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Excluding Contraceptives from a Prescription Plan — a Risky Position

By David W. Garland, Linda B. Katz and Jill Turner Lever

Introduction

In recent years, the issue of whether excluding contraceptives from an employer-sponsored benefits program that otherwise provides prescription drug coverage violates applicable federal and/or state laws prohibiting sex discrimination in employment has arisen with increased frequency. Thousands of female employees have sued their employers for sex discrimination, challenging their employer-sponsored plans' exclusion of prescription contraceptives, often prompted by the fact that their male colleagues' prescriptions for erectile dysfunction, male-pattern baldness, and other gender-specific conditions are included in the same plan.

This is an issue of major importance to employers because litigation challenging the exclusion typically takes the form of extraordinarily expensive and well-publicized class action lawsuits, such as the class action currently pending against Wal-Mart in the United States District Court for the Northern District of Georgia.[1] In that case, which challenges

[1] Mauldin v. Wal-Mart Stores, Inc., 2002 U.S. Dist. LEXIS 21024 (N.D. Ga. Aug. 23, 2002). As reported in Wal-Mart Stores, Inc.'s Form 10-Q filing with the United States Securities and Exchange Commission for the quarterly period ending July 31, 2005, the class seeks amendment of the plan to include coverage for prescriptive contraceptives, back pay for all members in the form of reimbursement of the cost of such contraceptives, pre-judgment interest, and attorneys' fees.

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the company's exclusion of contraceptives, the plaintiff class is comprised of thousands of female employees nationwide who are covered or had been covered by the company's health insurance plan at any time after March 8, 2001 and who used prescription contraceptives. Similar suits and charges also have been filed against many other national companies, such as Dow Jones & Co.[2] Most recently, as discussed in further detail below, in July 2005, the United States District Court for the District of Nebraska denied Union Pacific Rail Road's motion for partial summary judgment in a similar suit against it.[3]

The trend emerging from the courts addressing this issue, as well as the Equal Employment Opportunity Commission ("EEOC") and the legislatures of twenty-two (22) states[4] (and counting), favors the inclusion of prescription contraceptives in company plans. Further, a federal bill titled the Equity in Prescription Insurance and Contraceptive Coverage Act of 2005 ("EIPICC") was introduced to the Senate in June 2005 and now has been referred to a Senate Committee.[5] The bottom line is that companies should assess their prescription plans with a particular focus on any sex specific exclusions. Those employers who fail to include prescription contraceptives in their plans may be at legal risk.

Why Is the Timing Ripe for This Issue?

By way of background, the 1978 enactment of the Pregnancy Discrimination Act ("PDA") as an amendment of Title VII of the Civil Rights Act of 1964 ("Title VII"), the United States Supreme Court's 1991 decision in *International Union, UAW v. Johnson Controls*,[6] and the EEOC's December 14, 2000 Commission Decision on Coverage of Contraception have contributed to the legal framework for analyzing this issue. On the popular front, the availability of prescription medication for erectile dysfunction and the inclusion of such drugs in many employer-sponsored health plans that at the same time exclude contraceptive drugs, prompted vigorous public campaigns by various organizations, such as Planned Parenthood and the National Women's Law Center (which also have supported several of the class actions), to call for inclusion of the prescription contraceptives in health plans. This campaign appears to be working, as momentum at the state level resulted in the enactment of state contraceptive equity laws all during the relatively short period since 1998.

Pregnancy Discrimination Act

Title VII[7] prohibits discrimination on the basis of sex in all terms and conditions of employment. In 1978, Title VII was amended to define "sex" discrimination to include discrimination on the basis of "pregnancy, childbirth, or related medical conditions" in all aspects of employment, which includes the receipt of benefits under fringe benefit programs.[8] The PDA bars employers from treating women who are pregnant or affected by related medical conditions differently from others who are similarly able or unable to work.

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2 In December 2002, in settlement of sex discrimination charges brought by three female journalists (and negotiated by the Equal Employment Opportunity Commission), Dow Jones & Co. agreed to change its employee insurance program to provide coverage for prescription contraceptives. Dow Jones also agreed to reimburse its current and former employees for out-of-pocket costs spent on previously uncovered contraceptives and related services for themselves and their covered dependents since January 1, 2001. Daily Labor Report No. 238, 12/1/02.

