State Contraceptive Coverage Laws: Creative Responses to Questions of 'Conscience'

By Cynthia Dailard

In 1998, Congress set an important precedent for private-sector, employer-based health insurance when it guaranteed contraceptive coverage for employees of the federal government in the context of the Federal Employees Health Benefits Program (FEHBP), the largest employer-sponsored health insurance program in the world. Grappling with thorny questions over the scope of an exemption for FEHBP plans that might object to providing the coverage was key to allowing the proposal to become a reality for the nine million individuals enrolled in the program.

Indeed, questions over which of the 285 health plans participating in the FEHBP could opt out of the coverage requirement, and on what basis, were contentious sticking points. Opponents of contraceptive coverage argued for the widest possible "conscience clause"—one that would allow any plan to decline to provide the coverage because of a "moral" objection to doing so. In order to guarantee access to the greatest number of enrollees, contraceptive coverage supporters pressed for the narrowest possible exemption—one that would permit only *religious* plans that had a clearly stated "religious" objection to contraception to opt out. In the end, supporters largely prevailed; the law exempts five specific plans identified by the federal Office of Personnel Management (OPM) and allows additional existing or future plans to be exempted if they object to contraception "on the basis of religious beliefs."

In June, contraceptive coverage supporters reintroduced the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC)—proposed federal legislation designed to ensure contraceptive coverage throughout the private sector (*For the Record,* page 13). This has led some in Congress to question why the so-called conscience clause contained in the FEHBP provision ought not simply be transferred to EPICC. But while the exemption in the FEHBP law may be appropriate to that particular context, more appropriate models for EPICC may be found in state contraceptive coverage laws that address the related but different problems that might arise in the general private market.

Indeed, six of the nine states that have enacted contraceptive coverage laws aimed at the private sector included some form of "conscience clause" in their statute. These state-crafted provisions address the questions of what specific types of private-sector entities should be entitled to claim a conscientious objection to contraceptive coverage, what grounds should form the basis of the exemption and how the deleterious impact of those objections on individuals needing contraceptive services can be minimized.

Private-Sector Responses

While the conscience exemption agreed to in the FEHBP context neatly addresses the issues raised when the federal government imposes an insurance mandate on itself as an employer, it is not one that transfers well or appropriately to the private sector. Indeed, an exemption for religious *plans* was acceptable to contraceptive coverage supporters in the context of FEHBP, because it is unlikely to significantly interfere with an enrollee's ability to obtain contraceptives; since a federal employee may choose from up to 285 plans, he or she can fairly readily avoid those few plans that take advantage of the exemption and refuse to provide contraceptive coverage. This is not the case in the private sector, however, where it is very often the employer, not the employee, who selects the plan. In fact, according to KPMG Peat Marwick, almost eight in 10 employees in small firms (79%) and almost half of employees in large firms (46%) work for employers who offer only one plan. As a result, balancing the perceived need to exempt some *employers* as well as some *plans* from covering contraceptives with the right of individual employees to obtain the coverage to which they are entitled becomes more difficult in the private sector.

Six of the nine state contraceptive coverage laws provide some form of opt-out on religious grounds.

Employer Opt-Outs

In addition to concerns about plans, the private-sector context raises new questions surrounding employers who may object on religious grounds to providing contraceptive coverage. Indeed, this question was moot in the FEHBP debate, where the employer—the federal government—clearly did not have a religious objection to contraception.

Here, as in the case with FEHBP plans, the goal should be to craft as narrow an exemption as possible—one that exempts only those employers with genuine religious objections to contraception, while minimizing the impact of such an exemption on employees. This is particularly important given that an employer who opts out of providing contracep-

tive coverage does so for *all* its employees—many of whom may not share the employer's beliefs. For example, if a large religiously affiliated hospital or university—in its role as employer—claims a conscientious objection to contraception, it does so to the very real detriment of those employees who have no affiliation whatsoever with the employer's religion.

The scope of an exemption for employers was very much at issue in five of the nine states that have enacted contraceptive coverage laws—Connecticut, Hawaii, Maine, Maryland and North Carolina. These exemptions tend to allow entities that qualify as a "religious employer" to opt out of the coverage requirement when covering contraception would conflict with the employer's "religious tenets" (Hawaii and North Carolina), "bona fide religious tenets" (Connecticut) or "bona fide religious beliefs and practices" (Maine and Maryland).

