NARAL Pro-Choice America

## Landmark Law Guarantees Access to Birth Control Without Copay

The Affordable Care Act ushered in a new era in women's reproductive-health care by guaranteeing that most health-insurance plans cover contraception without co-pay. Prior to the enactment of this law, birth control was financially out of reach for many women whose health insurance did not cover contraception. Access to contraception is central to women's autonomy and equality. The average woman will spend five years pregnant or trying to get pregnant, and nearly three decades trying to avoid pregnancy.[1] It is estimated that without contraception, an average woman would have between 12 and 15 pregnancies.[2] Her body and the very course of her life would be governed almost solely by reproduction. Therefore, access to contraception is critical.

Prior to the Affordable Care Act, many states took action to improve insurance coverage for contraception by passing contraceptive equity laws. These laws ensured that insurers covered contraception to the same extent that they cover other prescription drugs. While these policies represented a great leap forward from a time when there was no guarantee that a woman's health insurance plan would provide comprehensive contraceptive coverage, such benefits remained elusive for millions of women living in states without contraceptive equity laws.

Now, under the Affordable Care Act, women in all 50 states and the District of Columbia are guaranteed access to all methods of FDA-approved birth control at no co-pay. This monumental policy removes significant obstacles to reproductive-health care and makes this critical service available for nearly all women.

### Need for Laws that Ensure Access to Contraception

Inadequate access to contraception carries substantial health risks for women. Not every contraceptive method is medically appropriate for every woman. Many women who use contraception rely on a reversible method that requires a prescription and, typically, a visit to a health care provider. When contraceptives are not available or affordable, some women may choose a less appropriate method or forego birth control altogether in order to avoid paying high, out-of-pocket costs—which may lead to unintended pregnancy.

Unintended pregnancy is strongly associated with negative health outcomes. These outcomes include delayed or inadequate prenatal care, increased fetal exposure to tobacco and alcohol, increased likelihood of low birth weight and death in the first year of life, and higher risk of abuse and failure to receive sufficient resources for healthy development.[3] Unintended pregnancy is also linked to negative social outcomes for parents and families, such as increased risk of the mother being physically abused, the dissolution of the parents' relationship,

economic hardship, and a reduced likelihood that parents will achieve their educational and career goals.[4]

Research has shown that even small cost-sharing requirements can drastically reduce use of preventive care, including family-planning services, particularly for low-income women.[5] Moreover, costs associated with birth control obstruct women's ability to access highly effective contraceptive methods, such as intrauterine devices (IUDs), leading them to use methods with higher failure rates.[6] Conversely, removal of cost barriers such as co-pays or deductibles results in a shift toward the most effective contraceptive methods. It follows, then, that removing cost barriers is a critical step to increasing access to highly effective contraception and reducing unintended pregnancy rates.[7] In fact, recent studies bear this out; one St. Louis-based study shows that no-cost contraception indeed resulted in substantially lower rates of abortion and teen pregnancy, and authors posited that nationwide implementation of no-cost coverage coupled with methods counseling could reduce abortion rates by 41 to 71 percent. [8]

Nonetheless, prior to the Affordable Care Act, many women did not have adequate coverage for contraception. It is estimated that 38 million women in the United States are in need of contraception and before the law, birth control was simply too expensive for many women. [9] A 2010 study found that one in three women struggled with the cost of prescription birth control, a number that increased significantly among women of color: 57 percent of Latinas ages 18-34 and 54 percent of African-American women in that same age group struggled with the cost of birth control at some point.[10] Because of the longstanding connection between racial discrimination and economic disadvantage, women of color are represented disproportionately among those affected by such health-care costs.

