Vermont). Insurance plans offered to federal employees must meet similar requirements. P.L. 106-58, 113 Stat. 430 (Sept. 29, 1999).

4. 42 U.S.C. 2000e(k).

5. *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187, 199, 211 (1991).

6. 42 U.S.C. 2000e(k).

7. H.R. Rep. No. 948, 95th Cong., 2d Sess. 3 (1978) ("[t]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs"); *see also id.* at 6-7; 123 Cong. Rec. 29,385 (1977) (statement of Senator Williams, chief sponsor of the Senate bill that led to the PDA) ("[b]ecause of their capacity to become pregnant, women have been viewed as marginal workers not deserving of the full benefits of compensation and advancement . . .").

8. H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978).

9. 124 Cong. Rec. H38,574 (daily ed. October 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA).

10. *See, e.g.*, 29 C.F.R. Part 1604, App. Introduction ("any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions").

11. *See* Respondents' Summary Plan Description at, *e.g.*, pp. 87, 90, 112, 137.

12. Letter from Respondents to EEOC, June 22, 2000.

13. *See, e.g., Equity in Prescription Insurance and Contraceptive Coverage Act 1998: Hearings on S. 766 before the Senate Committee on Labor and Human Resources*, 105th Cong., 2d Sess. 25 (1998) (statement of Richard H. Schwarz, M.D.); 144 Cong. Rec. S9,194 (daily ed. July 29, 1998) (statement of Senator Snowe) (there is "nothing 'optional' about contraception. It is a medical necessity for women during 30 years of their lifespan. To ignore the health benefits of contraception is to say that the alternative of 12 to 15 pregnancies during a woman's lifetime is medically acceptable.") (quoting statement by American College of Obstetricians and Gynecologists).

14. In addition, Respondents cover Viagra where patients complain about "decreased sexual interest or energy," whether or not the individual has been diagnosed as impotent. Letter from Respondents to EEOC, August 25, 2000. Respondents' assertion that their plan covers treatments only for abnormal medical conditions is not credible in light of these facts.

15. Letter from Respondents to EEOC, June 22, 2000.

16. 29 U.S.C. 1144(a) (setting forth basic rule of preemption of state law); 1144(d) ("[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law"); *see also Shaw v. Delta Airlines*, 463 U.S. 85 (1983) (state laws that are co-extensive with federal laws are not preempted by ERISA).

17. Letter from Respondents to EEOC, April 19, 2000.

18. *See, e.g.*, Statement of Senator Williams, floor manager of the PDA, *reprinted in* "Legislative History of the Pregnancy Discrimination Act of 1978," at 63, 64 (1980) (identifying "significant cost factor[s]" that would be incurred by employers, but noting that "the committee found that the cost of equal treatment of pregnancy has been greatly exaggerated"); H. Rep. No. 95-948, 95th Cong., 2d Sess. 10 (1978) (discussing anticipated costs of complying with PDA). In any event, the costs of contraception are low. *See* Alan Guttmacher Institute, *Cost to Employer Health Plans of Covering Contraceptives* (June 1998) (estimating that average added cost to employers of covering contraceptives is $1.43 per employee per month). Moreover, studies -- and common sense -- show that the financial costs associated with childbirth are much greater than the costs of many years of contraception. *See* Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 365 & n. 13 (1998) (citing studies). Even if a cost defense were available as a matter of law, therefore, Respondents would be unlikely to be able to cost-justify the exclusion of contraceptives.

19. *See Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1085 n. 14 (1983) (in enacting the PDA, Congress decided "to forbid special treatment of pregnancy despite the special costs associated therewith . . ."); *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 n. 26 (1983) ("no [cost] justification is recognized under Title VII once discrimination has been shown").

20. Letter from Respondents to EEOC, June 22, 2000.

21. This is the rationale that was set forth by the dissenters in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and adopted by Congress in passing the PDA. *See Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting) ("it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related'");*id.* at 162 (Stevens, J., dissenting) (special treatment of pregnancy is sex discrimination because it is "the capacity to become pregnant which primarily differentiates the female from the male"); H.R. Rep. No. 948, 95th Cong., 2d Sess. 2 (1978) (adopting reasoning of dissenters). *See also Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) ("Congress, by enacting the [PDA], not only overturned the specific holding in [*Gilbert*], but also rejected the test of discrimination employed by the Court in that case"); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 284 (1987) (in enacting the PDA, Congress "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in" *Gilbert*) (citation omitted).

22. Of course, as has been recognized by legal commentators, an employer's exclusion of contraceptives can also be challenged on disparate impact grounds. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 373-76 (1998). Based on the analysis in text, however, it is unnecessary to address application of the disparate impact theory here.

This page was last modified on December 14, 2000.


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The U.S. Equal Employment Opportunity Commission

Questions And Answers: Commission Decision On Coverage Of Contraception

What does this Commission Decision address?

- This Commission Decision addresses two charges of discrimination pending at EEOC which challenge the employers' failure to provide health insurance coverage for prescription contraceptives while covering a number of other preventive drugs, devices, and services. The Commission Decision, which is based on the specific facts in the charges under consideration, finds that the exclusion in this health plan discriminates on the basis of sex and pregnancy, in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.

What is the Pregnancy Discrimination Act?

- The Pregnancy Discrimination Act (PDA) was enacted by Congress in 1978 as an amendment to Title VII to clarify that Title VII's prohibition against sex discrimination includes discrimination on the basis of pregnancy. It was passed in response to a Supreme Court decision which held that discrimination on the basis of pregnancy is not sex discrimination.

What does the Pregnancy Discrimination Act require?

- The PDA requires equal treatment of women "affected by pregnancy, childbirth, or related medical conditions" in all aspects of employment, including the receipt of fringe benefits. It bars employers from treating women who are pregnant or affected by related medical conditions differently from others who are similarly able or unable to work. In a 1991 decision entitled Int'l Union, UAW v. Johnson Controls, the Supreme Court held that the PDA protects women from discrimination because they have the ability to become pregnant, and not just because they are already pregnant.

How is the PDA relevant to coverage of prescription contraceptives?

- Because the PDA prohibits discrimination against a woman based on her ability to become pregnant, it necessarily covers a health plan's exclusion of prescription contraceptives since they are a means by which a woman may control precisely that ability to become pregnant. The PDA does not require that all employers provide contraceptives to their employees through their health plans. It does require, however, that employers provide the same insurance coverage for prescription contraceptives that they do for other drugs, devices, or services that are used to prevent the occurrence of medical conditions other than pregnancy.

What factors did the Commission look at in determining whether the Respondents' health plan violated the PDA?