3 *In re* Union Pacific Railroad Employment Practices Litigation, 378 F. Supp. 2d 1139, 2005 U.S. Dist. LEXIS 18957 (D. Neb. 2005). There, the certified class consisted of "all female employees employed by Union Pacific Railroad Company after February 9, 2001, enrolled in one of the agreement plans who used prescription contraception, at least in part for the purpose of preventing pregnancy, without insurance reimbursement from said plan."

4 The twenty-two (22) states that currently have contraceptive equity laws are: Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Rhode Island, Vermont, Washington and West Virginia, as compiled by the Center for Reproductive Rights, available at www.crlp.org.

5 S. 1214, introduced by Senator Olympia Snowe with 16 co-sponsors.

6 499 U.S. 187, 1991 U.S. LEXIS 1715 (1991).

7 42 U.S.C. § 2000e *et seq.*

8 42 U.S.C. § 2000e(k).

International Union, UAW v. Johnson Controls

In a significant decision in 1991, *UAW v. Johnson Controls*,[9] the United States Supreme Court held that the PDA protects women from discrimination because they have the ability to become pregnant, and not just because they are already pregnant. In that case, the employer adopted a "fetal vulnerability policy," excluding "all women except those whose inability to bear children is medically documented" from positions involving exposure to lead because of the risk of fetal harm from lead exposure.[10] The issue presented was whether employers could exclude fertile women from jobs because of concern for fetal health.

The Court ruled that they could not, holding that such policies are facially discriminatory because they classify employees based on gender and childbearing capacity, both prohibited grounds under Title VII. The Court further held that the employer failed to establish a bona fide occupational qualification ("BFOQ") defense, even based on "professed moral and ethical concerns about the welfare of the next generation."[11]

EEOC Commission Decision

On December 14, 2000, the EEOC issued a Commission Decision on Coverage of Contraception ("EEOC Decision")[12] finding that there was reasonable cause to believe that discrimination occurred under Title VII, as amended by the PDA, in two charges challenging the exclusion of prescription contraception from a health insurance plan while the plan covered other preventive drugs, devices and services. The EEOC Decision was described as a formal statement of EEOC policy as applied to the facts at issue in those charges; however, it has had broader implications as it has been cited favorably by various courts, as noted below.

The EEOC's position is that because the PDA prohibits discrimination against a woman based on her ability to become pregnant, it necessarily covers a health plan's exclusion of prescription contraceptives since they are a means by which a woman may control precisely that ability to become pregnant. According to the EEOC, the PDA does not require that all employers provide contraceptives to their employees through their health plans, but rather requires that employers provide the same insurance coverage for prescription contraceptives that they do for other drugs, devices, or services that are used to prevent the occurrence of medical conditions other than pregnancy.[13]

Erickson v. Bartell Drug Co.

In one of the first federal decisions on the issue, on June 12, 2001, the United States District Court for the Western District of Washington, favorably citing the EEOC Decision, ruled that Bartell Drug Co. violated the sex discrimination provisions of Title VII by excluding prescription contraceptive coverage from its employee health benefit plan.[14]

The court determined that the employer provided less comprehensive plans for females than for males because it did not provide for prescription contraceptives, although it covered almost all drugs and devices used by men.[15] It ruled that a benefit plan must provide the same level of comprehensiveness in its offerings to female and male employees, even if the employer must incur additional costs to provide coverage for female-specific benefits.[16] The court noted that the lack of contraceptive coverage "created a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate health care need uncovered."[17] The court further held that an employer may not make cost containment decisions that result in disparate treatment of women by excluding from coverage important benefits that are designed exclusively for them.[18]

In re Union Pacific Rail Road Employment Practices Litigation

Most recently, the United States District Court for the District of Nebraska addressed this issue in a decision dated July 22, 2005, denying the employer's motion for partial summary judgment in a class action lawsuit brought by female employees alleging gender

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9 499 U.S. 187, 1991 U.S. LEXIS 1715 (1991).

10 *Id.*, 499 U.S. at 192.

11 *Id.* at 207.

12 The Commission Decision on Coverage of Contraception dated 12/14/2000 is available at www.eeoc.gov/policy/docs/decision-contraception.html.

13 Questions And Answers: Commission Decision On Coverage Of Contraception, 12/14/2000, available at www.eeoc.gov/policy/docs/qanda-decision-contraception.html.

14 Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 2001 U.S. Dist. LEXIS 7550 (W.D. Wash. 2001).

15 *Erickson*, 141 F. Supp. 2d at 1277. In *dicta*, the court further noted that even if the employer's statement that the plan does not cover Viagra was correct, such an exclusion may later be determined to violate male employees' rights under Title VII. *Id.* at n. 12.

