

**MICHIGAN CIVIL RIGHTS COMMISSION
DECLARATORY RULING ON CONTRACEPTIVE EQUITY**

August 21, 2006

Request for a Declaratory Ruling

On April 20, 2006, the Michigan Civil Rights Commission (MCRC) received a request from the Michigan Chapter of the American Civil Liberties Union (MIACLU) to issue a Declaratory Ruling on contraceptive equity.

The question presented for a ruling is: Does an employer's exclusion of prescription contraceptives from a health plan that covers other prescription drugs violate the Elliott-Larsen Civil Rights Act (ELCRA)?

It is the ruling of the MCRC that an employer's exclusion of contraceptives from a health plan that covers other prescription drugs and services does violate Article 2, Section 202 of the ELCRA. To comply with this ruling, an employer in Michigan must provide full coverage for all contraceptive drugs and services if the employer's comprehensive health plan covers other drugs and services.

Background and General Information

We define contraceptive equity to mean that an employer cannot exclude coverage of prescription contraceptives from its otherwise comprehensive health plan. By a comprehensive health plan, we mean a plan that provides preventative care, treatment, and prescription drug coverage for the insured.

Contraceptives are prescribed for reasons beyond the prevention of unintended pregnancy. Contraceptives are used to treat a variety of medical conditions including amenorrhea¹, dysmenorrhea², Mittelschmerz³, endometriosis⁴, and acne. In addition,

¹ Absence of periods, Stedman's Online Medical Dictionary, www.stedmans.com/Atwork/section.cfm/ (accessed July 26, 2006).

contraceptives are prescribed to prevent the inherent risks associated with pregnancy. Some women, including those with histories of multiple miscarriages, cancer, smoking, are overweight, or over age 35, have a higher risk of developing a dangerous condition like gestational diabetes, preeclampsia, or ectopic pregnancy during gestation. However, doctors can use a woman's medical history and health to determine if she may be at a higher risk for developing one of these conditions. If she is, the doctor may advise her to use contraceptives because the risk to her health and the likelihood of an unsuccessful outcome are too great.

As with any medication, provider services and care are necessary to ensure proper usage, success, and length of treatment. It follows, then, that contraceptives should be included in a comprehensive health plan because they are used in the prevention and treatment of medical conditions. Currently, there are no prescription-required contraceptives for men. Therefore, all medically prescribed contraceptives are provided for women. Typically, a woman pays \$40 per month for the cheapest form of prescribed contraceptives—oral pills⁵.

² Painful menstrual cramps, Stedman's Online Medical Dictionary, www.stedmans.com/Atwork/section.cfm/ (accessed July 26, 2006).

³ Painful ovulation, Stedman's Online Medical Dictionary, www.stedmans.com/Atwork/section.cfm/ (accessed July 26, 2006).

⁴ Painful menstruation with heavy bleeding, Stedman's Online Medical Dictionary, www.stedmans.com/Atwork/section.cfm/ (accessed July 26, 2006).

⁵ This figure represents the listed price for Ortho Tri-Cyclen at Walgreen's Pharmacy in Lansing, MI on June 28th, 2006.

ELLIOTT-LARSEN CIVIL RIGHTS ACT

In Michigan, employer provided health plans are protected from unlawful employment practices by the ELCRA. Section 201(a) of ELCRA states that an “employer” is a person who has one or more employees or agents. Section 201(d) states that “sex” includes, but is not limited to, *pregnancy, childbirth, or a medical condition related to pregnancy or childbirth* (emphasis added). Section 202(1) states that an employer shall not ... otherwise discriminate against an individual with respect to *employment, compensation, or a term, condition, or privilege of employment*, because of ... sex (emphasis added).

DISCUSSION

The language of ELCRA clearly prohibits employers from excluding prescription contraceptive coverage. Such an exclusion would mean that the employer is treating women differently based on sex. This is the same conclusion the EEOC and federal courts reached by using the plain language of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978⁶. Michigan courts have long held that because the language of the ELCRA and Title VII “strongly parallel” each other and are similar in function and scope, it is permissible to look to federal precedent and EEOC decisions for guidance in interpreting Michigan Law, *Radtke v. Everett*, 442 Mich 368, 385; 501 NW2d 155 (1993), *Dep’t of Civil Rights v. Horizon Tube Fabricating Inc.*, 148 Mich App 633; 385 NW2d 685 (1986), and *Arold v. Michigan Bell Telephone Co.* WL1997575 (1998).

⁶ Refer to 42 U.S.C.A. §2000e-2(a)(1) and (k) for exact language.

The EEOC is the federal administrative body charged with enforcing Title VII. In December 2000, the EEOC formally announced that exclusion of prescription contraceptives from an otherwise comprehensive health plan constituted unlawful employment discrimination, www.eeoc.gov/policy/docs/decision-contraception.html. The EEOC based its decision on the language of Title VII, especially as amended by the Pregnancy Discrimination Act of 1978 (PDA). Under Title VII, like the ELCRA, “pregnancy, childbirth, or related medical conditions” are included in the definition of “sex” and are thus protected from employment discrimination. Furthermore, the Supreme Court declared that the PDA prohibits discrimination based on a woman’s *ability* to become pregnant, *UAW v. Johnson Controls*, 499 US 187; 211, 111 S Ct 1196 (1991), emphasis added. When an employer excludes prescription coverage of contraceptives from an otherwise comprehensive health plan, the employer is discriminating against women. Contraceptives are prescribed only for women, and are principally used to control a woman’s ability to decide if and when she wishes to become pregnant. Exclusion of contraceptives becomes more obvious when, as is often the case, a health plan covers medication like Viagra, a prescription used solely by men.

