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Implications of Mandatory Insurance Coverage of Contraceptives for Catholic Colleges and Universities

October 2009

by The Becket Fund for Religious Liberty

About the Author

The Becket Fund for Religious Liberty is a Washington, D.C.-based public interest law firm protecting the free expression of all religious traditions through litigation, media outreach and scholarship. Since 1994, Chairman and President Kevin J. Hasson and The Becket Fund have successfully represented clients from nearly every faith tradition, earning the praise of leaders from Pope John Paul II to Elie Wiesel. As both primary counsel and amicus curiae, in federal and state trial and appellate courts, The Becket Fund has developed expertise in all areas of religious freedom law, but especially under the Free Speech, Free Exercise and Establishment Clauses of the First Amendment to the U.S. Constitution. It has been a steadfast advocate for laws that protect the conscience rights of individuals and institutions.

Executive Summary

The trajectory of state law and the Equal Employment Opportunity Commission's (EEOC) recent interpretations of Title VII and the Pregnancy Discrimination Act (PDA) pose serious threats to the conscience rights of Catholic institutions that believe that they cannot cover prescription contraceptives in student and employee insurance plans without contradicting fundamental tenets of their faith. Catholic institutions might be compelled to suspend, or significantly restrict, the prescription health care benefits available to their students and employees.

Colleges may have recourse to state constitutional language and the First Amendment of the U.S. Constitution. Catholic institutions can also raise various statutory defenses including federal and state "Religious Freedom Restoration Acts" and various anti-discrimination statutes. These protections are subject to the requirement that claims be sincere, or "bona fide;" courts are competent to judge whether a religious belief is "sincerely held."

Depending on new legal developments, objecting Catholic institutions may have to resort to creative arrangements to balance treating their students and employees justly and remaining faithful to their principles. Some possible courses of action and recommendations are outlined.

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www.CatholicHigherEd.org

About The Center

The Center for the Study of Catholic Higher Education is the research division of The Cardinal Newman Society. Its mission is to promote the ongoing renewal of Catholic higher education by researching and analyzing critical issues facing Catholic colleges and universities, and sharing best practices. The Center's work is guided by the principles of *Ex corde Ecclesiae* and the Magisterium of the Catholic Church.

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Implications of Mandatory Insurance Coverage of Contraceptives for Catholic Colleges and Universities

You have asked us to describe some of the current issues surrounding conscientious objections to the funding of contraceptives through employee and student health insurance benefit plans. In particular, you have asked us to describe the general considerations confronting Catholic institutions that seek to comply with their understanding of their obligations under *Ex corde Ecclesiae* and Roman Catholicism generally.

We emphasize at the outset that this is not legal advice, and no one should treat it as such. Nor are we presuming to give religious or theological advice.

We also note that it is not only those Catholic institutions that conform in all respects to the most obvious reading of *Ex corde Ecclesiae*, canon law, or any other source of church authority that enjoy religious liberty under the law. At least since *Thomas v. Review Board*, 450 U.S. 707 (1981), it has been clear that it is the specific religious beliefs of the person or institution before the Court that determine the extent of conscience protection afforded by civil courts. The legal analysis that follows is therefore belief-neutral.

Introduction

The issue of contraceptive mandates is a new one for most Catholic institutions. The trend toward state-mandated contraceptive coverage in employee health insurance plans began in the mid-1990s¹ and was accelerated by the decision of Congress in 1998 to guarantee contraceptive coverage to employees of the federal government through the Federal Employees Health Benefits Program (FEHBP).² After FEHBP—the largest employer-insurance benefits program in the country—set this precedent, the private sector followed suit, and state legislatures began to make such coverage mandatory.³

The trajectory of state law and the Equal Employment Opportunity Commission's (EEOC) recent interpretations of Title VII and the Pregnancy Discrimination Act (PDA) pose serious threats to the conscience rights of Catholic employers who believe that they cannot fund employee prescription contraceptives without contradicting fundamental tenets of their faith. Should this trend continue, many Catholic institutions will not be able to comply with state law and the PDA while remaining true to their religious convictions. As a result, Catholic institutions might be compelled to suspend, or significantly restrict, the prescription health care benefits available to their employees.

