

Why the ACA Contraception Compromise Strikes the Right Balance



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Under the *Affordable Care Act* (ACA), most health insurance plans must cover certain preventive services without requiring a co-pay from the patient, including immunizations, cancer screenings, and all forms of contraception that are approved by the U.S. Food and Drug Administration (FDA). When the contraceptive coverage requirement was first announced, the Obama Administration designated “religious employers” —defined in proposed regulations to include only institutions like churches and other houses of worship—exempt from providing coverage to their employees. The backlash was swift and strong, and many religious groups who had supported the Administration in its efforts to pass the ACA felt this exemption was too narrow and would force non-profit religious organizations to violate their beliefs. After a careful review of federal and state policy, the Administration announced a new compromise that strikes the right balance between religious liberty and the personal freedom to make one’s own healthcare decisions

- It clarified the rules for churches and instituted an accommodation that allows non-profit religious organizations with a religious objection to contraception to be relieved from the requirement, instead requiring private insurers to step in to provide coverage to their employees without cost to the employee or employer. *
- To qualify for this generous accommodation, the non-profit must simply fill out a form certifying that it is organized as a non-profit, it holds itself out as a religious organization, and it has a religious objection to contraception.

- For those religious organizations that self-insure (some large employers insure themselves rather than using an outside company), third party insurance companies will offer no-cost contraception to their employees in exchange for reduced usage fees in the state-based exchanges.
- No one working for an exempt employer has to take the coverage. It is free, but choosing the coverage is not mandatory—it's optional.

This is economically feasible because contraceptive use reduces overall health care costs and saves insurance companies money in the long run by avoiding expenses of unintended pregnancy care.

This thoughtful accommodation serves to ensure that women have access to the preventive health care they need while also ensuring that no religious organization is forced to provide contraceptive coverage in violation of their beliefs, but a few loud voices are saying it is not sufficient. Some for-profit companies are upset that they aren't exempted (despite the fact that prior to the ACA's enactment, 9 in 10 employers who provided health insurance already covered contraception without incidence).¹ Some religious organizations claim that even though they are eligible for the accommodation, the compromise doesn't go far enough. They argue that the form they must fill out to qualify provides a "permission slip" for their employees to use contraception, and that the cost of the contraceptive coverage could still be passed along in an insurance company's total premiums. Meanwhile, some women's groups are upset that the compromise goes as far as it does, since it singles out contraception care rather than treating it as any other kind of preventive care. Now the Supreme Court has decided to hear two cases challenging the coverage requirement brought by for-profit companies, and Justice Sotomayor has also granted a few non-profit religious organizations a temporary stay from complying with the requirements of the accommodation.

Third Way stands behind the Obama Administration and its contraceptive coverage requirement compromise, because we believe it appropriately recognizes the difference between

for-profit businesses and non-profit religious organizations, it follows the best practices of existing state contraception policies, and it adheres to the deeply held American values at the heart of this issue.

1. Our country has always drawn a firm line between for-profit businesses and non-profit religious organizations, and the compromise does just that.

The contraception compromise does not treat religious charities, schools, and hospitals the same way it treats secular for-profit businesses owned by religious individuals—and rightly so. Americans don't think businesses in the stream of commerce should get special exemptions from the laws based on the religious beliefs of their CEOs. In 2013, in conjunction with the Human Rights Campaign and Anzalone Liszt Grove, Third Way undertook extensive research to gain deeper insight into how Americans feel about religious exemptions, and we found huge differences in the way the country views religious exemptions for non-profit religious organizations and those which would extend to for-profit businesses. For example, in a national poll, the only two areas in which voters thought a religious exemption permitting refusals to serve gay couples was appropriate were religious services (including weddings) conducted by members of the clergy and in marriage counseling provided by religiously affiliated charities—neither of which involve for-profit business, big or small. ² Our focus group participants drew a clear line, with one saying that business leaders “are representing many individuals who may or may not agree with your position. I think CEO's have to think with their employees and boards before making an individual public claim.” Another suggested they should simply “bite your tongue (sic) and do your job.” This firm line in public opinion matches closely with distinctions that have existed in American law for decades, which treat non-profit religious organizations differently than for-profit businesses in many contexts.

