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The Federal Contraceptive Mandate and California State Laws

Introduction

In light of recently issued federal rules, the California Health Benefits Review Program (CHBRP) has prepared this brief for policymakers and interested readers on the complex subject of insurance coverage for contraceptives. This brief is intended to help readers understand the Affordable Care Act's (ACA) federal contraceptive coverage mandate, California's more recent state coverage laws, and the variability between those laws.

On October 6, 2017, the Trump administration released two interim final rules regarding the ACA's contraceptive coverage requirement, which went into effect immediately.^{1,2} The new rules allow for broader exemptions among employers based on either "religious beliefs" or "moral convictions". The rules also allow exemptions for health plan issuers and individuals who oppose contraceptive coverage. However, this brief focuses on the broadened employer exemptions.

Since its implementation in 2012, the federal contraceptive mandate has faced controversy and legal challenges.³ Partially in response to these challenges, eight states have passed laws that codify the federal mandate into state law, should there be further threats to the federal mandate.^{4,5,6} In 2014, California passed the Contraceptive Coverage Equity Act, which requires private plans and policies and Medi-Cal managed care plans to provide coverage for all prescribed FDA-approved contraceptives for women without cost sharing. The state has also passed measures intending to improve access to contraceptives. In 2016, California passed a law allowing women to receive up to a 12-month supply of self-administered hormonal contraceptives at one time, aiming to reduce barriers to effective use of contraceptives.

However, self-insured plans⁷ are not subject to state-regulation as they are regulated at the federal level by ERISA, the Employee Retirement Income Security Act of 1974. Thus, self-insured plans are not required to follow state laws related to contraceptive care. In 2017, the California Health Care Foundation estimates that 6.6 million Californians receive their health insurance coverage through self-insured employer plans.⁸

The following is a review and comparison of the federal contraceptive mandate including recent regulatory changes from the Trump Administration, and California's recent relevant state laws.

¹ Department of Health and Human Services. (2017). [Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act](#). Interim Final Rule. *Federal Register*. 82 FR 47792- 47835.

² Department of Health and Human Services. (2017). [Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act](#). Interim Final Rule. *Federal Register*. 82 FR 47838- 47862.

³ Noteworthy cases include *Hobby Lobby v. Burwell*, *Zubik v. Burwell*.

⁴ Guttmacher Institute. (2017). [Insurance Coverage of Contraceptives](#).

⁵ National Health Law Program. (2014). [Gov. Brown Signs SB 1053, Landmark Legislation to Expand Birth Control Access in California](#).

⁶ California, Illinois, Maine, Maryland, Nevada, New York, Oregon and Vermont are the states that have passed such laws. At the time of publication, the laws are in effect in California, Illinois, New York and Vermont. They will take effect in 2018 or later in Maine, Maryland, Nevada and Oregon.

⁷ Under a self-insured group health plan (also known as a self-funded plan), the employer assumes direct financial risk for providing health insurance benefits to its employees.

⁸ California Health Care Foundation (2017). [California Health Care Almanac: California Health Insurers 2 Years After Reform](#). University of California | California Health Benefits Review Program www.chbrp.org

Federal Contraceptive Mandate

On August 1, 2011, female contraception was added to a list of preventive services covered by the ACA that would be provided without enrollee cost sharing. The federal mandate applied to all new health insurance plans in all states, beginning in August of 2012. Before the federal mandate was implemented, 28 states had their own mandates that required health insurance plans to cover prescription contraceptives if they covered other prescription drugs, but the federal mandate was unique in prohibiting any enrollee cost-sharing.⁹

The federal mandate requires that health plans cover the full range of contraceptives for women without cost sharing including at least one option within each method approved by the Food and Drug Administration (FDA).^{10,11}

- The requirement applies to private, non-grandfathered health plans. This includes state-regulated individual and group plans and federally-regulated self-insured and federal employee plans.¹² The requirement does not apply to grandfathered plans available prior to the passage of the ACA.
- The mandate is part of a broader requirement to cover key preventive services without cost sharing, including specified women's preventive services. The Health Resources and Services Administration (HRSA) maintains and updates the women's preventive services guidelines which outline services to be covered without cost sharing.¹³
- Based on federal guidance, plans may use "reasonable medical management" techniques. For example, a plan may require cost sharing for a brand-name drug if there is an equivalent generic drug available.¹⁴