1. See The Guttmacher Institute, *The Cost of Contraceptive Insurance Coverage*, at 1 (2003), available at http://www.guttmacher.org/pubs/ib_4-03/pdf (“[H]alf of all traditional indemnity plans in 1993 did not cover any reversible prescription methods of contraception, and only 15% covered all of the five leading methods.”) (also citing 2001 Kaiser Family Foundation findings that only 41% of insured employees had coverage of all reversible contraceptives while “virtually all employees” had coverage of prescription drugs in general).

2. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681.

3. See The Guttmacher Institute, *State Contraceptive Coverage Laws: Creative Responses to Questions of ‘Conscience’*, at 1 (Aug. 1999) [hereinafter *State Contraceptive Coverage Laws*], available at <http://alanguttmacherinstitute.org/pubs/tgr/02/4/gr020401.pdf> (last visited Oct. 2, 2009). According to studies, contraceptive coverage does not tend to increase the cost to an employer of providing prescription coverage. To the contrary, an employer that is willing to extend coverage to new members of a growing family rather than paying for contraception would undertake greater expenses. See *The Cost of Contraceptive Insurance Coverage*, *supra* note 2 (citing numerous findings demonstrating that providing contraceptive coverage reduces costs to employer).

Failure to exclude objecting Catholic entities from the requirement to provide contraception constitutes an abandonment of the government's responsibility to protect against threats to the moral integrity of a large class of its citizens.⁴ What is at stake is therefore the right of an objecting Catholic college to remain "authentically Catholic" by its own lights.⁵

Overview of Governing Law

Catholic employers are no doubt familiar with Title VII, the primary federal law addressing employment discrimination. Title VII prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...."⁶ Title VII exempts religious organizations and institutions from its provision on religious discrimination, but does not exempt them from its provisions on gender discrimination.⁷

Title VII defines discrimination "on the basis of sex" to include discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions;" and specifies that "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...."⁸

This part of Title VII, commonly known as the Pregnancy Discrimination Act (PDA)⁹, was added by Congress in 1978 in response to a Supreme Court decision holding that an employer's selective refusal to cover pregnancy-related disability was not sex discrimination within the meaning of Title VII.¹⁰ The PDA specifies that it "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."¹¹ The PDA does not define abortion, and makes no mention of contraception.¹²

In 2000, the EEOC issued an opinion stating that the refusal to cover contraceptives in an employee prescription health plan constituted gender discrimination in violation

4. See, e.g., Christopher O. Tollefsen, *Should the Obama Conscience Rules Seek to Protect Persons or Provide Benefits?*, THE PUBLIC DISCOURSE (Mar. 24, 2009), available at www.thepublicdiscourse.com.

5. For an extensive discussion of these issues, see generally Susan Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV. J.L. & PUB. POL'Y 741 (2005).

6. 42 U.S.C. § 2000e-2(a)(1).

7. See 42 U.S.C. 2000e-1(a).

8. 42 U.S.C. 2000e(k).

9. 42 U.S.C. § 200e(k) (2000).

10. See Craig W. Mandell, *Tough Pill to Swallow: Whether Catholic Institutions are Obligated under Title VII to Cover Their Employees' Prescription Contraceptives*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 199, 203-04 (2008) (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)). Mandell notes that "Justices Brennan and Stevens sharply dissented from [the Gilbert majority's] conclusion, arguing that 'it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'" *Id.* According to Mandell, the "Supreme Court has since recognized that the PDA's enactment demonstrates that Congress viewed the dissenting opinions in *Gilbert* as more reflective of the principles behind Title VII." *Id.*

11. 42 U.S.C. 2000e(k).