- The Commission carefully considered the particular coverage provided by the health plan at issue. That plan covered, among other things, vaccinations; prescription drugs to prevent the development

of medical conditions, such as those to lower or maintain blood pressure or cholesterol levels; anorectics (weight loss drugs) for those 18 years of age and under; preventive care for children and adults; and preventive dental care. Because each of these drugs and services is used to prevent the occurrence of a medical condition, the Commission determined that the Respondents should cover prescription contraceptives in the same way.

What if a woman wants to use prescription contraceptives not for birth control but for other medical purposes?

- Oral contraceptives are widely recognized as effective in treating certain medical conditions that exclusively affect women, such as dysmenorrhea (menstrual cramps) and pre-menstrual syndrome. The Commission Decision recognizes that the Respondents' exclusion of prescription contraceptives constitutes sex discrimination, regardless of whether the contraceptives are used for birth control or other medical purposes. Because prescription contraceptives are available only for women, 100 percent of those affected by the exclusion are women. This, by definition, constitutes sex-discrimination.

Did the Commission consider arguments by the Respondents that their exclusion of prescription contraceptives is lawful?

- The Respondents advanced four reasons as to why their exclusion of prescription contraceptives did not violate the law. The Commission carefully considered these arguments but found them without merit
  - First, the Respondents asserted that their insurance plan covered only abnormal physical or mental conditions and therefore they had no obligation to cover contraceptives. However, this argument does not hold up since the plan covers numerous preventive drugs and services, as discussed above. In addition, it covers surgical sterilizations and Viagra where patients complain about decreased sexual interest or energy.
  - The Respondents also stated that the exclusion was permissible because it was based on cost considerations. However, Congress explicitly rejected a cost defense for pregnancy and sex discrimination; in any event, the Commission Decision cites studies that show that the cost of coverage of prescription contraceptives is, in fact, very low and is certainly less than the cost of childbirth.
  - The Respondents argued that the exclusion of prescription contraceptives does not constitute sex discrimination. However, because prescription contraceptives are available only for women, the exclusion amounts, by definition, to sex discrimination.
  - Finally, the Respondents argued that the charging parties' claims are preempted by the Employee Retirement Income Security Act (ERISA). However, while ERISA does preempt certain state laws that regulate insurance it explicitly exempts federal law from preemption. As a result, this argument is without merit.

What are the next steps in processing these charges?

- The charges have been sent back to the field with instructions for further processing in accord with the Commission Decision. This will include efforts to resolve the case through the conciliation process.

Will EEOC identify the charging parties and the health plan at issue?

- Based on strict confidentiality provisions in the law, EEOC is prohibited from providing any

identifying information about the parties to this case.

This page was last modified on December 14, 2000.


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December 13, 2000

Birth Control Akin to Preventive Meds

A.P. INDEXES: TOP STORIES | NEWS | SPORTS | BUSINESS | TECHNOLOGY | ENTERTAINMENT

By THE ASSOCIATED PRESS

Filed at 9:46 p.m. ET

WASHINGTON (AP) -- It's against federal law for employers to exclude contraceptives from their health insurance plans when they cover other preventive treatments, the Equal Employment Opportunity Commission said Wednesday.

The decision directly affects only two women who complained to the commission, but it has implications for millions of others whose health insurance plans exclude birth control pills, diaphragms and other forms of prescription contraceptives.

''Our hope is that we announce a principle and employers want to comply with the law,'' said Ellen J. Vargyas, an EEOC attorney who worked on the case.

Women's advocates have pushed for this coverage, but the EEOC ruling is the first by a federal agency or court on whether it should be required by law.

The debate over contraceptive coverage burst into public when the male impotence drug Viagra came onto the market in April 1998. Women's groups argued that it was unfair that many insurance companies covered Viagra and did not cover birth control since both allow for sexual activity, albeit in different ways.

Specifically, the EEOC said that excluding contraceptives is a violation of the 1978 Pregnancy Discrimination Act, which requires equal treatment of women ''affected by pregnancy, childbirth or

related medical conditions,'' in all aspects of employment, including fringe benefits. The law also protects women against discrimination because they have the ability to become pregnant, not just because they are already pregnant, the agency noted.

The commission also found that excluding contraceptives also amounts to sex discrimination because these prescriptions are available only for women.

Insurance companies argue that they are willing to cover contraceptives if employers are willing to pay for it. Some employers do just that; others say it's too expensive.

''Employers and consumers are struggling in many cases to be able to afford coverage,'' said Richard Coorsh, spokesman for the Health Insurance Association of America.

But the EEOC rejected arguments based on cost.

In the Pregnancy Discrimination Act, Congress specified that cost is not a defense, Vargyas said. She added that studies have found the cost is actually minimal. ''You can buy years and years of contraceptives for the cost of one unintended pregnancy.''

The health plan and employers involved in these cases -- who were not identified -- also argued that their plans only covered ''abnormal conditions'' and that it was not sex discrimination. The commission rejected both of those arguments.

The ruling is specific to the two cases presented to the commission and stops short of policy guidance that would apply to all employers. These particular health plans must cover contraceptives, the ruling said, because they already cover a wide range of preventive services, including vaccinations, drugs to control blood pressure, weight loss medication and preventive dental care. They also cover surgical sterilizations.

Another health plan -- one that doesn't cover these services -- might not be in violation of the law.

But most health plans cover similar services, and the decision announced Wednesday could be used by other women who seek coverage from their employers. It could also provide ammunition in a lawsuit.

Congress has considered legislation explicitly requiring health plans to cover contraceptives, but it hasn't gone anywhere.

A handful of states require insurers that cover other prescriptions to include contraceptives, but those laws only apply to state-regulated

insurance plans. The states include Maryland, Vermont, Nevada, Maine, Georgia and Connecticut.

A survey in 1994 by the Alan Guttmacher Institute, a New York-based research group that focuses on reproductive issues, found that about half of large group insurance plans cover no contraception and only a third cover birth control pills.

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On the Net:

Equal Employment Opportunity Commission: http://www.eeoc.gov

NATIONAL WOMEN'S LAW CENTER
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Please find attached, EEOC's Q+A on today's decision. The decision itself will be posted on the EEOC website later today.

QUESTIONS AND ANSWERS: COMMISSION DECISION ON COVERAGE OF CONTRACEPTION

What does this Commission Decision address?

- This Commission Decision addresses two charges of discrimination pending at EEOC which challenge the employers' failure to provide health insurance coverage for prescription contraceptives while covering a number of other preventive drugs, devices, and services. The Commission Decision, which is based on the specific facts in the charges under consideration, finds that the exclusion in this health plan discriminates on the basis of sex and pregnancy, in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.

