



# Rule Proposes Removing Moral Exemption to Contraception Mandate

By Allen Smith, J.D.

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**U**nder a new proposed rule, fewer employers would be able to decline to provide employees health care coverage for birth control. The U.S. Department of Health & Human Services (HHS) and the Departments of Labor and the Treasury issued the proposed rule on Jan. 30 to remove the moral exemption under Affordable Care Act (ACA) regulations. The religious exemption would remain in place.

Under the ACA, most plans are required to offer coverage of birth control with no out-of-pocket cost. The extent to which employers object to that mandate under the moral exemption has been debated.

"Now more than ever, access to and coverage of birth control is critical as the Biden-Harris Administration works to help ensure women everywhere can get the contraception they need, when they need it, and—thanks to the ACA—with no out-of-pocket cost," said HHS Secretary Xavier Becerra. "Today's proposed rule works to ensure that the tens of millions of women across the country who have and will benefit from the ACA will be protected. It says to women across the country, we have your back."

The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/supreme-court-dobbs.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/supreme-court-dobbs.aspx)) in 2022 has placed a heightened importance on access to contraceptive services nationwide, the Biden administration's Centers for Medicare & Medicaid Services said in a press release (<https://www.cms.gov/newsroom/press-releases/biden-harris-administration-proposes-new-rules-expand-access-birth-control-coverage-under-affordable>). In *Dobbs*, the Supreme Court overturned *Roe v. Wade*, a 1973 decision that pre-empted state restrictions on abortion.

Experts pointed out there is a difference between moral objections, which the proposed rule would scrap as a grounds for exemption, and religious objections, which would remain lawful.

"It might appear to be a fine line between religious and moral objections to certain contraceptive practices, but the Constitution and the Religious Freedom Restoration Act are designed to protect the free exercise of religion," said Marcia Wagner, an attorney with The Wagner Law Group in Boston.

"As to the practical impact of the proposal, if finalized in its present form, it will likely be subject to legal challenge. If it survives legal challenge, one possible result is that entities objecting currently on moral grounds will convert their objections to religious grounds. The government cannot question the substance of someone's religious beliefs, but they may be able to challenge the sincerity of that belief."

Robert Slavkin, an attorney with Akerman in Orlando, Fla., said that by limiting the exemption to only religious preference, the battles in the courts will get that much more contentious if the proposed rule is finalized.

## Background

A Trump administration final rule in 2018 expanded the exemptions to the contraceptive mandate to include private employers with moral or religious objections. The moral exemption was intended to relieve entities from being forced to choose between complying with their moral beliefs and providing contraceptive coverage in violation of their sincerely held moral beliefs.

In these regulations, the Trump administration estimated that fewer than 10 entities, if any, would object to the contraceptive coverage requirement. The Biden administration said this estimate was made "without data available to estimate the actual number of entities that would make use of the expanded exemption for for-profit entities without publicly traded ownership interests." The Trump administration predicted that only 15 women would be affected by the moral exemption.

However, the Center for American Progress called this prediction an underestimate.

In a 7-2 decision in 2020, the U.S. Supreme Court ruled in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* that the government "had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections." This case was the third time ([www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/aca-religious-exemption-contraceptive-mandate.aspx](http://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/aca-religious-exemption-contraceptive-mandate.aspx)) the Supreme Court had reviewed the applicability of the contraception mandate.

Following the decision, Jesse Gelsomini, an attorney with Haynes and Boone in Houston, noted, "If there's a change in administration, the exemption rules could change again."

### **Independent Pathway**

In addition to recommending scrapping the moral exemption, the 2023 proposed rule would provide a new independent pathway through which individuals enrolled in plans or coverage sponsored or arranged by objecting entities that have not opted for the existing accommodation could access contraceptive services at no cost.

Specifically, the proposed rule would create a mechanism, independent from the employer, group health plan, plan sponsor, institution of higher education or issuer, through which individuals could obtain contraceptive services at no cost from a willing provider of contraceptive services. This individual contraceptive arrangement would be available to the participant, beneficiary or enrollee without the objecting entity having to take any action facilitating the coverage to which it objects. The action is undertaken by the individual, on behalf of the individual.

Through the individual contraceptive arrangement, a willing provider of contraceptive services would provide these services at no cost to individuals receiving them. The provider would be able to seek reimbursement for its costs from a participating qualified health plan issuer in the federally facilitated exchange or state-based exchange on the federal platform with whom it has a signed agreement.

The proposed rule would also maintain the optional accommodation for sponsors of group health plans and institutions of higher education arranging student health insurance coverage that qualify for the religious exemption.

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