The EEOC rejected the argument that contraceptives were different from other prescriptions covered under an otherwise comprehensive health plan because those drugs were used to treat “abnormal conditions,” and pregnancy is not abnormal (EEOC Decision, part B). “Pregnancy itself is a medical condition that poses risks to, and consequences for, a woman,” *supra*. A cholesterol-reducing medication will treat high cholesterol, but it also decreases the chances of having a heart attack and related

complications of high cholesterol. Contraceptives do the same thing. They prevent pregnancy while taken, but also prevent a variety of associated risks.

Additionally, the EEOC declared that using prescription contraceptives for medical reasons other than to prevent pregnancy and pregnancy related risks are protected, *supra*. If an employer provides comprehensive coverage for an array of treatments and preventative care, they cannot exclude prescription coverage of contraceptives.

Several federal courts cited the EEOC's December 2000 ruling in their opinions. The courts used the ruling as guidance for holding the employer in the litigation liable for gender discrimination for failing to include prescription contraceptives in its otherwise comprehensive health plan, *Erickson v. The Bartell Drug Company*, 141 F Supp 2d 1266 (2001), *In re Union Pacific R.R. Employment Practices Litigation*, 378 F Supp 2d 1139 (2005). In addition to the EEOC Ruling, the two courts relied on the language of Title VII as amended by the PDA in justifying their holdings, *supra*.

The reasoning of the court in *Erickson* is instructive. In this case, the employer excluded contraceptives completely from its health plan, but provided coverage for a variety of other prescriptions such as drugs designed to prevent and treat blood-clotting, to lower blood pressure, and for smoking cessation, *Erickson* at 1268, FN1. The court detailed the language of Title VII and the legislative intent to explicitly include "pregnancy and related medical conditions" as protected from unlawful sex-based discrimination, *supra* at 1268-1271. The court held that if the health plan is otherwise comprehensive, the employer must provide coverage for all FDA approved prescription contraceptives and related services *to the same extent and terms* as other drugs, devices,

and services covered by the health plan, *supra* at 1277. The court did state that exclusion of contraceptives was discriminatory only if the employer has an otherwise comprehensive health plan, *supra* at 1272. If the employer does not provide a comprehensive plan, then it would not be unlawful to exclude contraceptives from the plan.

A second court used the same rationale as the *Erickson* court in holding that an employer discriminated against women because it excluded coverage of contraceptives for preventative purposes, *Union Pacific Railroad*. Unlike the Bartell Drug Company, Union Pacific Railroad covered contraceptives used for “non-contraceptive purpose[s].” *Union Pacific Railroad* at 1142. Female employees alleged, and the court agreed, that it was discriminatory to limit prescription contraceptive coverage. As in *Erickson*, the court based its decision on the EEOC Ruling and the plain language of Title VII and the PDA.

The court rejected the Defendant’s cost argument and said that although some net increase in cost *may* occur, it cannot justify discrimination, *supra* at 1145, FN14. The court also rejected the argument that contraceptive coverage was similar to infertility treatments (which do not have to be covered in a health plan). Unlike infertility, which affects both men and women, only women can become pregnant. Excluding contraceptives affects only women, and that is why it is a discriminatory employment practice, *supra* at 1146. It is not discriminatory, though, for an employer to exclude infertility treatment for all of its employees.

Additionally, the court quoted the language of an expert witness who described a gender-neutral hypothetical medical condition that detailed potential risks associated with

pregnancy. The hypothetical highlighted the value of contraceptives in the context of preventing the potentially fatal risks of pregnancy. This analysis supports the fact that prescription contraceptives may be used to prevent and treat numerous medical conditions in the same way as non-contraceptive drugs.

RELIGIOUS EXEMPTION

Although it is discriminatory to exclude prescription contraceptives from an otherwise comprehensive health plan, an exception should be made for certain religious employers. Of the 23 states that passed contraceptive equity legislation, the majority include a religious exemption⁷.

For our purposes, a “religious employer” is an entity for which all the following are true:

- (a) The entity is a nonprofit organization as defined under section 501(c)(3) of the Internal Revenue Code of 1986, as amended.
- (b) The inculcation of religious values is the purpose of the entity.
- (c) The entity primarily employs people who share the religious tenets of the entity.
- (d) The entity serves primarily persons who share the religious tenets of the entity.

This definition is used by most states with a religious exemption.

The exemption means that certain entities, while owned or operated by a religious organization, will not qualify for an exemption if they provide services to the general public. Examples include hospitals and charitable organizations that assist the general public. By narrowing the definition of a religious employer to those entities that only employ and serve a majority of people who share the same religious tenets, the provision

⁷ National Women’s Law Center, *Contraceptive Equity Laws in Your State*, August 2005 Report.

of an exemption recognizes the supremacy of the law, but still provides a way for an entity that is limited in scope to not compromise religious beliefs. An example would be a private religious school or college that only employed members with certain religious values and where religion was a core value that was inextricably linked with all aspects of the school. However, a hospital or charitable organization operates on a larger scale. These institutions service the general public and employ individuals with diverse religious beliefs. It cannot be assumed that a majority of individuals employed by this type of religious entity, nor those whom the entity serves, share common religious tenets.

CONCLUSION

The clear language of the ELCRA prohibits discrimination based upon a woman's ability to become pregnant. Exclusion of contraceptives from an otherwise comprehensive health plan targets women unfairly because only women are directly affected by pregnancy. The MCRC formally recognizes this exclusion as an unlawful employment practice. The MCRC's position is consistent not only with ELCRA, but also with the EEOC's position and federal court opinions holding that exclusion of prescription contraceptives is discriminatory. By issuing this Declaratory Ruling, all employers in Michigan are now subject to the same requirements that currently exist for employers covered under Title VII.