What is the Pregnancy Discrimination Act?

- The Pregnancy Discrimination Act (PDA) was enacted by Congress in 1978 as an amendment to Title VII to clarify that Title VII's prohibition against sex discrimination includes discrimination on the basis of pregnancy. It was passed in response to a Supreme Court decision which held that discrimination on the basis of pregnancy is not sex discrimination.

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THE VICE PRESIDENT

Gore, in Florida, Says Nothing About Elián

By KATHARINE Q. SEELYE

FORT LAUDERDALE, Fla., April 7 — Elián who?

On a campaign swing across Florida today, Vice President Al Gore talked about Social Security, racial profiling, insurance coverage for contraception, even the Microsoft case — in short, everything but Elián González, the 6-year-old Cuban boy who has dominated local and national media coverage here for weeks.

In the span of a week, Mr. Gore has gone from issuing a statement at odds with the administration's position in the case, to making a series of confusing comments to remaining silent today, while Attorney General Janet Reno said she would issue an order that the boy be handed over to his father next week.

Mr. Gore's spokesman, Doug Hattaway, told reporters here: "He thinks it's important to let those talks happen and let the process play out, so he's not going to make any statement. He understands that people disagree with his position, but he thinks it's the right approach, and you have to let the chips fall where they may."

Mr. Gore drew severe criticism on March 30 when he backed legislation to give the boy permanent residency status — a bill opposed by most Democrats as well as by President Clinton. The statement bewildered and angered many, who accused Mr. Gore of pandering to Florida's Cuban-Americans in an effort to win the state's 25 electoral votes this fall.

The vice president then made a series of muddled comments on Tuesday when he was asked in a television interview to explain his position, and he refused to say whether Elián's father should be given custody of the boy.

In Washington today, Ms. Reno said the boy's father would be given custody. But here on the campaign trail, less than 30 miles from where Elián is staying with his Miami relatives, Mr. Gore had nothing to say about the case.

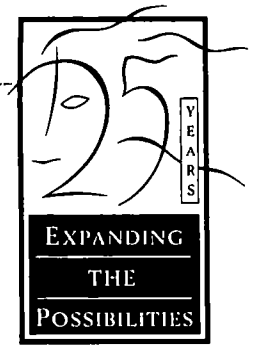
"He's made his position clear," Mr. Hattaway said of the vice president. "The people of Florida understand his position."

The vice president spoke at a forum in Delray on the Democratic Party platform. The audience asked him several questions, but none concerned Elián, and Mr. Gore's staff kept reporters at bay.

Mr. Gore later attended a $5,000-per-person fund-raising luncheon at the home here of Representative Peter Deutsch, a Florida Democrat, that raised $400,000 for the Democratic National Committee. Again, Mr. Gore did not discuss the boy.

Mr. Gore then flew to Tampa and talked about after-school programs with students and teachers. He ignored questions that reporters shouted at him on the airport tarmac about Elián.

The New York Times
SATURDAY, APRIL 8, 2000



NATIONAL WOMEN'S LAW CENTER

Hon. Ida L. Castro, Chairwoman
Vice Chair Paul M. Igasaki
Commissioner Reginald E. Jones
Commissioner Paul S. Miller
Equal Employment Opportunity Commission
1801 L St. NW
Washington, D.C. 20507

June 10, 1999

Dear Chairwoman Castro and Members of the Commission:

We are writing to urge the EEOC to issue a policy guidance setting out the Commission's position that it is an unlawful employment practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), for an employer covered by Title VII to exclude prescription contraceptives from insurance coverage provided to its employees, when other prescription drugs and devices are covered. This practice, which studies document to be widespread, singles out female employees and the female dependents of employees for disadvantageous treatment. As such, it constitutes sex discrimination in violation of Title VII, and specifically the provisions of Title VII added by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k). The EEOC policy guidance we request will ensure that employers are fully aware of their legal obligation to provide contraceptive coverage, and therefore could prove tremendously helpful in bringing about an end to this form of sex discrimination in employment.

Background

A very high proportion of large group health insurance plans cover prescription drugs and devices in general but exclude coverage of prescription contraceptive drugs and devices. A 1994 study by the Alan Guttmacher Institute (AGI) found that roughly half of typical large-group plans (49%) do not routinely cover any contraceptive method at all, and only 15% cover all five reversible methods.[1] AGI found that oral contraceptives, the most commonly used reversible

[1] Alan Guttmacher Institute, Uneven and Unequal: Insurance Coverage and Reproductive Health Services (New York, N.Y., 1994). The methods of prescription contraception covered in AGI's survey were: intrauterine devices, diaphragms, Norplant, Depo-Provera, and oral contraceptives. All of these methods, as well as new barrier methods (cervical caps) are usable only by women. Other forms of contraception are sterilization procedures (tubal ligation, vasectomy), which are available to both men and women and are generally covered by health

method in the United States, are routinely covered by only 33% of large-group plans, while 97% of large group plans typically include coverage of prescription drugs in general. Thus, according to AGI's data, "66% of plans that cover prescription drugs in general do not routinely cover oral contraceptives in their typical policy."[2] AGI also found that while 92% of typical large-group plans routinely cover medical devices in general, only 18% routinely cover IUDs, 15% cover diaphragms, and 24% cover the Norplant device.[3]

Health care professionals consider contraception to be an important component of health care for women and a critical contributor to improved maternal and child health.[4] But in the absence of insurance coverage, purchasing contraceptives can be expensive. In 1993, the average total cost of the contraceptive implant exceeded $700, the cost of an IUD was about $500, and a one-year supply of oral contraceptives and the associated physical examination cost nearly $300.[5]

A number of policy makers and commentators have noted the resulting unfairness to women, especially in the wake of the FDA's approval of the male impotence drug Viagra and indications that a large percentage of Viagra prescriptions are covered by insurance. Senator Olympia Snowe (R-ME) has expressed dismay that although the birth control pill was introduced nearly 40 years ago, "we still haven't seen something as fundamental as fair and equitable coverage by America's insurance companies of prescription contraceptives."[6] Senator James

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insurance, and condoms, which, like other non-prescription drugs and devices, typically are not covered by health insurance.

[2] Uneven and Unequal at 17. See also the 1998 survey by the Segal Company, a consulting firm, which found that 41% of the health plans it surveyed specifically excluded coverage of oral contraceptives. Survey of Health Plan Exclusions for Medication and Services Related to Reproduction and Sexual Dysfunction (The Segal Company, New York, N.Y., Aug. 1998).

[3] Uneven and Unequal at 17.