In early regulations, a limited scope of employers could be exempt from the mandate, including religious employers such as houses of worship. Over the years and in response to legal challenges to the provision, there has been further movement to address concerns of religious organizations.¹⁵ For example, some employers, including non-profit religiously affiliated organizations and closely held for-profit corporations not eligible for an exemption could be granted an accommodation.¹⁶ With an accommodation, an employer could notify the relevant insurer, third-party administrator or the Department of Health and Human Services of their objection. The insurer would then be responsible for providing contraceptive coverage to enrollees. Employers eligible for an exemption could also elect to pursue an accommodation instead.

Recent Final Rules for the Federal Contraceptive Mandate

Under the new rules, exemptions are broadened to a wider scope of employers that may object to the contraceptive mandate based on either religious beliefs or moral convictions:

- One rule allows exemptions for nonprofit organizations, for-profit employers or any other non-governmental employer with *sincerely held religious beliefs*;¹⁷

⁹ Sonfield A. (2013). ["Implementing the Federal Contraceptive Coverage Guarantee: Progress and Prospects"](#) (PDF). Guttmacher Policy Review. 16 (4).

¹⁰ Health Resources and Services Administration. (2017). [Women's Preventive Services Guidelines](#).

¹¹ Public Health Service Act, Section 2713.

¹² Sobel L, Salganicoff A, Rosenzweig C. (2017). [New Regulations Broadening Employer Exemptions to Contraceptive Coverage: Impact on Women](#). Kaiser Family Foundation.

¹³ Food and Drug Administration. (n.d.). [Birth Control Guide](#).

¹⁴ Department of Labor. (2013). [FAQs About Affordable Care Act Implementation Part XII](#).

¹⁵ Pew Research Center. (2013). [The Contraception Mandate and Religious Liberty](#).

¹⁶ Jost T. (2017). [Administration Sticks With Current Accommodation For Employers Objecting To Contraceptive Coverage](#). Health Affairs Blog.

¹⁷ 82 FR 47792- 47835.

- The other rule allows exemptions for nonprofit organizations and for profit entities (excluding publicly traded entities) with *sincerely held moral convictions*.¹⁸

Both rules also note that an institution of higher education that arranges for student health insurance is eligible for an exemption. Additionally, employers may pursue exemptions to the extent of their religious or moral objections. In other words, employers may object to one, some or all of the contraceptives outlined by HRSA. The exemption would only apply to the contraceptives to which the employers have religious or moral objections. Under the new regulations, entities that are eligible for an exemption may choose to pursue an accommodation instead.¹⁹

The rules also update requirements for employers that pursue an exemption:

- It is unclear whether or how objections would be certified. Both rules state that the mechanisms for determining whether an entity holds religious or moral objections are a matter of “well-established State law,” but do not elaborate further. Under previous regulations, entities seeking an accommodation were required to self-certify their eligibility and notify the plan issuer or third-party administrator. Entities could also notify HHS in writing of their religious objection.²⁰
- The rules do not require employers that pursue an exemption to provide notice or self-certify their exemption. However, ERISA requires employer sponsored plans to maintain updated benefit summaries reflecting covered services.²¹

It is unknown how many employers would pursue the broadened exemptions based on religious or moral objections, and thus, unclear how many enrollees may lose coverage for contraception.

California Legislation

Contraceptive Coverage Equity Act

In 2014, California passed the Contraceptive Coverage Equity Act, effective January 1, 2016.²²

- The law requires that relevant health plans provide coverage for FDA-approved contraceptive drugs, devices and products as well as voluntary sterilization, contraceptive education, counseling and related follow-up care for women. Plans must cover, without cost sharing, at least one form of contraception within each FDA-approved method.
- The law applies to health insurance plans and policies regulated by one of the state’s regulators, the California Department of Managed Healthcare (DMHC) or the California Department of Insurance (CDI); this includes Medi-Cal managed care plans regulated by DMHC.²³
- Religious employers whose primary purpose is the inculcation of religious values and that meet other specifications may be exempt from the state mandate.²⁴ Among states with contraceptive

¹⁸ 82 FR 47838- 47862.

