

State Notes

TOPICS OF LEGISLATIVE INTEREST

March/April 2006



Prescription Contraceptive Coverage **By Julie Koval, Legislative Analyst**

An issue of considerable public interest over the last few years is that of insurance coverage for prescription contraceptives. Nothing in current Michigan law prohibits insurers from excluding contraceptive drugs and devices from the prescription benefit plans they offer to employers and individuals, a practice some people believe amounts to sex-based discrimination. Although some insurance providers cover prescription contraceptives under the terms and conditions they apply to other prescription drugs, some do so only under a separate rider upon request of the purchaser (usually an employer). Others do not cover prescription contraceptives at all.

To date, more than 20 states have passed legislation requiring insurers that provide a prescription drug benefit to include prescription contraceptives under the same conditions as those that cover other drugs. This article examines the factors relevant to the debate surrounding state-mandated contraceptive coverage, and legislation that has been introduced in Michigan.

Contraception: Basic Health Care or Choice?

Reportedly, approximately 3.0 million unintended pregnancies occur in the United States every year--half of all pregnancies nationwide. Proponents of so-called "contraceptive equity" legislation assert that a woman's ability to control her fertility belongs within the scope of basic health care needs, and should be covered as such by insurance companies. According to the Alan Guttmacher Institute, a typical woman in the United States desires to have two children. Without using any form of contraceptive, however, a woman might become pregnant 12 times during her life. Thus, most women spend the majority of their childbearing years trying to avoid pregnancy.

Equity legislation advocates also point out that impotency drugs, such as Viagra, typically are covered under prescription drug plans, often without a separate rider. While some argue that those drugs are prescribed to treat a medical condition, others contend that they do not serve any clear purpose beyond enhancing the capacity to engage in sexual activity. Some find it illogical that drugs men use to treat problems of the reproductive system are considered basic health care, while measures women employ to control their reproductive health frequently are not.

Moreover, as supporters of equity legislation point out, contraceptives are used for purposes other than birth control. Physicians frequently prescribe oral contraceptives for the treatment of conditions such as acne, dysmenorrhea (menstrual pain), menorrhagia (excessive menstrual bleeding), and endometriosis (a condition in which tissue that normally lines the uterus is found elsewhere). While some insurers do cover contraceptives prescribed for a medical condition, many do not. Regardless of the reason for the prescription, advocates argue, insurers' ability to exclude contraceptives constitutes an intrusion into a health care decision that should be made by the physician and the patient.



Some opponents believe that contraceptive equity laws simply force insurance companies and subscribers to pay for the irresponsible behavior of others, and that people should avoid unintended pregnancies by practicing abstinence. Advocates often counter that contraceptives are used by a broad range of women, including married women, and that the desire to plan pregnancies in accordance with emotional, physical, and financial preparedness *is* responsible.

Contraceptive equity advocates also note that insurance plans typically cover surgical sterilization for both men and women, and question the distinction between that option and reversible methods.

Out-of-Pocket Costs

Reportedly, women, on average, pay 68.0% more in out-of-pocket costs for health care than men pay, a disparity due in part to the lack of contraceptive prescription coverage. Those in favor of equity laws argue that it is unfair that women must pay more simply because they have additional health care needs by virtue of their gender.

Supporters also assert that many women would like to make responsible choices with regard to pregnancy, but that an absence of insurance coverage renders such decisions unaffordable. At an average of \$40 per month, oral contraceptives cost approximately \$480 per year. In comparison, a first-trimester abortion reportedly can be obtained for about \$350.

Costs of Coverage vs. the Costs of Unintended Pregnancy

According to supporters, requiring equitable insurance coverage would raise costs in the short-term only minimally, and would result in reduced health care expenditures and other, less tangible costs over time.

At several hundred dollars per year, birth control pills clearly are less expensive than prenatal care, birth, and postnatal care, which cost thousands of dollars. According to equity law advocates, employers pay 15.0% to 17.0% more under benefit plans that exclude contraceptive coverage. Planned Parenthood Affiliates of Michigan estimates that including contraceptive options in prescription plans that do not currently include them would increase an employer's health care costs by \$1.43 per month per employee, assuming the employer pays for 80.0% of the premium.

Some employers acknowledge that the additional cost per employee might seem negligible, but point out that the aggregate increase for all employees can be significant. Health care costs are rising steadily, causing many business owners to offer less comprehensive plans, increase copays and deductibles, or simply drop coverage. Some employers argue that requiring additional benefits would exacerbate their economic troubles and actually could result in insurance coverage for fewer people.

Those who favor equity laws contend that increasing the affordability of contraception also would mitigate the social costs of unintended pregnancy. As mentioned above, approximately 3.0 million unintended pregnancies occur in the United States every year,



roughly half of which end in abortion. Some people believe that equity laws would result in fewer unintended pregnancies and, therefore, fewer abortions.

Unplanned pregnancy frequently is associated with increased health risks to women and their babies, as well as impediments to child development. Reportedly, women who experience unplanned pregnancies are less likely to seek adequate prenatal care, which can result in an increased risk of maternal morbidity and infant mortality, as well as low birth weight. Additionally, women who unintentionally become pregnant reportedly are at a greater risk of physical abuse, as are their children. Equity law advocates say that these negative impacts can be mitigated if women are able to control the timing of their pregnancies, ensuring that more children are born to parents who want and are prepared to care for them. Furthermore, these parents may be able to achieve more educationally and professionally, resulting in greater economic stability.