12. See *id.*

of the PDA.¹³ Although this opinion is not binding on federal courts, it is influential, since the EEOC is the government body charged with enforcing Title VII.¹⁴ This opinion led to many lawsuits against non-religious employers who refused to cover prescription contraceptives.¹⁵ The first federal court decision in one of these cases—*Erickson v. Bartell Drug Co.*—came less than a year after the EEOC opinion, and agreed that employers with prescription drug plans have “a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes.”¹⁶ The Supreme Court has not ruled on the issue of contraceptive coverage. But, since *Erickson*, new Title VII claims have been brought against Catholic institutions that did not provide contraceptive coverage.¹⁷

Current State Laws Concerning Insurance Coverage of Contraceptives

While virtually all insurance plans include coverage of prescription drugs, employers can opt to exclude coverage of the range of U.S. Food and Drug Administration (FDA)-approved prescription contraceptive drugs and devices.¹⁸ To counteract this policy, in the past two decades, 27 states have enacted laws to require insurers that cover any prescription drugs at all to cover *all* FDA-approved contraceptive drugs and devices.¹⁹ Furthermore, 16 of these states have mandated coverage of related outpatient services.²⁰ Such state laws regulate college and university health plans for students as well as employees.

Catholic institutions are afforded limited protection in 15 of the 27 states. These states have enacted conscience protections that allow institutional employers or insurers to exclude contraceptive coverage on religious or moral grounds.²¹ Under such provisions, a Catholic college or university may be able to exclude contraceptive coverage from its employee health plan. (However, the conscience protections do not extend to health plans

13. See U.S. Equal Employment Opportunity Commission, *Decision on Coverage of Contraception* (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html> (last visited Oct. 2, 2009).

14. See *id.*

15. See *id.*

16. 141 F. Supp. 2d 1266, 1269 (W.D. Wash. 2001).

17. See *infra*

18. See The Guttmacher Institute, *State Policies in Brief: Insurance Coverage of Contraceptives* (updated Oct. 1, 2009) [hereinafter *Insurance Coverage of Contraceptives*], available at http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (last visited Oct. 2, 2009).

19. See Stabile, *supra* note 7, at 747 n.27. The reason the laws proceed in this way is that the Employee Retirement Income Security Act (“ERISA”), the federal statute that regulates most employee benefit plans of private employers preempts state laws relating to employee benefit plans. See 29 U.S.C. § 1144(a) (2000). However, the statute’s preemption provision contains an exception for state insurance law. See *Id.* § 1144(b)(2)(A) (2000). Thus, ERISA forbids states from imposing direct mandates on an employer to provide certain benefits. It, however, does not forbid indirect regulation of employer benefit plans that operate through state law insurance mandates. See *id.*; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

20. See *Insurance Coverage of Contraceptives*, *supra* note 21.

21. For an overview of state legislation on insurance coverage of contraception, see National Conference of State Legislatures, *Insurance Coverage for Contraception Laws* (updated Sept. 2009), available at <http://www.ncsl.org/Default.aspx?TabId=14384> (last visited Oct. 2, 2009). Federal law requires insurance coverage of contraceptives for federal employees and their dependents; a few specific religious insurance providers are exempt from the requirements. In addition, several states have limited mandates that apply to either specific types of insurers, such as health maintenance organizations (HMOs), or to coverage created for a segment of the insurance market. See *id.*

offered by a college or university to its students.)²²

The state exemptions ordinarily allow entities to opt out if covering contraception would interfere with the employer's "religious tenets" (e.g., Hawaii and North Carolina), "bona fide religious tenets" (e.g., Connecticut), or "bona fide religious beliefs and practices" (e.g., Maine and Maryland).²³ Among the states that have enacted these mandates, Missouri is the most protective of conscience, allowing any employer to refuse coverage, regardless whether the motivation is based on religion or other ethical principle.²⁴ The objections of Catholic institutions to covering contraception should meet any of these state standards, since Catholic institutions that object to contraception, sterilization, and abortion as "intrinsic evils" can invoke a number of doctrinal statements expressing the value and dignity of human life from conception and the sacredness of the marital act open to procreation.²⁵

