Health Advocate

E-Newsletter of the National Health Law Program

Volume 13 May 2013

ACA Reproductive Health Litigation: Comments from Friends-of-the-Court

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Key Resources

Contraceptive Coverage Requirement Timeline, May 2013, here.

Medical Management and Access to Contraception, May 2013, here.

Q&A on Preventive Services for Women Coverage Requirements (Updated), April 2013, here.

NHeLP Litigation Docket: Pending ACA Challenges Post NFIB, May 2013, here.

Coming in June's Health Advocate:

Health Reform in CA: Lessons Learned from a Leader State

Introduction

The Affordable Care Act ("ACA") requires new group health plans and health insurance issuers to cover all forms of Food and Drug Administration ("FDA")-approved contraceptive drugs and devices without cost-sharing.[1] This requirement is being challenged in more than 50 lawsuits that have been filed in courts across the country. The importance of the rule to women's health and autonomy has motivated over 70 groups and individuals to file friend-of-the court briefs supporting the requirement. This issue of the Health Advocate delves into some of the points being made by these briefs.

Overview of the Lawsuits

The plaintiffs in these cases vary widely, but generally fall into three categories: (1) religiously affiliated entities arguing that the requirement should not apply to them; (2) religious entities arguing that they should not have to cover drugs they believe to be abortion-inducing, which they claim the rule requires; and (3) for-profit corporations whose owners have religious objections to providing their employees with health insurance that covers contraception. Here, we focus on the last category of plaintiffs, as their challenges make up the majority of cases currently pending in federal appeals courts.

The lawsuits brought by for-profit corporations allege that the contraceptive coverage rule violates the plaintiffs' rights under the Constitution's free exercise of religion clause and the Religious Freedom and Restoration Act of 1993 ("RFRA"). RFRA provides that the Government shall not "substantially burden a person's exercise of religion" unless the burden is "(1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[2]

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[1] *See* Affordable Care Act ("ACA"), Pub. L. No. 111-148, § 101, § 2713(a), 124 Stat. 131 (2010) (codified at 42 U.S.C. § 300gg-13); U.S. Dep't of Health & Human Servs., Health Res. & Servs. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines.

[2] 42 U.S.C. § 2000bb-1.

The plaintiffs allege that the contraceptive coverage requirement imposes a substantial burden on their religious freedom because they must choose between following the law and providing contraceptive coverage, or violating the law and subjecting themselves to monetary fines.

The government responds that contributing funds towards an employee's health insurance coverage does not entitle the employer to make health care decisions for the employee.[3] To date, no federal court of appeals has reached a final decision in these cases.

Friend-of-the-court, or *Amicus Curiae*, Briefs

Friend-of-the-court, or *amicus curiae*, briefs are legal briefs submitted by a group or individual who is not a party to the case. The main purpose of the brief is to provide the court with information, such as data, scientific research, legislative history, or legal reasoning that the amicus believes will be helpful to the court's consideration of the legal issue.

What Amicus Briefs are Saying in Support of Contraceptive Coverage

> "Prevailing standards of medical care recognize family planning services as a necessary component of preventive care for women." *Amici curie* **NHeLP** et al.

Contraception is critical preventive care for the health of women and children. The **National Health Law Program** (NHeLP), joined by ten other organizations, filed friend-of-the court briefs that highlight evidenced-based standards of medical care recognizing that contraception is essential preventive care for women.[4] The briefs explain that professional academies and associations deem contraception as critical preventive care because: it allows a woman to appropriately space her pregnancies; it permits women taking medications that pose serious risks to maternal and fetal health to prevent those harms; and it allows women with certain medical conditions, such as heart disease and diabetes, to control those conditions so they can carry healthy babies to term. The NHeLP coalition brief also explains that the ACA's coverage provisions reflect a long history of federal legislation through *which contraceptive counseling, services, and supplies are made widely available.*[5]

Courts should rely on accurate and objective scientific information about contraceptives. The plaintiffs, *amici* supporting the plaintiffs, and even some courts, incorrectly characterize emergency contraception pills as abortifacients. As a result, amici **Physicians for Reproductive Choice**, along with other medical and public health organizations, filed briefs setting forth objective scientific facts demonstrating that "emergency contraception approved by the FDA and the Copper Intrauterine Device, CuT380A ("Cu IUD"), also effective for emergency contraception, are not 'abortifacients.'"[6]

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[3] *Id.* at 30-31 (discussing dissenting opinion in *Grote*, 2013 WL 362725, *13).
[4] *See, e.g.*, Br. of Nat'l Health Law Program, et al. at 1-13, *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357 (8th Cir. Dec. 28, 2012). *See also* Bethany Krajelis, *Arguments Over Religious Challenge to ACA Contraceptive Mandate Set for May*, THE MADISON-ST. CLAIR RECORD (Apr. 4, 2013), *available at* http://madisonrecord.com/news/s-3167-federal-court/254587-arguments-over-religious-challenge-to-aca-contraceptive-mandate-set-for-may.
[5] *See, e.g.*, Br. of Nat'l Health Law Program, et al. at 14-19, *O'Brien*, No. 12-3357.
[6] *See e.g.*, Br. of Physicians for Reprod. Health, et al. at 7, *Grote v. Sebelius*, No. 13-1077 (7th Cir. filed March 22, 2013).