Religious Freedom

Some oppose contraceptive equity laws for religious reasons and believe that such laws reinforce the idea that fertility is a disease requiring treatment. They claim that equity laws essentially force employers that oppose the use of birth control, such as Catholic employers, to choose between offering comprehensive coverage that violates their core beliefs, and dropping prescription coverage altogether in order to avoid breaking the law. Some states have included religious exemptions in their equity laws; reportedly, however, the additional language, in practice, has not provided the expected level of protection for employers that exercise this option.

The Role of Government

Some stakeholders oppose contraceptive equity legislation on the basis that it is a state mandate that will drive up insurance premiums further and contribute to a less friendly business environment. They argue that insurers' decisions regarding the plans they offer should be driven by market demand. Indeed, if employers and other purchasers want a benefits package that includes prescription contraceptive coverage, it is in insurance companies' best interest to provide that option, according to these opponents. Some feel that the state should have a regulatory role in health care to ensure a certain level of consumer safety, but that involvement in purchasers' ability to determine what type of coverage meets their needs is inappropriate.

Some also have pointed out that insurance companies currently are not required to provide prescription coverage at all, and argue that it would not make sense to specify in statute what that coverage must include *if* it is offered.

Legal History

In 2001, the U.S. District Court for the Western District of Washington at Seattle addressed whether the exclusion of contraceptives from an employer's comprehensive prescription plan constituted sex-based discrimination, in *Erickson v Bartell Drug Co.* (No. C00-1213L). In this case, Bartell, a self-insured business, covered all prescriptions, except for contraceptive



devices, weight reduction drugs, infertility drugs, smoking cessation drugs, dermatologicals for cosmetic purposes, growth hormones, and experimental drugs. The plaintiffs claimed that the exclusion of prescription contraceptives violated Title VII of the Federal Civil Rights Act, as amended by the Pregnancy Discrimination Act (PDA).

Title VII applies to employers with at least 15 employees, and prohibits such an employer from failing or refusing to hire, discharging, or otherwise discriminating 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".

Congress amended the Civil Rights Act in 1978 by enacting the PDA, which clarifies that discrimination due to "pregnancy, childbirth, or related medical conditions" constitutes prohibited sex-based discrimination. Based upon the legislative history, the plain language of the statute, and relevant case law, the Court determined that "Bartell's exclusion of prescription contraception from its prescription plan is inconsistent with the requirements of federal law...Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs."

Although Bartell raised several arguments in its defense, it focused primarily on the contention that contraceptives are voluntary and preventative, do not treat or prevent an illness or disease, and are not truly a "healthcare" issue, so it was reasonable to treat them differently from other prescription drugs.

With regard to this assertion, the Court stated, "...the availability of affordable and effective contraceptives is of great importance to the health of women and children because it can help to prevent a litany of physical, emotional, economic, and social consequences." The court noted that a woman experiencing an unintended pregnancy is less likely to seek prenatal care and more likely to engage in unhealthy activities, have an abortion, or deliver an underweight, ill, or unwanted baby. Additionally, the Court cited an earlier U.S. Supreme Court assertion that women's ability to control their reproductive lives fosters their ability to "participate equally in the economic and social life of the nation."

In conclusion, the Court determined that "Bartell's prescription drug plan discriminates against Bartell's female employees by providing less complete coverage than that offered to male employees...leaving a fundamental and immediate healthcare need uncovered...Title VII requires employers to recognize differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses."

The Court granted the plaintiffs' motion for summary judgment, and ordered Bartell to cover prescription contraception methods to the same extent and on the same terms that it covered other drugs, devices, and preventative care. Additionally, the Court ordered Bartell to cover contraception-related services, such as the initial physician's visit and any follow-up visits and outpatient services, on the same terms.



State Activity

Several bills pertaining to prescription contraceptive coverage have been introduced in the Michigan Legislature during the 2005-2006 session. Senate Bills 431 and 432 and House Bill 5175 would require a policy or certificate that provides prescription coverage to include coverage for any prescribed drug or device approved by the U.S. Food and Drug Administration for use as a contraceptive.

The coverage required under the bills could not be subject to any dollar limit, copayment, deductible, or coinsurance provision that did not apply to prescription coverage generally.

Senate Bill 431, sponsored by Senator Martha Scott, and House Bill 5175, sponsored by Representative Steve Bieda, would apply to an expense-incurred hospital, medical, or surgical policy or certificate delivered, issued for delivery, or renewed in this State, and to a health maintenance organization group or individual contract. Senate Bill 432, sponsored by Senator Bev Hammerstrom, would apply to a Blue Cross and Blue Shield of Michigan certificate.

Senate Bills 431 and 432 have been referred to the Senate Health Policy Committee, while House Bill 5175 has been referred to the House Insurance Committee.

In addition, the Civil Rights Commission announced on April 17, 2006, that it is accepting arguments on the issue of contraceptive equity in comprehensive employer health care plans. "At issue is whether an employer's exclusion of prescription contraceptives, from a health care plan that covers other prescription drugs, violates the sex discrimination provisions of the Elliott-Larsen Civil Rights Act." The Commission voted at a March meeting to issue a declaratory ruling following a request from the American Civil Liberties Union of Michigan. The Commission will issue a formal ruling at a future date to be determined.