More complicated, however, is how the state laws define the religious employers to be exempted under their conscience provision. Some states do not define the term "religious employer" at all, which could permit any institution that self-identifies as religious to claim the exemption.²⁶ In North Carolina, for example, a religious employer is a non-profit organization whose purpose is to advance the "inculcation of religious values" and whose employees primarily "share the [employer's] religious tenets."²⁷ Thus, in North Carolina and states employing similar language, Catholic colleges would ordinarily be exempted. Hawaii's statute is similar to North Carolina's, although it also affords protection to nonprofit organizations that are owned or controlled by a religious employer, as long as the organization "primarily employs persons who share the religious tenets of the entity."²⁸ In New York and California, among others, the term "religious employer" is interpreted so as to exempt Catholic churches themselves, but not the various organs of the Catholic Church such as Catholic Charities, or Catholic hospitals, colleges, universities or nursing homes.²⁹

22. The state contraceptive mandate statutes apply to "insurers providing a health benefit plan." The statutes define an insurer as an insurance company, a corporate service provider, or health maintenance organizations. The exemptions contained in these statutes apply to *employers* contracting with *insurers* to provide *employee* benefits. The religion-based exemptions do not extend to institutions contracting for insurance benefits in a non-employer capacity. See, e.g., NORTH CAROLINA GENERAL STATUTES § 58-3-178 *et seq.*

23. See *State Contraceptive Coverage Laws*, *supra* note 4, at 2.

24. See *id.* (citing Mo. REV. STAT. § 376.1199 (2005)).

25. See, e.g., CATECHISM OF THE CATHOLIC CHURCH § 2370; PAUL VI, HUMANAE VITAE § 14 (July 25, 1968); SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, PERSONA HUMANA (Dec. 29, 1975); JOHN PAUL II, FAMILIARIS CONSORTIO (Nov. 22, 1981); JOHN PAUL II, VERITATIS SPLENDOR (Aug. 6, 1993).

26. See *State Contraceptive Coverage Laws*, *supra* note 4, at 2.

27. See NORTH CAROLINA GENERAL STATUTES § 58-3-178(4)(e).

28. See HAWAII REV. STAT. §431:10A-116.7(a) (1999).

29. See *generally Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004) (holding that a fully-insured employee health plan must cover contraceptives in compliance with California's Women's Contraceptive Equity Act); see also Susan Stabile, *supra* note 7, at 743 (citing N.Y. INS. LAW §§ 3221(16)(A)(1), 4303(cc)(1)(A) (Consol. Supp. 2005); CAL. HEALTH & SAFETY CODE § 1367.25(b)(1) (Deering Supp. 2005); CAL. INS. CODE § 10123.196(d)(1) (Deering Supp. 2005)). The New York and California statutes also impose a four-part test for whether an entity qualifies as a religious employer and is thus excluded from the statutory mandates. To qualify for the religious employer exclusion, (1) the purpose of the organization must be to inculcate religious values; (2) the organization must primarily employ persons of same faith; (3) the organization must primarily serve persons of same faith; (4) the organization must be organized as a non-profit under Internal Revenue Code section 6033(a)(2)(A)(i) or (iii), rather than section 501(c)(3). See *id.*

Catholic colleges are subject to the overlapping jurisdictions of the state and federal governments; a fact that complicates approaches to benefits decisions. For example, fully-insured health plans, such as those extended to employees and students of most colleges and universities, are governed by both federal and state law. Self-insured employee health plans, by contrast, are governed exclusively by federal law under ERISA.³⁰ However, this federal preemption of state mandates under ERISA affects employee health plans only; student health plans remain subject to state regulations despite an institution's decision to self insure.³¹

Since the PDA is federal law, a religious exemption to the PDA would be ineffectual in protecting religious employers in the 27 states that require contraceptive coverage. An exemption to the PDA would only affect those religious institutions that are able to provide self-insurance programs (that are subject to Federal ERISA) or in the minority of states that have not mandated contraceptive coverage.