[4] According to the Director of Women's Health Issues, American College of Obstetricians and Gynecologists, "[t]here's nothing 'optional' about contraception. It's a medical necessity for women during 30 years of their lifespan." 144 Cong. Rec. S9181, 9194 (July 29, 1998) (Senate Debate on Treasury-Postal Appropriations Bill, Statement of Sen. Snowe).

[5] James Trussell et al., The Economic Value of Contraception: A Comparison of 15 Methods, 85 Am. J. of Pub. Health 494 (Apr. 1995).

[6] Snowe: Contraceptive Coverage "Fundamental" in Resolving Health Care Inequities, Gov. Press Release (July 21, 1998) (Statement of Sen. Snowe before the Labor Comm. on S. 766, Equity in Prescription Insurance and Contraceptive Coverage Act).

Jeffords (R-VT) has commented, "[i]t is disturbing how rapidly some insurance plans began covering Viagra when it has taken so long for many of them to begin covering contraceptives."[7] One syndicated columnist called the refusal of many insurance plans to cover contraceptives for women "one of the great stupidities in the health care system."[8] Others have labeled the refusal to cover contraception "discrimination against women" and "an issue of gender equity."[9] Recognizing this inequity, Congress recently acted to explicitly require that all health insurance plans made available to federal employees, through the Federal Employees Health Benefits Plan, include coverage of prescription contraceptives if other prescription drugs are covered.[10]

Public opinion polls demonstrate that a substantial majority of Americans share the view that exclusion of contraceptive coverage is inequitable. A June 1998 survey by the Kaiser Family Foundation found that 75% of those polled "strongly" or "somewhat strongly" favored requiring insurers to provide contraceptives as part of prescription coverage. A Kaiser Family Foundation official summarized the results this way: "Both men and women think comprehensive coverage for contraception makes sense; they think it should be part of prescription coverage, and they say they are willing to pay for it."[11]

Analysis

It is well settled that under Title VII's prohibition against discrimination on the basis of sex with respect to an employee's compensation, terms, conditions, or privileges of employment, 42 U.S.C. § 2000e-2(a)(1), it is unlawful for an employer to discriminate between men and

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[7] 144 Cong. Rec. S9181, 9196-97.

[8] David S. Broder, Thanks, Viagra (Op-ed), Wash. Post, July 26, 1998, at C7.

[9] See, 144 Cong. Rec. S9181, 9197 (Statements of Sens. Frank Lautenberg (D-NJ) and Barbara Boxer (D-CA)).

[10] Pub. L. No. 105-277, Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (signed Oct. 21, 1998). This measure, which enjoyed broad, bipartisan support, does not apply to private sector employees, but legislation that would impose such a requirement in all private insurance has also received broad, bipartisan support. The Equity in Prescription Insurance and Contraceptive Coverage Act was introduced in the 105th Congress by Sens. Olympia Snowe (R-ME) and Harry Reid (D-NV) and co-sponsored by 34 other Senators. It was introduced in the House by Reps. Jim Greenwood (R-PA) and Nita Lowey (D-NY) and co-sponsored by 127 other House members.

[11] Contraceptive Coverage: Poll Finds Support for Mandated Coverage, Daily Reprod. Health Rep. (Kaiser Fam. Found., Wash., D.C., June 19, 1998); see also, e.g., Editorial, Contraception Muddle, Wash. Post, Oct. 11, 1998, at C6 ("Attempts to expand and ensure access to contraception have broad support from Americans generally. . . .").

women with regard to fringe benefits, including health insurance. See Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) ("[h]ealth insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'"); see also EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(b).

Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), specifically provides that Title VII's prohibition against discrimination "on the basis of sex" includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. § 2000e(k). This language was enacted by Congress to overrule the decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), holding that the exclusion of disabilities arising from pregnancy from an employees' disability plan did not violate Title VII. As the Supreme Court has held, the PDA now makes it clear that, for Title VII purposes, such singling out of pregnancy coverage is sex discrimination on its face. Newport News, 462 U.S. at 684-85 & n.26; see also International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

The PDA, moreover, is not limited to discrimination based on pregnancy; it expressly applies to discrimination based on "pregnancy, childbirth, *or related medical conditions*." As the Supreme Court said in Newport News, "[t]he 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions," 462 U.S. at 684, and the EEOC has interpreted the PDA to mean that "any health insurance provided [to employees] must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions." Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. Part 1604, App.

It would be difficult to dispute that contraception -- the prevention of pregnancy, by its dictionary definition -- is "pregnancy-related." Indeed, since the underlying "pregnancy-related condition" at issue must be considered the potential for pregnancy, the Supreme Court has already settled the question by treating an employer's classification of employees on the basis of potential for pregnancy as covered by the PDA's language. In Johnson Controls, the Court noted that an employer's policy barring women capable of bearing children from certain jobs was a classification on the basis of potential for pregnancy, and concluded that "[u]nder the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination." 499 U.S. at 199. The Court cited PDA legislative history to show that "*this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children.*" Id. at 205 (emphasis added).

The PDA's treatment of abortion is further evidence that the PDA's prohibition against discrimination on the basis of "pregnancy, childbirth, or related medical conditions" was intended to include a prohibition against unfavorable treatment of contraception. Included in the PDA is an explicit exception for insurance coverage of abortion: "[The PDA] shall not require an

employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e(k). Congress thus understood that absent such an exception, the PDA could require employers to pay for health insurance benefits for abortion to avoid discrimination on the basis of "pregnancy, childbirth, or related medical conditions." If benefits for abortion (pregnancy termination) would be covered absent an express abortion exception, then, clearly, benefits for contraception (pregnancy prevention) must be covered, since Congress did not include any statutory exception for insurance coverage of contraception. The PDA thus plainly encompasses unfavorable treatment of contraception within its prohibition against discrimination on the basis of pregnancy, childbirth, or related medical conditions.

We are aware of no cases directly addressing the question whether the exclusion of contraceptive coverage in an employees' health insurance plan violates Title VII. One court has held that the exclusion of insurance coverage for an employee's fertility treatments falls outside the PDA's protection because infertility is not pregnancy, childbirth, or a related medical condition. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996). But that court distinguished potential pregnancy from infertility (and thereby distinguished Johnson Controls), noting that "[p]otential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant" while "denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral." 95 F.3d at 680. The better view, we submit, is that discrimination on the basis of a woman's infertility is covered by the PDA, and other courts have agreed (in cases involving forms of discrimination other than health insurance coverage, such as discriminatory application of leave policies). Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994); Erickson v. Board of Governors, 911 F. Supp. 316 (N.D. Ill. 1995); Cleese v. Hewlett-Packard Co., 911 F. Supp. 1312 (D. Or. 1995). But even under the reasoning of Krauel, an employer's unfavorable treatment of contraception in its employees' health insurance plan is discrimination on the basis of potential pregnancy in violation of the PDA.