**Contraceptive Coverage Under the Affordable Care Act**

Under the Affordable Care Act, most health plans issued after March 23, 2010 must cover family-planning services, including the full range of Food and Drug Administration-approved methods of contraception.[11] This policy came to be because the law requires plans to cover—with no cost-sharing—certain preventive-health services. Through a provision known as the Women's Health Amendment, the health-reform law extended the list of preventive-care services to include certain health services specific to women.[12] In order to implement this provision, the Department of Health and Human Services (HHS) commissioned the Institute of Medicine (IOM) to conduct a study on preventive care for women. In July 2011, the IOM officially recommended that family-planning services, including the full range of FDA-approved contraceptive methods, as well as related education and counseling, be recognized as a women's preventive-health service that should be covered by insurance plans without additional costs to individuals.[13]

HHS adopted the IOM recommendations in full and in subsequent guidance, clarified that related services – such as device insertion and removal, and office visits for management of side effects – are also covered without co-pay.[14] The first phase of this momentous policy went into effect on August 1, 2012. However, the administration explicitly exempted religious houses of

worship from the contraceptive coverage requirement.[15] Moreover, the policy provides an accommodation to religiously *affiliated* non-profit employers that oppose offering their employees contraceptive coverage.[16] Under the accommodation, these organizations—such as hospitals, universities, and social-service organizations—are allowed to opt out of the policy by either submitting a form to their insurers or by sending a letter to HHS directly—but in those cases, insurance companies will be responsible for covering birth control directly, ensuring that women who work at these organizations will receive coverage of contraceptives seamlessly, confidentially, and without a co-pay. In August 2014, the administration announced a modification to the contraceptive-coverage policy in which it solicited comments on permitting closely held, for-profit corporations to avail themselves of the same accommodation arrangement and released final rules for this policy in July 2015.[17] The change in policy was in response to the U.S. Supreme Court's *Hobby Lobby* decision, which held that closely held, for-profit organizations may deny their employees birth-control coverage, citing religious objections. The modification is an attempt to ensure that women who work for these employers will enjoy the same level of coverage.

Near-universal coverage of family-planning services significantly improves access to contraception. Multiple studies have found that, as a result of the health-reform law's new no-cost birth-control benefit, women in the United States are saving a significant amount of money in out-of-pocket health-care costs. For instance, a 2015 study found that women using birth control saved an average of $255 the year after the contraceptive policy went into effect.[18] A 2014 study estimated that collectively women saved $438 million in out-of-pocket costs for oral contraceptives alone.[19]

The decision to make family planning a no-cost preventive-health service is founded not only in science, but is consistent with existing federal policy. The Medicaid program currently labels family planning as a preventive service and requires that it be covered without cost-sharing.[20] TRICARE and the Peace Corps also cover approved contraceptives free of cost,[21] and the Federal Employee Health Benefits program requires all participating plans to cover family-planning care, including contraception. Moreover, nine in 10 Americans support public funding for family planning,[22] and nearly three out of four support covering contraception as a preventive health-service with no out-of-pocket costs.[23]

**Implementation of the Benefit has Been Uneven**

Although the contraceptive coverage benefit should guarantee that most women have access to birth-control without co-pay, investigations have revealed that implementation has been inconsistent. Reports from several organizations, including the National Women's Law Center, Kaiser Family Foundation, and NARAL Pro-Choice Washington, found that health-insurers are not fully complying with the requirements in the law. For instance, the National Women's Law Center found multiple instances of insurance companies not covering all FDA-approved methods of birth control, inappropriately imposing co-pays, limiting coverage to generic birth control, and failing to cover the services associated with birth control, including counseling and follow-up visits.[24] The Kaiser Family Foundation found similar results; for instance, the

organization found health insurers that did not cover the vaginal contraceptive ring, contraceptive implants, or non-hormonal IUDs – all of which are unique methods of birth control, according to the FDA's guide.[25] NARAL Pro-Choice Washington used secret shoppers to survey insurance carriers in their state and found that no single insurer's customer service representatives consistently said that they covered all FDA-approved methods without cost-sharing.[26]

In response to these reports, the administration released guidance in May 2015 clarifying that plans are required to cover at least one form of contraception within each of the 18 methods of birth control, as defined by FDA.[27] The new guidance also clarifies that the benefit includes coverage without copay for clinical services related to contraception, such as patient education and counseling, and describes the types of reasonable medical management techniques that may be used for contraception.