Trends in the Law

The law governing contraceptive mandates has seen much change in recent years. One of the most far-reaching state contraceptive mandates was enacted earlier this year in Wisconsin. As of January 2010, Wisconsin will require all providers of health insurance to include contraceptive services, irrespective of religious affiliation, moral objection, or category of "religious employer." The Roman Catholic bishops of Wisconsin issued a statement in response, decrying "this blatant insensitivity to our moral values and legal rights."³² The new mandate will have direct impact on all objecting Catholic institutions and dioceses, except for the few that have the size and wherewithal to self-insure for their employees.³³

The Wisconsin law is the latest iteration of a growing body of state law that rejects conscientious objections to contraceptive mandates. For instance, in 2004 the California Supreme Court held that Catholic Charities was required to cover contraceptives under their fully-insured employee health plan in order to comply with California's Women's Contraceptive Equity Act (WCEA). See generally *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal. 2004).³⁴

The reasoning in *Catholic Charities of Sacramento* was followed in New York, where the state's highest court affirmed a decision that Catholic Charities was not a "religious employer" for the purposes of a religious exemption to the state mandate on contraceptive coverage.³⁵ Part of the intermediate appellate court's explanation for overriding Catholic

30. See sources cited *supra* note 22. ERISA preempts all self-insured plans from state law. See 29 U.S.C. § 1003(a)(1) (2000 & Supp. 2005) (stating that ERISA applies to any "employee benefit plan if it is established or maintained--by any employer engaged in...any industry or activity affecting commerce...."); 29 U.S.C.S. § 1002(1-3) (LexisNexis 2006) (defining "employee benefit plan" as an "employee welfare benefit plan" which is "established or maintained by an employer....").

31. See JANET L. HURLEY, *THE HISTORY AND PRACTICE OF COLLEGE HEALTH* 347 (2002).

32. See CatholicNewsAgency.com, *Wisconsin Requiring Catholic Institutions to Provide Contraception Coverage* (Aug. 23, 2009), available at www.catholicnewsagency.com/ (last visited Sept. 30, 2009).

33. See *id.* Two of the five dioceses in Wisconsin are self-insured.

34. The court held that provisions of WCEA which required a church-affiliated employer who provided group health care and disability insurance prescription coverage for its employees to include coverage for prescription contraceptives, did not violate state and federal constitutional religious freedom protections by impermissibly interfering with religious autonomy. See *Catholic Charities of Sacramento, Inc.*, 85 P.3d 67.

35. See generally *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (N.Y. 2006).

Charities' Free Exercise claims was that "the paramount right of personal health...of many employees who do not share plaintiffs' views on contraceptives would be subordinated to plaintiffs' right to freely exercise their beliefs."³⁶ This reasoning manifests the courts' and legislatures' recent tendency to treat government as the guarantor of a limited set of state-defined benefits—even at the expense freedom of conscience—rather than as the protector of the liberty and integrity of persons.³⁷

If other state courts follow the reasoning of the California and New York courts, then state contraceptive mandates will affect Catholic institutions in every state where state law does not provide conscience protections.

There is similar uncertainty with respect to the EEOC's claim that the PDA provides for a contraceptive mandate for employers. Lower courts have split over whether Title VII, as amended by the PDA, compels insurance coverage for contraceptives. *Compare Cummins v. Illinois*, No. 2002-cv-4201-JPG, 2005 U.S. Dist. LEXIS 42634 (S. D. Ill. 2005) (employee health plan does not violate Title VII if both men and women are denied contraceptive coverage); *Alexander v. American Airlines, Inc.*, 2002 WL 731815 (N.D.Tex. 2002) ("[b]y no stretch of the imagination does the prohibition against discrimination based on 'pregnancy, childbirth, or related medical condition[s]' require the provision of contraceptives.") *with Erickson*, 141 F. Supp. 2d 1266 (failure to provide contraceptive coverage violated the PDA); *Stocking v. AT&T Corp.*, 436 F.Supp.2d 1014 (W.D.Mo.2006) (same); *Cooley v. DaimlerChrysler Corp.*, 281 F.Supp.2d 979, 984-85 (E.D. Mo. 2003) (same); *Mauldin v. Wal-Mart Stores, Inc.*, 2002 WL 2022334 (N.D. Ga. 2002) (same).