Employers might attempt to explain or justify the exclusion of contraceptive coverage on the ground that other prescription drugs and devices covered by insurance are intended to treat or cure diseases, whereas contraception is used by healthy women to prevent unwanted pregnancies. But while the traditional health insurance framework in this country once may have had principally a curative focus, today virtually all employment-based insurance plans cover a wide range of preventive services, and many include coverage of preventive drugs and devices. Covered preventive benefits typically include well child visits and immunizations, adult preventive physical examinations, screening exams to detect problems in healthy adults (such as mammograms, Pap smears, prostate and colon cancer screening), and estrogen replacement therapy to forestall osteoporosis. The exclusion of contraceptives thus cannot be justified on the

ground that contraception is uniquely preventive in nature.[12]

Nor is there any other defense or justification available. An employer cannot hide behind the fact that an insurance company may have written the plan. See Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1088-91 (1983) (employer that adopts discriminatory fringe benefit plan cannot avoid liability because it could not find a third party willing to treat its employees on a nondiscriminatory basis). Equally unavailing would be an argument that the discriminatory practice is justified by cost savings. See Norris, 463 U.S. at 1084-85 n.14; Newport News, 462 U.S. at 685 n.26.[13]

Thus, as shown, the exclusion of contraceptive coverage in these circumstances is sex discrimination on its face (i.e., disparate treatment). It could be considered discriminatory under a disparate impact analysis as well. See, e.g., Scherr v. Woodland Sch. Community Consol. Dist. No. 50, 867 F.2d 974 (7th Cir. 1988) (concluding, in a case involving allegations that neutral leave policies had been applied in a way that had an adverse impact on pregnant workers, that while the PDA made it clear that pregnancy-based distinctions are per se violations of Title VII, reliance on a disparate impact approach under the PDA was not foreclosed); see also 29 C.F.R. § 1604.10(c) (termination of a temporarily disabled worker under an employment policy providing inadequate leave violates Title VII if it has a disparate impact on employees of one sex and is not justified by business necessity). Considered under a disparate impact approach, the exclusion of contraceptive coverage would violate Title VII because even if such exclusion were considered

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[12] Moreover, as noted, medical professionals consider contraception important for women's health in general. As the American College of Obstetricians and Gynecologists has stated "[t]o ignore the health benefits of contraception is to say that the alternative of 12 to 15 pregnancies during a woman's lifetime is medically acceptable." 144 Cong. Rec. S9181, 9194. Additionally, women with conditions including diabetes, obesity, and certain heart defects and cancers are advised to avoid pregnancy due to the added stress on the body and/or the impact that medical treatment would have on the fetus. And while oral contraceptives are used most frequently to prevent pregnancy, they are also prescribed for other purposes, such as treating endometriosis, ovarian cysts and uterine bleeding, and prevention of osteoporosis. Abigail Zuger, The Pill at 40: Renewed, Improved and in Its Prime, N.Y. Times, Oct. 20, 1998, at F2; see also Steven R. Bayer & Alan H. DeCherney, Clinical Manifestations and Treatment of Dysfunctional Uterine Bleeding, 269 JAMA 1823 (1993).

[13] In any event, providing coverage for contraceptives adds very little to the cost of insurance. A recent study by AGI found that the average total cost (including administrative costs) of adding coverage for the full range of reversible medical contraceptives to health plans that do not currently cover them will increase total health coverage costs for employees and their dependents by $21.40 per employee per year -- $17.12 of employers' costs and $4.28 of employees' costs. This makes the added cost for employers $1.43 per month. Alan Guttmacher Institute, Cost to Employer Health Plans of Covering Contraceptives, June 1998.

facially neutral with respect to sex, its impact falls 100% on women -- since there are no male prescription contraceptives currently available -- and it cannot conceivably be justified by any business necessity.

Conclusion

Title VII, as amended by the Pregnancy Discrimination Act, prohibits covered employers from discriminating on the basis of sex by providing insurance coverage to their employees that includes prescription drugs and devices but excludes prescription contraceptives. This practice, which the evidence suggests is quite common, must be considered sex discrimination on its face (as well as in its disparate impact), based on the language and history of the PDA and strengthened by the Supreme Court's construction of it as prohibiting the treatment of female workers differently from other employees simply because of their capacity to bear children. At least one recent commentary has come to the same conclusion. Sylvia Law, Sex Discrimination and Insurance for Contraception, 73 Wash. L. Rev. 363 (1998).

In order to provide clear guidance to employers on this issue and prompt those who are out of compliance with Title VII to revise their policies accordingly, we urge the Commission to issue a policy guidance setting forth its position. The guidance must make it clear that an employer covered by Title VII that provides coverage for prescription drugs and devices in its employees health plan but does not provide coverage of all available methods of prescription contraception is in violation of Title VII.[14] In addition, the Commission should look for opportunities to litigate this issue in court.

We would be pleased to work with the Commission as it moves forward on this matter.

Sincerely,

Marcia D. Greenberger
Co-President

Judith C. Appelbaum
Vice President for Employment Opportunities

Susan Liss
Vice President for Health and Reproductive Rights

On behalf of the National Women's Law Center and:

---

[14] It is essential that plans cover the full range of prescription contraceptive choices, because different contraceptive methods are appropriate for different women, and different methods are often appropriate for an individual woman at different points in her life.

Alan Guttmacher Institute
American Academy of Pediatrics
American Association of University Women
American Civil Liberties Union
American Civil Liberties Union Reproductive Freedom Project
American College of Nurse-Midwives
American College of Obstetricians and Gynecologists
American Federation of Teachers
American Medical Women's Association
American Psychological Association
American Public Health Association
American Social Health Association
American Society for Reproductive Medicine
Association of Reproductive Health Professionals
Association of Women's Health, Obstetric, and Neonatal Nurses
Business and Professional Women USA
California Women's Law Center
Catholics for a Free Choice
Center for Women's Policy Studies
Center for Advancement of Public Policy
Center for Reproductive Law and Policy
Choice USA
Coalition of Labor Union Women
Connecticut Women's Education and Legal Fund
Equal Rights Advocates
Hadassah
Jewish Women International
Lawyers' Committee for Civil Rights Under Law
Mexican American Legal Defense and Education Fund
NAACP Legal Defense and Education Fund
National Abortion and Reproductive Rights Action League
National Abortion Federation
National Association of Commissions for Women
National Association of Negro Business and Professional Women's Clubs, Inc.
National Association of Nurse Practitioners and Reproductive Health
National Black Women's Health Project
National Council of Jewish Women
National Council of Negro Women
National Council of La Raza
National Education Association
National Employee Rights Institute
National Employment Law Project
National Employment Lawyers Association