A central question determining the scope of such an exemption is how each law defines the term "religious employer." For example, while the Maryland law does not define the term at all—potentially allowing any entity that self-identifies as a religious organization to claim an exemption—the Connecticut law limits its exemption to "qualified church-controlled organizations," as defined in the federal tax code, or organizations that are "church-affiliated."

Maine, North Carolina and Hawaii have more elaborate standards. In the Maine law, a "religious employer" is defined as a tax-exempt organization that is "a church, convention or association of churches or an elementary or secondary school that is controlled, operated or principally supported by a church or by a convention or association of churches," also defined by the federal tax code. In this state, therefore, employers that are religiously affiliated universities or hospitals, for example, would not qualify as employers entitled to an exemption.

To qualify as a "religious employer" under the North Carolina law, the employer must be a nonprofit organization whose purpose is to further the "inculcation of religious values." Moreover, the employer must primarily employ individuals who "share the [employer's] religious tenets." Thus, it appears that churches, synagogues and religious schools in North Carolina would be exempt, but religiously affiliated hospitals would not.

Under Hawaii law, when an employer is exempted from the contraceptive coverage requirement, its employees are entitled to purchase coverage directly from the plan, at a cost no more than what they would have paid had the employer not been exempted.

The Hawaii law contains language similar to North Carolina's to define a religious employer, but it broadens the exemption to include nonprofit organizations that are owned or controlled by a religious employer. Hawaii adds a new restriction, however—that the entity cannot be staffed by public employees.

Mitigating the Harm

Thus far, Hawaii is the only state whose legislature has taken specific action designed to prevent individual enrollees from being disadvantaged as a result of their employer's invoking a religious exemption. The Hawaii law specifies that when an employer is exempted from the contraceptive coverage requirement on religious grounds, its employees are entitled to purchase coverage directly from the plan. The cost to the employee must be no more than the price the employee would have paid had the employer not been exempted. The law requires an exempted employer to notify its employees of this option. (This type of language was first proposed in legislation introduced in the state of Washington; that legislation will still be pending before the legislature when it reconvenes next year.)

California is the only other state to actively consider a means to ensure that individuals have access to contraceptives when their employer opts out of a coverage requirement on religious grounds, but it has yet to enact legislation. A bill passed by the state legislature in 1998 made such employees eligible for state-funded services, as part of a larger state-funded family planning program; the proposal went so far as to require that these employees be given the toll-free phone number for the state's family planning program. Then-governor Pete Wilson (R), however, cited this provision when he vetoed the bill—in his third veto of contraceptive coverage legislation in as many years. Nonetheless, the provision stands as an important model for efforts to strike a balance between maintaining the ability of employers to adhere to religious doctrine and protecting the right of employees and their dependents to obtain contraceptives.

What About Plans?

Finally, the question arises how an insurer that objects on religious grounds to writing a plan that includes contraceptive coverage can function in a marketplace where most private-sector employers are required to provide such coverage. In fact, religious plans across the country finding themselves in roughly analogous situations have been quietly developing means of sufficiently distancing themselves from the actual provision of services to which they object—thus allowing them, for example, to participate in Medicaid programs that require cov-

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erage of contraception and to compete in the private marketplace in situations where contraceptive coverage is being sought by a large employer (*TGR,* Vol. 1, No. 6, December 1998).

Taking a cue from these models, the Connecticut law explicitly includes a "carve-out" option that allows religious plans to "provide for the coverage of prescription contraceptive methods...through another such entity offering a limited benefit plan. The cost, terms and availability of such coverage may not differ from [that] of other prescription coverage offered to the insured." In other words, plans that object on religious grounds to providing contraceptive services could, through a subcontract, assign responsibility for administering the required benefit to another insurer or third-party entity.

Looking Ahead

In summary, as the contraceptive coverage issue continues to gain momentum, questions over so-called conscience clauses will continue to play a major role in these debates. Indeed, recent history demonstrates that resolving these questions is often key to a bill's ultimate success. Fortunately, for each of the difficult issues that have been raised to date, a handful of states have devised creative responses that can serve as a starting point for future debates involving contraceptive coverage at both the state and federal level.