Although the federal district courts have split over the issue of whether the PDA requires employers to provide contraception, the only federal court of appeals to reach the issue held that the PDA did not include a contraceptive mandate. In 2007, the Eighth Circuit Court of Appeals ruled that contraception was not sufficiently "related to" pregnancy to fit under the umbrella of the PDA. *See In re Union Pacific Railroad*, 479 F.3d 936 (8th Cir. 2007). Specifically, the court grounded its opinion on the fact that contraception itself is "gender-neutral" and the plain language of the PDA statute did not refer to contraception.³⁸ An employee health insurance plan, therefore, did not violate the PDA by failing to include contraception coverage. Since the court ruled the employer's decision not to cover contraceptives did not involve a "sex classification," it could not be categorized as a sex-based violation of Title VII.³⁹

Given the relatively recent vintage of the EEOC's interpretation (2000) and the mixed court rulings so far, it remains an open question whether federal law, like some state laws, will impose a contraceptive mandate on objecting Catholic colleges and institutions.

Legal Defenses for Catholic Colleges and Universities

Catholic institutions with objections to contraceptive mandates are not wholly without legal options, even in the face of federal or state law. There are two main kinds of legal defenses that Catholic colleges can raise in response to federal- or state-imposed contraceptive mandates.

First, there are various defenses arising from the federal Constitution or state constitutions that objecting Catholic institutions may be able to employ to defend against con-

36. *Catholic Charities of Diocese of Albany v. Serio*, 28 A.D.3d 115, 127 (N.Y.A.D. 3 Dept. 2006).

37. *See Tollefsen*, *supra* note 6.

38. *See In re Union Pacific Railroad*, 479 F.3d at 944-45.

39. *See id.* at 944 (citing *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir.1997)).

traceptive mandates. Colleges may have recourse to state constitutional language and the First Amendment of the U.S. Constitution, which preserve free exercise of religion. Colleges may also raise defenses rooted in the constitutional doctrine of “church autonomy,” which protects internal church affairs on matters of theology and ecclesiastical governance from government interference.

Despite these constitutional guarantees, Catholic institutions will have to be prepared for arguments stemming from the Supreme Court’s decision in *Employment Division v. Smith*.⁴⁰ In *Smith*, the Supreme Court announced that the First Amendment’s free exercise clause “does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability,’” simply because “the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”⁴¹ In other words, the fact that an act infringes on the religious beliefs or regulates the religiously motivated policies of a Catholic institution does not necessarily make the law unconstitutional.⁴² This is because, as the New York and California courts have asserted, their state contraceptive insurance mandates “apply neutrally and generally to all employers, regardless of religious affiliation, except to those few who satisfy the statute’s strict requirements for exemption on religious grounds.”⁴³

In New York and California, “those few” may not include Catholic colleges. Nonetheless, objecting Catholic institutions can argue that the definition of a “religious employer” for purposes of a statutory exemption should comprehend Catholic colleges with a strong Catholic identity, since there is a very strong argument that the mission of a Catholic college is “to inculcate religious values.”

That said, any constitutional defense will necessarily vary with both the location and the circumstances of the particular Catholic institution affected. Therefore experienced constitutional counsel should be consulted at the earliest opportunity.

Second, Catholic institutions can raise various statutory defenses to contraceptive mandates. These include federal and state “Religious Freedom Restoration Acts,” as well as various anti-discrimination statutes.⁴⁴ These laws typically protect against (a) religious discrimination and (b) “substantial burdens” on religious exercise, without regard to whether the government intended to discriminate. However, in the context of an EEOC action, the EEOC is likely to argue that statutory religious discrimination defenses do not trump gender discrimination claims made under the PDA.⁴⁵ Moreover, since state religious freedom laws (including state constitutions) do not protect against action by the federal government, PDA claims brought by the EEOC would be relatively difficult to defend against on that basis.

40. *Employment Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). For a discussion of the history of the *Smith* case, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L.J. 953 (1998). Many commentators have criticized *Smith*, but it remains settled law. See, e.g., Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145 (1995); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1993) cited in *Stabile*, *supra* note 7, at 744 n.18.

41. 495 U.S. at 879-80 (citing *United States v. Lee*, 455 U.S. 252, 263, n.3 (1982)).