National Family Planning and Reproductive Health Association
National Latinas Caucus
National Latina Institute for Reproductive Health
National Organization for Women
National Partnership for Women & Families
National Political Congress of Black Women
National Women's Health Network
Northwest Women's Law Center
NOW Legal Defense and Education Fund
Planned Parenthood Federation of America
Physicians for Reproductive Choice and Health
Religious Coalition for Reproductive Choice
RESOLVE, The National Infertility Association
Sexuality Information and Education Council of the United States (SIECUS)
Society for Adolescent Medicine
Women Employed
Women's Law Center of Maryland, Inc.
Women's Law Project
Women's Law and Public Policy Fellowship Program
YWCA of the USA

Title VII has protections for religious employers ...
There still exist

don't mock my Title VII

RLPA — "charitable choice" provisions

NATIONAL WOMEN'S LAW CENTER

Hon. Ida L. Castro, Chairwoman
Vice Chair Paul M. Igasaki
Commissioner Reginald E. Jones
Commissioner Paul S. Miller
Equal Employment Opportunity Commission
1801 L St. NW
Washington, D.C. 20507

June 10, 1999

Dear Chairwoman Castro and Members of the Commission:

We are writing to urge the EEOC to issue a policy guidance setting out the Commission's position that it is an unlawful employment practice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), for an employer covered by Title VII to exclude prescription contraceptives from insurance coverage provided to its employees, when other prescription drugs and devices are covered. This practice, which studies document to be widespread, singles out female employees and the female dependents of employees for disadvantageous treatment. As such, it constitutes sex discrimination in violation of Title VII, and specifically the provisions of Title VII added by the Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k). The EEOC policy guidance we request will ensure that employers are fully aware of their legal obligation to provide contraceptive coverage, and therefore could prove tremendously helpful in bringing about an end to this form of sex discrimination in employment.

Background

A very high proportion of large group health insurance plans cover prescription drugs and devices in general but exclude coverage of prescription contraceptive drugs and devices. A 1994 study by the Alan Guttmacher Institute (AGI) found that roughly half of typical large-group plans (49%) do not routinely cover any contraceptive method at all, and only 15% cover all five reversible methods.[1] AGI found that oral contraceptives, the most commonly used reversible

[1] Alan Guttmacher Institute, Uneven and Unequal: Insurance Coverage and Reproductive Health Services (New York, N.Y., 1994). The methods of prescription contraception covered in AGI's survey were: intrauterine devices, diaphragms, Norplant, Depo-Provera, and oral contraceptives. All of these methods, as well as new barrier methods (cervical caps) are usable only by women. Other forms of contraception are sterilization procedures (tubal ligation, vasectomy), which are available to both men and women and are generally covered by health

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method in the United States, are routinely covered by only 33% of large-group plans, while 97% of large group plans typically include coverage of prescription drugs in general. Thus, according to AGI's data, "66% of plans that cover prescription drugs in general do not routinely cover oral contraceptives in their typical policy."[2] AGI also found that while 92% of typical large-group plans routinely cover medical devices in general, only 18% routinely cover IUDs, 15% cover diaphragms, and 24% cover the Norplant device.[3]

Health care professionals consider contraception to be an important component of health care for women and a critical contributor to improved maternal and child health.[4] But in the absence of insurance coverage, purchasing contraceptives can be expensive. In 1993, the average total cost of the contraceptive implant exceeded $700, the cost of an IUD was about $500, and a one-year supply of oral contraceptives and the associated physical examination cost nearly $300.[5]

A number of policy makers and commentators have noted the resulting unfairness to women, especially in the wake of the FDA's approval of the male impotence drug Viagra and indications that a large percentage of Viagra prescriptions are covered by insurance. Senator Olympia Snowe (R-ME) has expressed dismay that although the birth control pill was introduced nearly 40 years ago, "we still haven't seen something as fundamental as fair and equitable coverage by America's insurance companies of prescription contraceptives."[6] Senator James

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insurance, and condoms, which, like other non-prescription drugs and devices, typically are not covered by health insurance.

[2] Uneven and Unequal at 17. See also the 1998 survey by the Segal Company, a consulting firm, which found that 41% of the health plans it surveyed specifically excluded coverage of oral contraceptives. Survey of Health Plan Exclusions for Medication and Services Related to Reproduction and Sexual Dysfunction (The Segal Company, New York, N.Y., Aug. 1998).

[3] Uneven and Unequal at 17.

[4] According to the Director of Women's Health Issues, American College of Obstetricians and Gynecologists, "[t]here's nothing 'optional' about contraception. It's a medical necessity for women during 30 years of their lifespan." 144 Cong. Rec. S9181, 9194 (July 29, 1998) (Senate Debate on Treasury-Postal Appropriations Bill, Statement of Sen. Snowe).

[5] James Trussell et al., The Economic Value of Contraception: A Comparison of 15 Methods, 85 Am. J. of Pub. Health 494 (Apr. 1995).

[6] Snowe: Contraceptive Coverage "Fundamental" in Resolving Health Care Inequities, Gov. Press Release (July 21, 1998) (Statement of Sen. Snowe before the Labor Comm. on S. 766, Equity in Prescription Insurance and Contraceptive Coverage Act).

Jeffords (R-VT) has commented, "[i]t is disturbing how rapidly some insurance plans began covering Viagra when it has taken so long for many of them to begin covering contraceptives."[7] One syndicated columnist called the refusal of many insurance plans to cover contraceptives for women "one of the great stupidities in the health care system."[8] Others have labeled the refusal to cover contraception "discrimination against women" and "an issue of gender equity."[9] Recognizing this inequity, Congress recently acted to explicitly require that all health insurance plans made available to federal employees, through the Federal Employees Health Benefits Plan, include coverage of prescription contraceptives if other prescription drugs are covered.[10]

Public opinion polls demonstrate that a substantial majority of Americans share the view that exclusion of contraceptive coverage is inequitable. A June 1998 survey by the Kaiser Family Foundation found that 75% of those polled "strongly" or "somewhat strongly" favored requiring insurers to provide contraceptives as part of prescription coverage. A Kaiser Family Foundation official summarized the results this way: "Both men and women think comprehensive coverage for contraception makes sense; they think it should be part of prescription coverage, and they say they are willing to pay for it."[11]

Analysis

It is well settled that under Title VII's prohibition against discrimination on the basis of sex with respect to an employee's compensation, terms, conditions, or privileges of employment, 42 U.S.C. § 2000e-2(a)(1), it is unlawful for an employer to discriminate between men and

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[7] 144 Cong. Rec. S9181, 9196-97.