¹⁹ Department of Health and Human Services. (2017). [Fact Sheet: Religious and Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act.](#)

²⁰ Department of Health and Human Services. (2015). [Coverage of Certain Preventive Services Under the Affordable Care Act, Final Rule.](#) *Federal Register*. 80 FR 41317-41347.

²¹ Jost T, Keith K. (2017). [Trump Administration Regulatory Rebalancing Favors Religious And Moral Freedom Over Contraceptive Access.](#) Health Affairs Blog.

²² California Legislative Information. (2014). [SB-1053 Health care coverage: contraceptives.](#)

²³ California Legislative Information. (2014). [SB-1053 Health care coverage: contraceptives.](#)

²⁴ Religious employers eligible for exemptions include an entity: a) whose purpose is the inculcation of religious values, b) that primarily employs persons who share the entity’s religious tenets, c) that primarily serves persons who share the entity’s religious tenets, d) that is a nonprofit organization. These qualifications mirror those for a religious employer eligible for exemption in prior federal rules. A religious employer that invokes the exemption must provide written notice to prospective plan enrollees and must list the health care services that the employer will not cover for religious reasons.

coverage laws in place, California's requirements for religious exemptions are comparatively narrow.²⁵

This state law does not apply to self-insured health plans, which are not subject to state regulation. A handful of other states, including Illinois, New York and Vermont, have enacted similar laws.^{26,27}

Annual Supply of Contraceptives

In 2016, California passed a law allowing women to receive up to an annual supply of self-administered hormonal contraceptives at one time, effective January 1, 2017.²⁸

- Contraceptives that may be dispensed annually include the pill, patch and ring. Among plans subject to the law, an annual supply of contraceptives shall be covered without cost sharing.
- The law applies to all state-regulated health insurance plans and policies regulated by DMHC and CDI, including Medi-Cal managed care plans regulated by DMHC.

Again, this state law does not apply to self-insured health plans, which are not subject to state regulation.

Table 1 describes the federal contraceptive mandate, before and after the newest regulations, and recent California laws related to contraceptive coverage.

Implications of New Regulations and Looking Ahead

It remains to be seen how many employers will pursue an exemption based on the broadened exemption eligibility. Certain state laws in effect will preserve coverage of contraceptive care without cost sharing for many California women; namely, women with insurance coverage regulated by the state. However, self-insured plans are not subject to state regulation and enrollees in these plans may stand to lose coverage for contraceptives, depending on their employer's decisions. Additionally, most states have not codified legislation for contraceptive coverage without cost sharing into state law. Consequently, women enrolled in state-regulated *and* self-insured plans in those states could lose coverage for contraceptives if their employers pursue the broadened exemptions.

Almost immediately after the release of these rules, the state of California filed a lawsuit challenging the Trump Administration's actions.²⁹ At the time of publication, Massachusetts, Washington, Pennsylvania and the American Civil Liberties Union have also filed lawsuits in response to these rules.^{30,31,32,33} Impending litigation may continue to impact the future of the ACA's contraceptive mandate and the precise impact of these rules on women's access to contraceptive care remains to be seen.

The California Health Benefits Review Program (CHBRP) conducts independent analysis of proposed health insurance benefits-related legislation on behalf of the California Legislature. This issue brief was prepared by Erin Shigekawa, Adara Citron and Garen Corbett, published October 19, 2017.

²⁵ Kaiser Family Foundation. (2017). [State Requirements for Insurance Coverage of Contraceptives](#).

²⁶ Guttmacher Institute. (2017). [Insurance Coverage of Contraceptives](#).

²⁷ Sobel L, Salganicoff A, Rosenzweig C. (2017). [The Future of Contraceptive Coverage](#). Kaiser Family Foundation.

²⁸ California Legislative Information. (2016). [SB-999 Health care coverage: contraceptives: annual supply](#).

²⁹ California Office of the Attorney General. (2017). [Attorney General Becerra to Challenge Trump Administration Over Contraceptive Regulations, Files Federal Lawsuit in California](#).