42. For a discussion of *Smith* in relation to *Catholic Charities of Sacramento*, see, e.g., Richard W. Garnett, *Confine and Conquer: The California Supreme Court and Religious Freedom*, NATIONAL REVIEW ONLINE (Mar. 3, 2004), available at <https://www.nationalreview.com/comment/garnett200403030850.asp> (last visited Oct. 2, 2009).

43. *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 82.

44. See 42 U.S.C. § 2000bb *et seq.* (federal RFRA prohibiting “substantial burdens” on religious exercise; TEX. CIV. PRAC. & REM. CODE § 110.001 *et seq.*, applied in *Barr v. City of Sinton*, 52 Tex. Sup. Ct. J. 871 (Tex. 2009)).

45. See, e.g., *Erickson*, 141 F. Supp. 2d 1266; see also *supra* Part V.

Catholic institutions should be aware that all of these protections—constitutional and statutory—are subject to the requirement that the religious institutions’ claims be sincere, or “bona fide.” Although the courts will not delve into the reasonableness of a religious belief, they are competent to judge whether a belief is “sincerely held.”⁴⁶ Insincere religious beliefs enjoy neither constitutional nor statutory protection.⁴⁷ For example, a prison inmate who requests to be served a vegetarian diet for religious reasons but who nonetheless buys hot dogs from the commissary cannot invoke free exercise protections because his behavior appears to be insincere. In the context of Catholic colleges and universities, first acting inconsistently with the school’s religious identity and then later claiming a religious exemption (after a lawsuit has been filed) is unlikely to succeed.

As with the constitutional defenses, there is no one-size-fits-all legal strategy to lawsuits attempting to impose contraceptive mandates on Catholic institutions. Therefore the key to raising a successful defense will be to involve competent counsel at an early juncture.

Areas of Consideration for Catholic Colleges and Universities

Depending on the state legislative developments and the outcome of future litigation over the scope of the PDA, objecting Catholic institutions may have to resort to creative arrangements to balance treating their employees and students justly and remaining faithful to their principles. Some possible courses of action and recommendations are outlined below:

Eliminating Prescription Drug Benefits Altogether. This option was proposed by the New York Court of Appeals in *Catholic Charities of Albany*, but has obvious drawbacks, including burdens on students, employees and their families who require prescription drugs.⁴⁸ It would also likely present objecting Catholic institutions with the dilemma of reconciling Catholic teaching on living wages for workers with their beliefs about facilitating contraception, sterilization, and abortion.

Eliminating prescription drug benefits altogether may be a more appealing option for student health insurance plans (rather than employee plans). Already, student plans tend to be less comprehensive than employee plans; students are typically offered a choice among different plans with varying levels of benefits. Because basic student plans, or “catastrophic plans,” usually exclude prescription drugs or “out-patient treatment” altogether, these plans would not be obligated to provide “family planning services” under state mandates. Moreover, unlike a university employee, a student pays an additional fee for health coverage offered by the university. Thus, a student who desires prescription health benefits can simply opt for a private health plan instead of the university plan. Although the student might have to sacrifice convenience, a Catholic college might decide this is an acceptable compromise.

46. See, e.g., *Jackson v. Mann*, 196 F.3d 316, 321 (2d Cir. 1999) (“[T]he question whether Jackson’s beliefs are entitled to Free Exercise protection turns on whether they are ‘sincerely held,’ not on the ‘ecclesiastical question’ whether he is in fact a Jew under Judaic law. Courts are clearly competent to determine whether religious beliefs are ‘sincerely held.’”); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991).

47. See *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (“[P]rison officials may appropriately question whether a prisoner’s religiosity . . . is authentic. . . . [T]he Act does not preclude inquiry into the sincerity of a prisoner’s professed religiosity.”).

48. See *Serio*, 7 N.Y.3d at 527 (“Plaintiffs are not required by law to purchase prescription drug coverage at all . . . it is surely not impossible, though it may be expensive or difficult, to compensate employees adequately without including prescription drugs in their group health care policies.”).