16 *Id.*

17 *Erickson*, 141 F. Supp. 2d at 1278. The case was on appeal to the United States Court of Appeals for the Ninth Circuit when the parties reached a settlement in March 2003. *Id.* at 1274.

18 *Id.* at 1274.

discrimination.[19] The employer there provided health insurance that excluded coverage for prescription contraceptives.

The court held that the employer's practice violated Title VII, as amended by the PDA.[20] It held that "because the PDA plainly states that its protection from discrimination, including discrimination in 'receipt of benefits under fringe benefit programs,' applies to 'women affected by pregnancy' and not merely to pregnant women, the clear language of the statue requires that plans treat the risk of pregnancy no less favorably than the plans treat other similar health risks."

In reaching this conclusion, the court cited favorably to such persuasive authorities as the EEOC Decision, which declared that the exclusion of coverage for prescription contraceptives violates Title VII, as amended by the PDA.[21] In addition, the court cited *Erickson* and *Cooley v. DaimlerChrysler Corp.*,[22] a case in the same federal circuit, where the court recognized that "[p]otential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant."[23]

The court rejected Union Pacific's argument that there were "potentially huge ramifications to requiring coverage of gender-specific drugs and medical services" because "the growing cost of health insurance is a real concern for both employers and employees," stating that such costs cannot justify discrimination under Title VII or the PDA.[24] The court also rejected the employer's argument that the "imminent" arrival of prescription male contraceptives would nullify the plaintiffs' argument regarding sex discrimination, observing that the "exclusion of coverage for prescription contraceptives for men and women would still affect only the health of women."[25]

The employer also unsuccessfully argued that denial of contraceptives for both men and women constituted "equal treatment." The court rejected this argument, noting that "health plans that deny coverage for contraception, by definition, 'affect only the health of women' because only women have the ability to conceive."[26] In contrast, the court did state that health plans that deny coverage for fertility treatments or for sterilization may apply equally to men and women and would not violate Title VII and the PDA.[27]

In an interesting diatribe, the court utilized a sex-neutral hypothetical "in an attempt to bridge the gender gap-in-attitude toward the prevention and treatment of illness." The court went on to describe in some detail a "hypothetical disease" that affects both men and women, and is unrelated to procreation, namely describing the symptoms of pregnancy and process of child birth in entirely sex-neutral terms (using the male pronoun):

> Our typical patient becomes aware that he has contracted this disease when he experiences extreme fatigue, accompanied by nausea and vomiting. These symptoms diminish after a few months, as his abdomen begins to distend. Pressure on his bladder requires that he urinate frequently. He feels hot and sweaty, and has headaches and dizziness. As his digestive tract slows, he becomes constipated and suffers heartburn and hemorrhoidal symptoms. His weight increases by twenty per cent, with most of the gain centered in his abdomen, altering his balance and causing strain and discomfort in his lower back. His breasts, ankles, and feet swell, and his legs cramp. His mobility, his sleep, and even his breathing are impaired as his abdomen expands to twice its normal circumference. Stretch marks appear on his thighs, chest and abdomen. The ligaments in his hips and pelvis soften, and he develops sciatica, causing tingling and numbness. After nine months, he feels the onset of intense, intermittent pain, accompanied by diarrhea and nausea. His pain increases and accelerates over approximately 15 hours as his genital opening, usually the size of a pencil lead, is stretched to a diameter of 10 centimeters. Surgical incisions are used to facilitate the opening of his genitals. His pain may require general anesthesia, but usually can be managed through other methods, such as injections of fluid surrounding his spinal

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[19] *In re* Union Pac. Rail Road Employment Practices Litigation, 378 F. Supp. 2d 1139, 2005 U.S. Dist. LEXIS 18957 (D. Neb. 2005).

[20] According to CBS News, "Railroad Loses Contraceptives Suit," July 25, 2005, available at www.cbsnews.com/stories/2005/07/25/health/main711590.shtml, a spokesperson for Union Pacific stated that the ruling will be appealed.

[21] *In re* Union Pac. Rail Road Employment Practices Litigation, 378 F. Supp. 2d at 1145.

[22] 281 F. Supp. 2d 979, 981, 2003 U.S. Dist. LEXIS 20659 (E.D. Mo. 2003).

[23] *In re* Union Pac. Rail Road Employment Practices Litigation, 378 F. Supp. 2d at 1145.