[8] David S. Broder, Thanks, Viagra (Op-ed), Wash. Post, July 26, 1998, at C7.

[9] See, 144 Cong. Rec. S9181, 9197 (Statements of Sens. Frank Lautenberg (D-NJ) and Barbara Boxer (D-CA)).

[10] Pub. L. No. 105-277, Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (signed Oct. 21, 1998). This measure, which enjoyed broad, bipartisan support, does not apply to private sector employees, but legislation that would impose such a requirement in all private insurance has also received broad, bipartisan support. The Equity in Prescription Insurance and Contraceptive Coverage Act was introduced in the 105th Congress by Sens. Olympia Snowe (R-ME) and Harry Reid (D-NV) and co-sponsored by 34 other Senators. It was introduced in the House by Reps. Jim Greenwood (R-PA) and Nita Lowey (D-NY) and co-sponsored by 127 other House members.

[11] Contraceptive Coverage: Poll Finds Support for Mandated Coverage, Daily Reprod. Health Rep. (Kaiser Fam. Found., Wash., D.C., June 19, 1998); see also, e.g., Editorial, Contraception Muddle, Wash. Post, Oct. 11, 1998, at C6 ("Attempts to expand and ensure access to contraception have broad support from Americans generally. . . .").

women with regard to fringe benefits, including health insurance. See Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983) ("[h]ealth insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'"); see also EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.9(b).

Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA), specifically provides that Title VII's prohibition against discrimination "on the basis of sex" includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." 42 U.S.C. § 2000e(k). This language was enacted by Congress to overrule the decision in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), holding that the exclusion of disabilities arising from pregnancy from an employees' disability plan did not violate Title VII. As the Supreme Court has held, the PDA now makes it clear that, for Title VII purposes, such singling out of pregnancy coverage is sex discrimination on its face. Newport News, 462 U.S. at 684-85 & n.26; see also International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991).

The PDA, moreover, is not limited to discrimination based on pregnancy; it expressly applies to discrimination based on "pregnancy, childbirth, *or related medical conditions*." As the Supreme Court said in Newport News, "[t]he 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions," 462 U.S. at 684, and the EEOC has interpreted the PDA to mean that "any health insurance provided [to employees] must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions." Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. Part 1604, App.

It would be difficult to dispute that contraception -- the prevention of pregnancy, by its dictionary definition -- is "pregnancy-related." Indeed, since the underlying "pregnancy-related condition" at issue must be considered the potential for pregnancy, the Supreme Court has already settled the question by treating an employer's classification of employees on the basis of potential for pregnancy as covered by the PDA's language. In Johnson Controls, the Court noted that an employer's policy barring women capable of bearing children from certain jobs was a classification on the basis of potential for pregnancy, and concluded that "[u]nder the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination." 499 U.S. at 199. The Court cited PDA legislative history to show that "*this statutory standard was chosen to protect female workers from being treated differently from other employees simply because of their capacity to bear children.*" Id. at 205 (emphasis added).

The PDA's treatment of abortion is further evidence that the PDA's prohibition against discrimination on the basis of "pregnancy, childbirth, or related medical conditions" was intended to include a prohibition against unfavorable treatment of contraception. Included in the PDA is an explicit exception for insurance coverage of abortion: "[The PDA] shall not require an

employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion." 42 U.S.C. § 2000e(k). Congress thus understood that absent such an exception, the PDA could require employers to pay for health insurance benefits for abortion to avoid discrimination on the basis of "pregnancy, childbirth, or related medical conditions." If benefits for abortion (pregnancy termination) would be covered absent an express abortion exception, then, clearly, benefits for contraception (pregnancy prevention) must be covered, since Congress did not include any statutory exception for insurance coverage of contraception. The PDA thus plainly encompasses unfavorable treatment of contraception within its prohibition against discrimination on the basis of pregnancy, childbirth, or related medical conditions.

We are aware of no cases directly addressing the question whether the exclusion of contraceptive coverage in an employees' health insurance plan violates Title VII. One court has held that the exclusion of insurance coverage for an employee's fertility treatments falls outside the PDA's protection because infertility is not pregnancy, childbirth, or a related medical condition. Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996). But that court distinguished potential pregnancy from infertility (and thereby distinguished Johnson Controls), noting that "[p]otential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant" while "denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral." 95 F.3d at 680. The better view, we submit, is that discrimination on the basis of a woman's infertility is covered by the PDA, and other courts have agreed (in cases involving forms of discrimination other than health insurance coverage, such as discriminatory application of leave policies). Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994); Erickson v. Board of Governors, 911 F. Supp. 316 (N.D. Ill. 1995); Cleese v. Hewlett-Packard Co., 911 F. Supp. 1312 (D. Or. 1995). But even under the reasoning of Krauel, an employer's unfavorable treatment of contraception in its employees' health insurance plan is discrimination on the basis of potential pregnancy in violation of the PDA.

Employers might attempt to explain or justify the exclusion of contraceptive coverage on the ground that other prescription drugs and devices covered by insurance are intended to treat or cure diseases, whereas contraception is used by healthy women to prevent unwanted pregnancies. But while the traditional health insurance framework in this country once may have had principally a curative focus, today virtually all employment-based insurance plans cover a wide range of preventive services, and many include coverage of preventive drugs and devices. Covered preventive benefits typically include well child visits and immunizations, adult preventive physical examinations, screening exams to detect problems in healthy adults (such as mammograms, Pap smears, prostate and colon cancer screening), and estrogen replacement therapy to forestall osteoporosis. The exclusion of contraceptives thus cannot be justified on the

ground that contraception is uniquely preventive in nature.[12]

Nor is there any other defense or justification available. An employer cannot hide behind the fact that an insurance company may have written the plan. See Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1088-91 (1983) (employer that adopts discriminatory fringe benefit plan cannot avoid liability because it could not find a third party willing to treat its employees on a nondiscriminatory basis). Equally unavailing would be an argument that the discriminatory practice is justified by cost savings. See Norris, 463 U.S. at 1084-85 n.14; Newport News, 462 U.S. at 685 n.26.[13]