³⁰ The Attorney General of Massachusetts. (2017). [AG Healey Sues the Trump Administration for Roll Back of Contraception Coverage Mandate](#).

³¹ Washington State Office of the Attorney General. (2017). [AG Ferguson Sues to Block Trump Rules Eroding Contraception Access](#).

³² Office of Attorney General Josh Shapiro, Commonwealth of Pennsylvania. (2017). [Attorney General Josh Shapiro Sues President Trump and Trump Administration for Eliminating Guaranteed Contraceptive Care](#).

³³ American Civil Liberties Union. (2017). [ACLU Filing Lawsuit Challenging Trump Administration Contraceptive Coverage Rule](#).

Table 1: ACA Contraceptive Mandate and Recent California State Laws

	Federal Contraceptive Mandate, Prior to 10/6 Rules	Federal Contraceptive Mandate, As of 10/6 Regulations	CA State Law – Contraceptive Coverage Equity Act	CA State Law – Annual Supply of Contraceptives
To what plans does the provision apply?	-Private, non-grandfathered health plans: individual, group and self-insured plans	-No change	-All state-regulated health insurance (DMHC-regulated plans including Medi-Cal managed care and CDI-regulated policies)	-All state-regulated health insurance (DMHC-regulated plans including Medi-Cal managed care and CDI-regulated policies)
To what plans does the provision NOT apply?	-Grandfathered plans	-Grandfathered plans	-Self-insured plans -Grandfathered plans	-Self-insured plans -Grandfathered plans
What entities are eligible for an exemption?	-Exemptions for houses of worship, churches	-Exemptions for <i>religious beliefs</i> broadened to: integrated auxiliary of a church, convention, association of churches, religious order, non-governmental nonprofit or for-profit entities, any other non-governmental employer, institutions of higher education that arrange student health plans ³⁴ -Exemptions for <i>moral convictions</i> broadened to: nonprofit organizations, for-profit privately held entities, institutions of higher education that arrange student health plans ³⁵	-Religious entities that meet the following qualifications: purpose is the inculcation of religious values; primarily employs persons who share the entity's religious tenets; primarily serves persons who share the entity's religious tenets; a nonprofit organization	-Same as qualifications for religious entities under the Contraceptive Coverage Equity Act
What entities are eligible for an accommodation?	-Accommodations available to nonprofit religiously-affiliated organizations and closely held for-profit corporations ^{36,37,38}	-Eligibility for accommodations applies to entities that are newly eligible for exemptions	N/A	N/A
What types of contraceptives are covered?	-Based on HRSA guidelines, all FDA-approved contraceptive methods, counseling, follow-up -At least one form of contraception of each FDA-approved method ³⁹ -Plans may use "reasonable medical management techniques" ⁴⁰	-Does not impact HRSA's ability to maintain guidelines or the types of contraceptives covered for those without religious or moral objections	-All FDA-approved contraceptive drugs, devices, and products, as well as voluntary sterilization procedures, contraceptive education and counseling and related follow-up (for women) -At least one form of contraception of each FDA-approved method ⁴¹	-Allows for annual supply of self-administered hormonal contraceptives to be dispensed at once (includes pill, patch and ring)
How does it impact cost sharing?	-No cost sharing permitted	-No change for those without religious or moral objections	-No cost sharing permitted	-No cost sharing permitted for annual supply

³⁴ 80 FR 41317 – 41347.³⁵ 82 FR 47838 – 47862.³⁶ Sobel L, Beamesderfer A, Salganicoff A. (2016). [Private Insurance Coverage of Contraception](#). Kaiser Family Foundation.³⁷ Jost T. (2017). [Administration Sticks With Current Accommodation For Employers Objecting To Contraceptive Coverage](#). Health Affairs Blog.³⁸ 80 FR 41317 – 41347.³⁹ Centers for Medicare and Medicaid Services. (2015). [FAQs about Affordable Care Act about Affordable Care Act Implementation \(Part XXVI\)](#).⁴⁰ Centers for Medicare and Medicaid Services. (2015). [FAQs about Affordable Care Act about Affordable Care Act Implementation \(Part XXVI\)](#).⁴¹ California Legislative Information. (2014). [SB-1053 Health care coverage: contraceptives](#).