[24] *Id.*

[25] *Id.* at 1146.

[26] *Id.* at 1145.

[27] *Id.* (citations omitted).

> cord. He is encouraged to reject pain medication entirely so he can remain alert to assist in the treatment of his disease. The incisions and tears in his genitalia are closed with internal and external sutures. His breasts continue to swell, and his nipples become sore. Healing of his genitals takes about six weeks, during which time his pain may be relieved by sitz baths, heat lamps, ice packs and anesthetic sprays. Finally, he has a heavy bloody discharge from his genitals, lasting several weeks.[28]

The court then posited that having described the condition of pregnancy in sex-neutral terms, "the question is whether the plans treated women who have the risk of pregnancy less favorably than the plans treat other people. That is, do the plans cover medicines or medical services to prevent employees from developing diseases or conditions that pose an equal or lesser threat to employees' health than does pregnancy?"[29]

The court answered this question in the affirmative, concluding that there is some evidence that at least one of the plans covers prescription medication for male-pattern baldness, as well as male erectile dysfunction when medically necessary. The court held that "[i]t is clear that the plans do cover a variety of medications and medical services designed to prevent diseases or other medical conditions that pose an equal or lesser threat to employees' health than does pregnancy."[30] In sum, the court held that the employer's policy of excluding prescriptive contraceptives and related outpatient services from its plans violates Title VII as amended by the PDA because it treats medical care needed to prevent other medical conditions that are no greater threat to employees' health than is pregnancy.[31]

State Contraceptive Equity Laws

In general, state contraceptive equity laws provide that health insurance policies that are issued in that state and that provide coverage for prescription drugs, generally, must provide coverage for any prescription drug or device that has been approved by the United States Food and Drug Administration ("FDA") for use as a contraceptive. Significantly, the scope of these laws may be limited, because the state laws generally apply to insurance policies regulated under state law.[32] If an employer insures its employees through a self-funded or self-insured plan, the state contraceptive equity law typically would not apply because such plans are considered to be employer benefit plans that are governed by the federal Employee Retirement Income Security Act ("ERISA"), rather than state insurance laws.[33] Employers that are self-funded must nonetheless be concerned about potential claims of sex discrimination, as well as federal legislative activity.

The Equity in Prescription Insurance and Contraceptive Coverage Act of 2005

As noted above, on the federal level, legislation was first introduced, but not enacted, as early as 1997. Recently, in June 2005, the Equity in Prescription Insurance and Contraceptive Coverage Act of 2005 ("EIPICC") was introduced in the Senate. In sum, this bill would amend ERISA and the Public Health Service Act by prohibiting a group health plan, and a health insurance issuer providing group coverage, from: (1) excluding or restricting benefits for prescription contraceptive drugs, devices, and outpatient services if the plan provides benefits for other outpatient prescription drugs, devices, or outpatient services; (2) denying eligibility based on use or potential use of such items or services; (3) providing monetary payments or rebates to a covered individual to encourage acceptance of less than the minimum protections available; (4) penalizing, reducing, or limiting a professional's reimbursement because the professional prescribed such drugs or devices or provided such services; or (5) providing incentives to a professional to induce the professional to withhold such drugs, devices, or services. The bill would apply such prohibitions to coverage offered in the individual market.[34]

Conclusion

As set forth above, the growing momentum is for employers to include prescription contraceptives in their plans if other comparable prescriptions are

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28 *Id.* at 1147-48.

29 *Id.* at 1148.

30 *Id.* at 1149.

31 *Id.*

32 In addition, many state laws have so-called religious exemptions that further limit the scope. For example, New York law provides that a religious employer that meets the statutory definition may request a contract without coverage for contraceptive methods that are contrary to that employer's religious tenets. N.Y. INS. § 3221(l)(16)(A)-(B) (West 2005).

33 29 U.S.C. § 1144(a), ERISA Section 514(a); 29 U.S.C. § 1003(b); ERISA Section 4(b).

34 Summary of Equity in Prescription Insurance and Contraceptive Coverage Act of 2005 (S 1214) as of 6/9/2005, available at the federal government's THOMAS database, http://thomas.loc.gov.

included. Employers are urged to review their plans for sex-based exclusions. Those employers who adhere to a policy of exclusion further are advised to consult with legal counsel to examine closely the plan provisions, applicable case law and legislation in the applicable jurisdiction to determine whether this course of action is, in fact, lawful.

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