

Title VII Requires Covered Employers to Provide Contraceptive Coverage

EEOC Has Issued A Commission Ruling Making Title VII Obligations Explicit

Title VII of the Civil Rights Act of 1964 requires covered employers—those with fifteen or more employees—not to discriminate in pay and benefits to their employees. In December 2000, the EEOC issued a Commission Ruling explicitly stating that Title VII's prohibition against sex discrimination reaches employees whose employer-sponsored health insurance plans provide coverage of other prescription drugs and preventive services but fail to provide coverage of contraceptives.¹ The former EEOC leadership and Attorney General under the Bush Administration publicly committed to enforce this interpretation of Title VII as enforceable law.²

Several Courts Have Held that Covered Employers Must Cover Contraceptives

Erickson v. Bartell Drug Co., the first federal court to consider the issue of employer's duty under Title VII to provide contraceptive coverage after the EEOC ruling, held that an employer offering otherwise comprehensive health insurance to its employees, but failing to cover prescription contraceptives, was in violation of Title VII.³ The court found that women disproportionately bear the "adverse economic and social consequences of unintended pregnancies," rendering the defendant's exclusion of prescription contraceptives from the health plan while including a range of other preventive drugs discrimination under the Pregnancy Discrimination Act. There has been limited case law directly addressing the issue ever since, with the majority of cases finding that the exclusion of contraception from an otherwise comprehensive health insurance plan that includes preventive services constitutes impermissible sex discrimination.⁴

In Cooley v. Daimler Chrysler Corp., 281 F.Supp.2d 979 (E.D. Mo. 2003), the court held that the exclusion of prescription contraceptives from the employee insurance plan, while "seemingly neutral" placed a burden on women since only they have the capacity to become pregnant and the only prescription contraceptives available were for women. In Mauldin v. Wal-Mart, 89 Fair Empl. Prac. Cas. (BNA) 1600, 2002 WL 2022334 (N.D. Ga. 2002), the court certified the plaintiff class of women who use contraceptives and cited Erickson favorably. The case ultimately settled with the provision of contraceptives to Wal-Mart employees.

Courts' Reasoning in Adverse Decisions Was Both Incorrect and Has Been Nullified by Recent IOM Findings and their Adoption by HHS

The analysis in the court cases finding that the failure of an otherwise comprehensive health insurance plan to cover contraceptives are not relevant given the Institute of Medicine (IOM) Report on Women's Preventive Health Services and the Department of Health and Human Services (HHS) decision to adopt that report in its totality.

In a 2-1 decision, In re Union Pacific R.R. Emp't Practices Litig., 479 F.3d 936 (8th Cir. 2007), the Court basically disagreed with the EEOC decision on the grounds that it did not present a persuasive basis for comparing contraception to the broad spectrum of other preventive treatments and services.⁵ The district court in Cummins v. Illinois, No. 02-4201 (S.D. Ill 2005) used similar reasoning.

These cases are not only at odds with the fundamental principles reflected in the 2000 EEOC Commission Ruling, but cannot stand in light of the IOM Report and HHS's endorsement of the IOM's recommendations, which leave no doubt regarding contraception's necessity as a medical treatment, nor that women bear severe and disproportionate health burdens when contraception is unavailable and unaffordable.

Religious Employers Are Currently Bound by Title VII Duty to Provide Contraceptive Coverage

Title VII does not allow religious organizations to discriminate on the basis of race, sex (including pregnancy-related conditions), national origin or religion in the provision of pay or benefits to their employees. The EEOC has addressed the issue squarely in the context of fringe benefits. It has determined that it is sex discrimination for a religious organization to deny benefits to women or to pay women less based on a religious belief, for example, that only men can be the head of a household.⁶ And, as discussed above, it is also sex discrimination to exclude contraceptives when other prescription drugs and preventive services are provided as a fringe benefit. Furthermore, the Title VII Bona Fide Occupational Qualification exemption applicable to religious employers is explicitly limited to hiring and employment only, and does not allow religious employers to discriminate in pay or benefits once an employee is hired.⁷

**For more information on contraceptive coverage please visit
<http://www.nwlc.org/contraceptivecoverage>**

¹ EEOC on Coverage of Contraception, (Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

² Senate Judiciary Committee U.S. Senator Patrick Leahy (D-VT) Holds Second Day of Confirmation Hearing for Attorney General-Designate John Ashcroft, 107th Cong. Sess. 1 (2001) (when asked by Sen. Maria Cantwell if he would defend the agency's December 2000 contraceptive coverage ruling, Ashcroft responded "I would defend the law and seek to uphold the law.").

³ Erickson v. Bartell Drug Co., 141 F. Supp.2d 1266, 1273 (W.D. Wash. 2001).

⁴ Although in EEOC v. United Parcel Service, Inc., 141 F.Supp.2d 1216 (D. Minn. 2001), the Court did not consider the applicability of the PDA because the plaintiff was not taking contraceptives to prevent pregnancy, the Court nonetheless found that the denial of insurance coverage for contraceptives to treat a hormonal disorder resulted in disparate impact discrimination under Title VII when drugs used to treat male hormonal disorders were covered. See, Alexander v. American Airlines, 2002 WL 731815, *2 (N.D. Tex. 2002) (plaintiff lacked standing to challenge exclusion of contraceptives from employee health benefits plan).

⁵ See also Stocking v. AT&T, No. 03-0421, 2007 WL 3071825 (W.D. Mo. 2007) (controlled by Union Pacific).

⁶ EEOC Directives Transmittal, Section 12: Religious Discrimination, No. 915.003, July 22, 2008, nn.46-49 and accompanying text, available at <http://www.eeoc.gov/policy/docs/religion.html>.

⁷ Title VII's BFOQ exemption, 42 U.S.C. §2000e-2(e)1 states in relevant part:

[I]t shall not be an unlawful employment practice for an employer to *hire and employ* employees, ... on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, ... See, e.g., EEOC v. Fremont Christian Sch., 781 F.2d 1362, 1367 (9th Cir. 1986) (church owned and operated school held religious belief that only single persons and men could be the "head of household" eligible for the employee health insurance plan; court held "BFOQ exception does not apply to the discriminatory provision of benefits involved here").