The ACA contraception compromise respects this difference by allowing religiously affiliated non-profit employers to opt out of the coverage requirement, while requiring all for-profit companies in the stream of commerce to comply with the law. It's important to recognize that under the compromise, no one has to change their beliefs—they just can't use those beliefs to deny their employees access to no-cost contraception. **The compromise puts women in control of their own healthcare decisions according to their religious beliefs, not their employers'.** This is consistent with public opinion, which is strongly supportive of contraception access and use:

- 99% of American women ages 15-44 who have had sexual intercourse have used contraception at some point in their lives; ³
- 95% of Americans—including 92% of Republicans—consider use of contraception to be a form of personal responsibility; ⁴
- 79% of Americans say anti-abortion policymakers should support contraception because it decreases unplanned pregnancies—including 71% of Republicans and 80% of Independents; ⁵ and,
- 63% of Americans believe businesses should have to provide their employees with contraceptive coverage without co-pay, regardless of the religious beliefs of the business owner, compared to 53% who feel the same about non-profit religious schools, hospitals, and charities. ⁶

2. When it comes to exemptions for religious organizations, the ACA compromise takes the lead from carefully crafted state policies.

Currently, 28 states require health insurance plans to cover contraception, though many still require cost-sharing. Twenty of those states have some sort of religious exemption

or accommodation, though they vary in application from those limited to only houses of worship (CA, NY, OR), to those that also cover some religiously affiliated schools and churches (AR, ME, MA, MI, NJ, NC, RI), to those that additionally exempt non-profit religious organizations and at least some hospitals (AZ, CT, DE, HI, IL, MD, MO, NM, WV). Only one state (IL) exempts secular entities that object to contraceptive coverage for moral or religious reasons.⁷

Because the ACA's initial religious exemption for contraceptive coverage was limited to only institutions like houses of worship, it was not as generous as many of these existing state policies. Under the original federal definition of "religious employer," non-profit religious organizations (and even some churches) wouldn't have qualified for the exemption if they employed or served large numbers of people from different faiths. In order to answer concerns raised by some of these religious non-profits, the Obama Administration decided to revisit the initial definition and clarify that it was never intended to exclude churches that, for instance, ran soup kitchens that served people of many faiths.⁸ The Administration then re-wrote the definition of religious employer to ensure that churches *and* non-profit religious organizations, even those providing social services to or employing people of different faiths, could opt out of providing the coverage if they had a religious objection to contraception, while ensuring that their employees still had the option to receive the coverage without co-pay.

The federal compromise now in place most closely mirrors the laws of Connecticut, West Virginia, and Hawaii, where insurance companies must cover contraception care for employees of objecting religiously-affiliated organizations. However, the federal policy goes even further to address the concerns of religious organizations than those state laws, since unlike in those states, under the ACA:

- Religious employers have no responsibility to tell their workers how to obtain contraceptive coverage;

- The insurance companies themselves must reach out directly to each of the organizations' employees; and,
- Those workers then decide for themselves whether to take advantage of that coverage.

3. The ACA contraception compromise adheres to American values.

In addition to tracking the long-held distinction between non-profit organizations and for-profit businesses, and existing state laws on the subject, the ACA contraception compromise strikes the right balance because it addresses the moral complexity inherent in public policy decisions regarding religion, contraception, and personal autonomy by adhering to the values we hold dear. America was founded on the ideal of religious liberty, and that principle is a major tenet of our national identity. The ACA compromise respects that value by ensuring that non-profit religious organizations can opt out of providing contraceptive coverage to their employees when doing so would violate their sincerely held religious beliefs. The federal exemption is based on some of the broadest in state law, and in some ways it goes even further by excusing religious organizations from even providing referrals.

But religious liberty is not the only value at play here—no one's boss should have veto power over a person's ability to make decisions about his or her health care. The ACA compromise protects that principle without requiring religious organizations to violate their beliefs. And broader access to contraception can only lower the number of unplanned pregnancies and reduce the need for abortion—something Americans across the ideological spectrum support.

Conclusion

According to estimates by the Department of Health and Human Services, as of March 2013, 27 million American

women were benefiting from no-cost preventive care under the ACA—including access to contraception without co-pays.⁹ The contraception accommodation is the right one—balanced and respectful of both religious institutions and employees who need preventive care. It establishes a policy to ensure that no church or non-profit religious organization will have to violate its beliefs by covering contraception care, but it also ensures that their employees are not left without access. The compromise rightly distinguishes between non-profit religiously affiliated institutions and organizations—like Catholic schools and charities—and for-profit businesses in the stream of commerce, it follows the best practices of existing state laws with generous exemptions, and it stays true to our nation’s values. We hope the Supreme Court will agree.

TOPICS

ABORTION/CONTRACEPTION 50

AFFORDABLE CARE ACT 38

END NOTES

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