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The Affordable Care Act's Contraceptive Mandate: A Loss in Massachusetts and Other Current Events

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The contraceptive mandate, one of the more controversial provisions of the Affordable Care Act, continues to make news as various stakeholders duke it out in and out of court. This blog post describes the history of the contraceptive mandate as well as a recent court loss delivered to the Commonwealth of Massachusetts on March 12, 2018 in the United States District Court for the District of Massachusetts.

A Brief History of the Contraceptive Mandate

The Patient Protection and Affordable Care Act of 2010 (also known as the "Affordable Care Act" or "ACA") requires most health plans to provide coverage of preventive care without cost-sharing. For women, these preventive services include FDA-approved contraception methods as prescribed by a health care provider.

The contraceptive mandate (the "Mandate") has proved controversial from the get-go, and throughout the Obama Administration the Mandate was modified (both through regulation and litigation) to provide various exemptions and accommodations for employers with religious or moral objections to including contraceptive services in their employer-provided health plans.

- In 2012, the Departments of Labor, Health and Human Services, and the Treasury (the "Departments") provided a full exemption from the Mandate for a narrow group of religious employers (generally, churches and houses of worship).
- Over 2013 and 2014, the Departments developed an accommodation for nonprofit, religious organizations that, on account of religious objections, oppose providing coverage to employees under their health plans for some or all of the contraceptive services. The accommodation required the objecting employer to self-certify its objection. As well, the employer was required to notify the department of Health and Human Services, the plan's insurer, or the plan's third party administration of its objection; once notified, these parties would separately provide the coverage.
- Hobby Lobby (among others) asserted in a series of lawsuits that the accommodation was too narrow and should be extended to additional entities. In 2014, the United States Supreme Court agreed, and the accommodation was extended to closely-held, private, for-profit entities, whose owners object to the mandate on religious grounds, at least if there are less restrictive means of meeting the government's objectives.
- The Little Sisters of the Poor (and others) asserted in court that the accommodation was too intrusive (i.e. even though the employer was somewhat removed from the process, at the end of the day employees were still able to obtain contraceptive coverage through the employer's plan). At the time of President Trump's election, this line of cases remained largely unresolved in court.

Trump Provides a Broad Exemption to the Mandate

During his presidential campaign, candidate Trump made repeated promises to repeal the ACA generally, and gave specific attention to the contraceptive mandate. Following his election, President Trump took near immediate actions to claw back the contraceptive mandate. On May 4, 2017, President Trump issued an executive order directing the Departments to expand the exemption to cover additional entities, and effective October 6, 2017, the Departments issued rules providing a full exemption from the Mandate to any non-governmental plan sponsor that objects on religious grounds.

A Challenge – and Loss – By Massachusetts

In the days and weeks following the publication of the October 6, 2017 rules, several state attorneys general, including Massachusetts AG Maura Healy, filed suit against the Departments challenging the validity of the October 6, 2017 rules. In its complaint filed on October 6, 2017, Massachusetts claimed, among other things, that the Departments did not engage in proper rulemaking, that the rules violate the Establishment Clause of the First Amendment of the United States Constitution, and that the rules violate the Due Process Clause of the Fifth Amendment of the United States Constitution.

Meanwhile in Boston, Massachusetts Governor Charlie Baker signed on November 20, 2017 "An Act Relative to Advancing Contraceptive Coverage and Economic Security in Our State" (the "ACCESS Act"). The ACCESS Act requires insured health plans to, in effect, honor the Mandate, with only a narrow exception for churches similar to the original narrow exemption provided by the Departments in 2012. The ACCESS Act does not impose any Mandate-like requirements on self-funded health plans.

On March 12, 2018, Judge Nathaniel Gorton of the United States District Court for the District of Massachusetts found that the Commonwealth failed to show that it had standing – *i.e.* that it would be injured by the Departments' conduct - and **dismissed the Commonwealth's suit**. More specifically, Massachusetts did not identify any particular woman likely to be harmed by the new rules, nor did it identify any particular employer who planned to avail itself of the broadened exemption, nor did it show that Massachusetts itself faced injury. The Commonwealth also failed to address the fact that the ACCESS Act ensured dollar-one contraceptive coverage for a large portion of Massachusetts employees, potentially lessening any blow of the October 6, 2017 rules.

But the Battle Wages On

Lawsuits challenging the October 6, 2017 rules remain active in other states including California, Pennsylvania and Washington. Notably, the Eastern District of Pennsylvania temporarily blocked the rules on December 15, 2017. In his decision in Massachusetts, Judge Gorton noted that Pennsylvania and California had done a better job than Massachusetts in showing that employers in those states intended to apply the October 6, 2017 rules, perhaps foreshadowing a better shot at success in the courts. In short, the battle over the controversial Mandate shows no sign of wrapping up anytime soon.

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