Nationwide Injunctions Bar Enforcement of New Rules Curtailing the ACA Contraceptive Mandate

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The Affordable Care Act (ACA) contraceptive mandate, contained in 2012 agency guidelines fleshing out the ACA "essential health benefit" pertaining to women's health and preventive services, required most group health plans to provide contraceptive coverage with no cost-sharing, unless the plan sponsor fell within a religious exemption. On October 6, 2017, the Trump Administration issued immediately effective "Interim Final Rules" (the "2017 IFRs") that "rolled back" that mandate.

Now, however, in two of several lawsuits challenging the new rules, federal courts in California and Pennsylvania have entered nationwide injunctions barring the Administration from enforcing the 2017 IFRs.

Nationwide Injunctions: In a 29-page December 21st opinion, the California court expressly found it "appropriate to enter a nationwide preliminary injunction" and "required [the Departments of Health and Human Services, Labor and Treasury (the Departments)] to continue under the regime in place before October 6, 2017," pending a decision on the merits.[1]

The previous Friday, in a 44-page opinion accompanied by a 2-page order, the Pennsylvania court enjoined the Departments, their Secretaries, and "their officers, agents, servants, employees, attorneys, designees, and subordinates, as well as any person acting in concert or participation with them" from enforcing the 2017 IFRs. [2]

"About-Face" in Policy without APA Compliance: IFRs remain an exception to the notice-and-comment requirements of the federal Administrative Procedure Act (the APA). Under those requirements, federal executive agencies propose rules or regulations, invite comments from the public, consider the comments provided, and issue final rules or regulations, typically revised (at least in part) in light of those comments.

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The California court seemed particularly troubled that the Departments had issued the October 6 IFRs with immediate effective dates to accomplish a dramatic "about-face in federal policy" (Doc. 105, pp. 22-23, n 13). Without complying with the notice and comment requirements, the Departments reversed course and now concluded (contrary to their prior position before the courts, including the US Supreme Court) that the ACA contraceptive mandate serves no compelling government interest.

According to the court, the 2017 IFRs **1)** created an entirely new exemption based on moral objections, **2)** greatly expanded the scope of the original religious exemption, and **3)** effected "a reversal of [the Departments'] approach to striking the proper balance between substantial governmental and societal interests" (Doc. 105, pp. 1-2).

No Statutory Authorization or Good Cause to Violate the APA: Where executive agencies seek to "end run" the APA requirements with IFRs, the agencies bear the burden of proving that they fall within one of the exceptions to that process – "a high bar" to overcome (Doc. 105, pp. 23-24).

Both courts rejected the Departments' arguments that the APA and other statutes (including the Religious Freedom and Restoration Act) expressly or impliedly authorized the Departments to reverse course completely through the IFRs. The courts also concluded that the Departments did not show any good cause to forego the APA's notice and comment requirements. Thus, both courts found that the plaintiff states before them had demonstrated a substantial likelihood of success on the argument that the Departments had violated the APA in issuing the 2017 IFRs.

Irreparable Harm to the States and Its Citizens: As the California court recognized, "for a substantial number of women, the 2017 IFRs transform contraceptive coverage from a legal entitlement to an essentially gratuitous benefit wholly subject to their employer's discretion" (Doc. 105, pp. 25-26).

To show injury to the plaintiff states that would warrant injunctive relief, California (joined by Delaware, Maryland, New York and Virginia) explained that the plaintiff states have an interest in ensuring that women have access to no-cost contraceptive coverage. In the absence of such coverage, the states will incur economic obligations "to cover contraceptive services necessary to fill in the gaps left by the 2017 IFRs" or for expenses occasioned by unexpected pregnancies. Reviewing the evidence submitted in support of the injunction, the California court found that a concrete injury flowed from the agencies' failure to follow the APA requirements, evidence showing that "California pays for 64% of unplanned births, with the average cost estimated at more than $15,000 per birth," and that in 2010 alone (i.e., prior to the ACA contraceptive mandate as defined in 2012) unintended pregnancies cost the state about $689 million) (Doc. 105, p. 14).

Pennsylvania argued that it would suffer two harms in the absence of injunctive relief. First, the state itself will experience significant damage to its fiscal integrity: it will "shoulder much of the burden of providing contraceptive services to those women who lose it [sic] because their health plans will opt out of coverage," as those women turn to public programs financed by the states. The Pennsylvania court recognized that the state would not recoup that money because it could not seek money damages from the federal government (Doc. 59, p. 37).

Second, the state expressed concern about the health, safety, and well-being of its citizens, who would "either forego contraception entirely or choose cheaper but less effective methods," with additional costs to state-funded health programs. The court found the record evidence compelling, from a study finding that 68% of unplanned births were paid for by public insurance programs to a study reviewing insurance claims data and finding that, subsequent to the no-cost ACA contraceptive mandate, the number of women using previously cost-prohibitive (and more effective) contraceptives nearly doubled and the number of women using no contraceptives decreased by 50% (Doc. 59, p. 41).

Effect of the Injunctions on Employers and Group Health Plans: While the injunctions remain in effect, employers that sponsor group health plans, health care issuers, and other entities that may have planned to impose cost-sharing for contraceptives, or perhaps to eliminate contraceptive coverage altogether, should reconsider.

At this time, the safer course of action is to retain no-cost contraceptives in non-grandfathered ACA-compliant group health plans, unless plan sponsors can satisfy the exemptions in the prior regulations implementing the ACA contraceptive mandate.

Those prior regulations now remain in effect until further order of the courts or until reversal of these injunctions on appeal, or perhaps until other executive action to correct defects in the 2017 IFRs.

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[1] *State of California et al. v Health and Human Services et al.*, No. 4:17-cv-05783, Order Granting Plaintiffs' Motion for a Preliminary Injunction, Doc. 105 (ND. Cal. 12/21/17).
[2] *Commonwealth of Pennsylvania v. Donald J. Trump et al.*, 2:17-cv-04540, Opinion and Order, Doc. No. 59 & 60 (E.D. Pa. 12/15/2017).