Attempting to “Out-source” Contraceptive Coverage. Another way that some Catholic institutions, principally health care systems, have dealt with mandated contraception coverage is by attempting to distance themselves from the actual provision of benefits.⁴⁹ According to a 2000 report of “Catholics for a Free Choice,” more than half of managed care plans adopted by Catholic health systems have found “creative approaches” to contract at arm’s length to meet the state requirements and joint federal-state Medicaid mandate that entitles Medicaid recipients to family planning services and supplies.⁵⁰ Some of these Catholic employers have attempted to distance themselves from providing this coverage by separating out the amount of the premium that would be used to cover contraception and contracting with a third-party administrator to handle payment. Others contract with an independent insurance company to handle coverage of those services.

This approach would have the disadvantage of putting many religious institutions and individuals into a quandary of conscience.⁵¹ Such arrangements would also make it much more difficult for Catholic institutions to invoke religious freedom protections against facilitating access to morally objectionable services in other contexts, because plaintiffs would likely argue that the outsourcing arrangements contradict the institution’s claimed beliefs.

Form self-insurance pools. Another option may be for Catholic institutions to pool their benefits and liabilities in such a way as to self-insure. This strategy would allow Catholic employers to escape restrictive state laws styled after Wisconsin’s recent mandate, but would not protect against federal laws or EEOC action. However, converting from insured to self-insured has larger consequences than protecting against state law prescription contraceptive mandates. For instance, self-insuring would expose the religious employer to financial risk whenever high-cost claims are filed.⁵²

Be consistent in policy decisions and in media communications. A Catholic institution must be careful to ensure that all of its members’ actions are consistent with the values it espouses. Recent history amply demonstrates that religious institutions will be charged with hypocrisy, and incur civil liability, if they do not act consistent with their beliefs. Similarly, all media communications need to be consistent with the actual values of the institution. A civil court will be much less inclined to believe assertions of sincere conscientious objection if the institution has not been consistently acting and communicating in accordance with its claimed beliefs.

Make clear—externally and internally—what one’s institutional values are. It is crucially important that the administration of a Catholic institution state publicly and privately what moral precepts it intends to follow and why. Many religious institutions have seen religious freedom defenses fail because the institutions failed to assert their values openly, vigorously, and consistently. Catholic institutions also run the risk of liability if they fail to explain in detail why they believe what they do. Rooting benefits policies in specific Church doctrines makes clear where the institution stands, and that it is sincere. Sound theology can be a sound defense, even in civil court.

49. See The Guttmacher Institute, *Future Uncertain for Catholic Plans’ Creative Approaches to Providing Contraceptive Access*, The Guttmacher Report on Public Policy (Dec. 2000), available at <http://www.guttmacher.org/pubs/tgr/03/6/gr030601.html> (last visited Oct. 1, 2009).

50. See *id.* at 1 (citing P. Miller and C. Chelala, *Catholic HMOs and Reproductive Health Care*, Catholics for a Free Choice (2000)).

51. See *id.*

52. See Stabile, *supra* note 7, at 776.

Don't carelessly discuss finances and costs of health insurance. Colleges and universities often take a business-like approach to certain decisions, even when there are underlying religious principles at stake. Make sure that the written record of any decision regarding benefits reflects the religious principles motivating the decision. Plaintiffs seeking to defeat a religious freedom defense often argue that denying certain benefits is "just about the money." Don't give a civil court reason to believe them.

Seek legal advice at the earliest opportunity. Every legal situation is different, and religious freedom issues can be particularly tricky in any state. Catholic institutions should get expert legal advice as soon they find out about a challenge to their benefits practices. Waiting to get legal advice until later often leads to mistakes that can be difficult to unwind.

Responding firmly. As the analysis above shows, objecting Catholic institutions have legal options. Immediately accommodating a potential plaintiff once he or she complains often results in only temporary appeasement and additional requests later. It is frequently better to respond firmly at the outset than to accommodate and merely delay the inevitable conflict until later.

Conclusion

The next few years may present difficult times for Catholic colleges and universities that have conscientious objections to contraceptive mandates. However, there are a number of ways Catholic institutions can continue to carry out their missions while minimizing the threat of government penalty. They should not be afraid to do so.