The contraceptive coverage rule is necessary to close gaps in coverage. The **National Women's Law Center** and other regional, local, and national organizations' friend-of-the-court briefs provide a legislative history of the ACA provision leading to the challenged rule. Initially, the ACA did not require health plans to cover many preventive care services necessary to preserve and maintain women's health. "Recognizing this limitation for what it was—a significant gap in coverage that threatened women's health—Senator Mikulski sponsored the Women's Health Amendment to ensure essential protection for women's access to preventive health care not currently covered in other prevention sections of the [ACA]."[7]

"It is a long road from Appellants' own religious opposition to contraception use, to an independent decision by an employee to use her health insurance coverage for contraceptives." *Amici curiae* **American Civil Liberties Union** et al.

The contraceptive coverage rule does not violate RFRA. **Lambda Legal Defense and Education Fund, Inc**.'s friend-of-the-court briefs emphasize that a commercial entity "does not hold religious beliefs and does not engage in religious exercise protected by RFRA."[8] In a separate brief, Americans United for Separation of Church and State, along with other groups, emphasize that the federal rule does not require plaintiffs to participate in, agree with, or encourage, any contraceptive act.[9] Just as allowing an employee to use wages to purchase contraception does not substantially burden an employer's religion, using health insurance—a form of employee compensation—to obtain contraception does not substantially burden an employer's religion.

The **Center for Reproductive Rights** and other Friend-of-the-court briefs further urge that there is no RFRA violation because the contraceptive coverage rule is justified by the compelling government interest in promoting public health by preventing unintended pregnancy; addressing prevailing gender inequities; and providing access to the full range of pregnancy prevention options.

In the approximately 29 lawsuits involving for-profit entities, courts have granted the plaintiffs preliminary relief in 19 cases, *i.e.*, temporarily excused noncompliance with the coverage requirement, and denied preliminary relief in 6 cases. No appellate court has issued a decision on the merits yet.

[7] *See e.g.*, Br. of Nat'l Women's Law Ctr., et al. at 7, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6264 (10th Cir. filed March. 22, 2013) (internal quotations omitted) (alterations in original).
[8] *See, e.g.*, Brief of Lamda Legal Def. & Educ. Fund, Inc. at 4, *Annex Med., Inc.*, No. 13-1118 (8th Cir. Apr. 2013).
[9] *See, e.g.*, Br. of Ams. United for Separation of Church & State 15-16 *Newland v. Sebelius*, No. 12-1380 (10th Cir. Jan. 2013).

Status of the 29 For-Profit Cases*		
District Court	**Court of Appeals**	**Supreme Court**
Preliminary Relief Granted (favoring Plaintiffs): • *Seneca Hardwood* (W.D. Pa Apr. 2013) • *Newland* (D. Colo. July 2012), *on appeal* • *Legatus* (D. Mich. Dec. 2012), *on appeal* • *Tyndale*, (D. D.C. Nov. 2012), *dismissed on appeal* • *Am. Pulverizer Co.* (W.D. Mo. Dec. 2012), *on appeal* • *Domino's Farms*, (E.D. Mich. March 2013) • *Triune Health Group, Inc.* (N.D. Ill. Jan. 2013), *on appeal* • *Sioux Chief Mfg. Co.*, (W.D. Mo. Feb. 2013), *Gov't did not appeal* • *Lindsay, Rappaprt & Postel, LLC* (N.D. Ill. March 2013) • *Bick Holdings, Inc.* (E.D. Mo. Apr. 2013) • *Am. Mfg.* *(D. Minn. Apr. 2013) • *Hart Electric* (N.D. Ill. Apr. 2013) • *Tonn & Blank Construction* (N.D. Ind. Sept. 2012) • Preliminary Relief Denied (favoring Defendants):*Gilardi ("Freshway Foods")* (D. D.C. March 2013), *on appeal* • *Briscoe* (D. Colo. Feb. 2013) • *Eden Foods* (E.D. Mich. March 2013) • *MK Chambers* (E.D. Mich. Apr. 2013) Cases Pending: • *Armstrong* (D. Colo.) • *Beckwith* (M.D. Fla.) • *Infrastructure Alternatives* (W.D. Mich.) • *Mersino Mgmt.* (E.D. Mich.)	Preliminary Relief Granted (favoring Plaintiffs): • *Korte* (7th Cir. Dec. 2012) • *Grote* (7th Cir. Jan. 2013) • *O'Brien* (8th Cir. Nov. 2012) • *Annex Medical* (8th Cir. Feb. 2013) Preliminary Relief Denied (favoring Defendants): • *Hobby Lobby* (10th Cir. Dec. 2012) • *Autocam Corp.* (6th Cir. Dec. 2012) • *Conestoga Wood*, (3d Cir. Feb. 2013)	Cases reaching Supreme Court: 0

*as of 05/09/13

CONCLUSION

In the coming months, the litigation challenging the ACA's requirement for health insurance to include no-cost contraceptive services will continue to work its way through the courts. These cases promise to be hotly contested. To view NHeLP's litigation docket of all pending challenges, updated monthly, please visit our website at www.healthlaw.org.

About Us

The National Health Law Program protects and advances the health rights of low income and underserved individuals. The oldest non-profit of its kind, NHeLP advocates, educates and litigates at the federal and state level.

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