In September 2016, as part of the five-year review and update process, a key panel of women's health experts announced a series of important recommendations regarding the contraceptive-coverage policy. These recommendations would put into regulation the guidance described above and say that insurance plans should also cover without a copay: (1) over-the-counter contraceptives, such as emergency contraception; (2) 12 months of contraception dispensed at once; and (3) male methods of contraception, such as condoms and vasectomies. These recommended updates will ensure women and men have even better access to contraception than they do now. After receiving public comment, the panel submitted final recommendations to HHS. The recommendations HHS adopts will effectively change the contraceptive-coverage policy and health-insurance plans nationwide will have to follow the new guidelines.

**Court Challenges**

Even though the contraceptive coverage benefit is wildly popular among the American public, there is a small faction who continue to protest this policy. In 2014, the U.S. Supreme Court issued two rulings on the contraceptive-coverage benefit: on June 30, in *Burwell v. Hobby Lobby Stores, Inc.*, the court held that closely held, for-profit corporations may deny their employees contraceptive coverage, citing religious objections; just three days later, in *Wheaton College v. Burwell*, the court called into question how it would rule on the accommodation when it issued an order suggesting an objecting non-profit need not complete and submit to its insurance company a form registering its objection to providing contraceptive coverage, but could instead register its religious objection to the government directly—an option that was not then available under the accommodation.

In response to the Supreme Court's holdings, the administration announced two modifications to the birth-control policy. With respect to religiously affiliated non-profits, such as Wheaton College, the administration adopted the court's suggestion and offered objecting non-profits an alternative means of obtaining the accommodation. Under the rule, a religiously affiliated non-profit that objects to the policy may either complete and submit the current form to its insurance company *or* it may register its objection to providing birth-control coverage by sending a letter

to HHS directly. In either case, the employees of objecting non-profits would receive contraceptive coverage through a third party. In response to *Hobby Lobby*, the administration released a final rule governing which closely held, for-profit companies are eligible for the accommodation. Under this rule, for-profits must meet the following criteria:

1. not publicly traded,
2. more than 50 percent of the value is owned by five or fewer individuals (where one individual is defined as all members of an immediate family), and
3. the highest governing body must adopt a statement in opposition to providing contraceptive-coverage based on the owners sincerely held beliefs.

Meanwhile, an additional wave of legal challenges to the contraceptive-coverage policy brought by religiously affiliated non-profits continues to work its way through the federal courts. These organizations claim the accommodation violates their religious liberty and argue that the mere act of stating their opposition to birth-control coverage is too burdensome. The Supreme Court heard *Zubik v. Burwell,* the consolidated case brought by these non-profits, in early 2016. The high court did not rule on the merits of the case; instead it asked the circuit courts to review the cases to try to find an approach to the accommodation that ensures seamless access to birth control while even further accommodating employers who oppose birth control. Although eight of the nine circuits to rule on this case have decided in favor of women, it is deeply disappointing that the Supreme Court did not put this question to rest once and for all. The final outcome of the case could have a significant impact on women's access to birth-control coverage.

**States Expand on the Federal Benefit**

Over the past few years, states have begun to pass laws that act as a backstop for the federal contraception benefit and require more robust coverage in the state.[28] California led this effort and Illinois and Maryland have followed suit. These laws expand on the Affordable Care Act by requiring that insurers cover all unique FDA-approved contraceptive products. This guarantees more comprehensive coverage than the federal law, which only requires insurers to cover one drug or product within each of the 18 methods defined by the FDA. These laws also shore up the federal benefit by requiring that such coverage must not require any cost-sharing and must include related services, such as device insertion and removal, counseling, education, and management of side effects. California's law also includes a narrow exception for religious employers, defined as employers for which: the inculcation of religious values is the purpose of the entity; the entity primarily employs persons who share the religious tenets of the entity; the entity serves primarily persons who share the religious tenets of the entity; and the entity meets the Internal Revenue Service's definition of a non-profit. Houses of worship are likely the only organizations that meet that standard.

**Conclusion**

The Affordable Care Act represents a historic moment for reproductive health-care by guaranteeing near-universal access to contraception. By expanding access to this critical health-

care service, the law gave millions of women the opportunity to control their reproductive lives. While work remains in terms of implementing the law consistently – and there continue to be legal battles against the policy – it remains a tremendously important benefit for American women.

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***Notes:***

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[3] Comm. on Unintended Pregnancy, Inst. of Med., The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families.

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