Thus, as shown, the exclusion of contraceptive coverage in these circumstances is sex discrimination on its face (i.e., disparate treatment). It could be considered discriminatory under a disparate impact analysis as well. See, e.g., Scherr v. Woodland Sch. Community Consol. Dist. No. 50, 867 F.2d 974 (7th Cir. 1988) (concluding, in a case involving allegations that neutral leave policies had been applied in a way that had an adverse impact on pregnant workers, that while the PDA made it clear that pregnancy-based distinctions are per se violations of Title VII, reliance on a disparate impact approach under the PDA was not foreclosed); see also 29 C.F.R. § 1604.10(c) (termination of a temporarily disabled worker under an employment policy providing inadequate leave violates Title VII if it has a disparate impact on employees of one sex and is not justified by business necessity). Considered under a disparate impact approach, the exclusion of contraceptive coverage would violate Title VII because even if such exclusion were considered

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[12] Moreover, as noted, medical professionals consider contraception important for women's health in general. As the American College of Obstetricians and Gynecologists has stated "[t]o ignore the health benefits of contraception is to say that the alternative of 12 to 15 pregnancies during a woman's lifetime is medically acceptable." 144 Cong. Rec. S9181, 9194. Additionally, women with conditions including diabetes, obesity, and certain heart defects and cancers are advised to avoid pregnancy due to the added stress on the body and/or the impact that medical treatment would have on the fetus. And while oral contraceptives are used most frequently to prevent pregnancy, they are also prescribed for other purposes, such as treating endometriosis, ovarian cysts and uterine bleeding, and prevention of osteoporosis. Abigail Zuger, The Pill at 40: Renewed, Improved and in Its Prime, N.Y. Times, Oct. 20, 1998, at F2; see also Steven R. Bayer & Alan H. DeCherney, Clinical Manifestations and Treatment of Dysfunctional Uterine Bleeding, 269 JAMA 1823 (1993).

[13] In any event, providing coverage for contraceptives adds very little to the cost of insurance. A recent study by AGI found that the average total cost (including administrative costs) of adding coverage for the full range of reversible medical contraceptives to health plans that do not currently cover them will increase total health coverage costs for employees and their dependents by $21.40 per employee per year -- $17.12 of employers' costs and $4.28 of employees' costs. This makes the added cost for employers $1.43 per month. Alan Guttmacher Institute, Cost to Employer Health Plans of Covering Contraceptives, June 1998.

facially neutral with respect to sex, its impact falls 100% on women -- since there are no male prescription contraceptives currently available -- and it cannot conceivably be justified by any business necessity.

Conclusion

Title VII, as amended by the Pregnancy Discrimination Act, prohibits covered employers from discriminating on the basis of sex by providing insurance coverage to their employees that includes prescription drugs and devices but excludes prescription contraceptives. This practice, which the evidence suggests is quite common, must be considered sex discrimination on its face (as well as in its disparate impact), based on the language and history of the PDA and strengthened by the Supreme Court's construction of it as prohibiting the treatment of female workers differently from other employees simply because of their capacity to bear children. At least one recent commentary has come to the same conclusion. Sylvia Law, Sex Discrimination and Insurance for Contraception, 73 Wash. L. Rev. 363 (1998).

In order to provide clear guidance to employers on this issue and prompt those who are out of compliance with Title VII to revise their policies accordingly, we urge the Commission to issue a policy guidance setting forth its position. The guidance must make it clear that an employer covered by Title VII that provides coverage for prescription drugs and devices in its employees health plan but does not provide coverage of all available methods of prescription contraception is in violation of Title VII.[14] In addition, the Commission should look for opportunities to litigate this issue in court.

We would be pleased to work with the Commission as it moves forward on this matter.

Sincerely,

Marcia D. Greenberger
Co-President

Judith C. Appelbaum
Vice President for Employment Opportunities

Susan Liss
Vice President for Health and Reproductive Rights

On behalf of the National Women's Law Center and:

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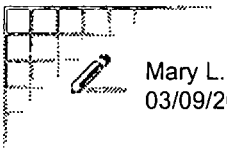


Mary L. Smith - DPC
03/09/2000 09:26:48 PM

Record Type: Record

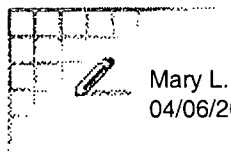
To: See the distribution list at the bottom of this message

cc: Anna Richter/OPD/EOP@EOP
Subject: Contraceptives and Title VII

I'm hearing that the women's groups are going to try to push us to have the EEOC issue guidance that would say that it is a violation of Title VII if a health care plan offers other prescription drugs but doesn't offer contraceptives. I'm also hearing that the EEOC has informally determined that it has the legal authority to do this. We should decide what, if anything, we want to do on this. Thanks, Mary

Message Sent To:

Bruce N. Reed/OPD/EOP@EOP
Eric P. Liu/OPD/EOP@EOP
Thomas L. Freedman/OPD/EOP@EOP
Ann O'Leary/OPD/EOP@EOP
Devorah R. Adler/OPD/EOP@EOP



Mary L. Smith
04/06/2000 04:48:24 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Anna Richter/OPD/EOP@EOP, Leslie Bernstein/WHO/EOP@EOP, Carolyn T. Wu/WHO/EOP@EOP
Subject: Contraceptives and Sex Discrimination

The National Women's Law Center, and many other groups, have urged the EEOC to issue guidance stating that it is sex discrimination under Title VII for an employer to exclude prescription contraceptives from insurance coverage where other prescription drugs and devices are covered. The analysis is that Title VII, as amended by the Pregnancy Discrimination Act (PDA), provides that sex discrimination includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions." Because the prevention of pregnancy is a "related medical condition," it is covered by the PDA. An employer commits sex discrimination when it covers other drugs or devices that are used to prevent the occurrence of other medical conditions such as vaccinations and immunizations.

I don't know whether this is something we would be interested in looking at. The main problem with this is that religious employers, like the Catholic Archdiocese, might be required to have their insurers provide contraceptives in contravention of their religious beliefs. Since we are in the middle of discussions on the Religious Liberties Protection, I thought I would raise this. Furthermore, what the women's groups really want is legislation, like Senator Snowe's, to pass that would require this of health insurers, and this is just a circuitous way of putting pressure on insurers. I thought I would put this on everyone's radar screen. We could put together a meeting to discuss any further issues if everyone is interested.

Message Sent To:

Karen Tramontano/WHO/EOP@EOP
Eric P. Liu/OPD/EOP@EOP
Bruce N. Reed/OPD/EOP@EOP
Maria Echaveste/WHO/EOP@EOP
William Marshall/WHO/EOP@EOP
Ann O'Leary/OPD/EOP@EOP
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Thomas L. Freedman/OPD/EOP@EOP