

# Health Care in Motion

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## Back in the Habit: Trump Administration Expands Religious Exemption at the Cost of Access to Contraceptive Care

On May 29, 2017, the Trump Administration quietly posted a [notice](#) at the [Office of Management and Budget](#) signaling that it is about to make significant changes to the Obama Administration's regulations mandating that employer-provided health insurance cover contraception. By the following day, a draft of the interim final rule had [leaked](#), giving stakeholders a preview of the Trump Administration's latest move to roll back health care coverage provided under the Affordable Care Act (ACA).

The leaked draft demonstrates the Trump Administration is poised to significantly weaken the ACA's contraceptive mandate by making full exemptions available to any employer who purports to have a "moral or religious objection" to providing such coverage. This move also demonstrates that regardless of whether Congress makes progress in passing the American Health Care Act (AHCA) and repealing the ACA, the Administration likely intends to use every tool at its discretion to dismantle the ACA piece-by-piece. Advocates for access to care should be prepared to respond quickly and develop strategies to protect access to key services such as contraceptive care, including through potential litigation.

### Advocates should:

1. Monitor for the official release of the interim final rule and consider submitting comments if a comment period is provided.
2. Understand that the Trump Administration clearly intends to use all the regulatory tools at its disposal to chip away at the coverage requirements and patient protections provided under the ACA in an effort to dismantle the law, regardless of whether Congress moves on the AHCA.
3. Remain vigilant for other executive, regulatory, and subregulatory actions that dismantle key portions of the ACA and other patient protections.
4. Consider strategies, including advocacy and litigation, that could be available to combat this and other actions that the Trump Administration may take that reduce access to care.

### Access to Contraceptive Care Under the Obama Administration

Under regulations promulgated under the Obama Administration to implement the ACA, all employer-sponsored health plans must include [contraceptive](#) coverage. These rules went through several iterations, as the Administration and some religious groups opposed to contraception wrangled over the details of the rules and how they would apply to religious

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organizations and other employers who objected to contraceptives on religious grounds. Ultimately, the Administration settled on a system whereby churches and houses of worship were exempt from the requirement while religious non-profit employers, such as religious hospitals and universities, who objected to providing coverage for religious reasons received more limited accommodations that still ensured contraceptive coverage to their employees.

Under this system, qualifying employers could simply notify either the Administration or their health plan of their objection in writing, and contraceptive coverage for their employees would be paid for directly from the health plan or the plan's third-party administrator. A religious non-profit was thus not required to contract, arrange, pay for, or refer employees seeking contraceptives, but these services remained available at no cost to women or the organization. This accommodation was designed to take these' concerns into account while preserving broad access to reproductive care under the ACA.

## Religious Freedom Clashes with Access to Care in Legal Battles

While the accommodation offered by the Obama Administration applied to religious non-profits, it was not available to for-profit entities that objected to providing contraceptive coverage on religious grounds. A number of for-profit businesses challenged the contraceptive coverage mandate, culminating in the [Burwell v. Hobby Lobby Stores Inc.](#) Supreme Court decision in 2014. In *Hobby Lobby*, the Court found that under the [Religious Freedom Restoration Act](#) (RFRA), certain for-profit corporations were also entitled to the same accommodation available to religious non-profit employers.

Under the RFRA, a law cannot substantially burden a person's exercise of religion, even if the law is generally applicable and not meant to target the exercise of religion. The RFRA provides an exception if the law serves a compelling governmental interest and is the least restrictive means of furthering that interest. Noting that the Obama Administration had already provided a less restrictive alternative for religious non-profits, the Court in *Hobby Lobby* held that the contraceptive coverage requirement as applied to closely held for-profit corporations with religious objections violated the RFRA. In response to the *Hobby Lobby* decision, the Obama Administration [extended](#) the accommodation discussed above to certain for-profit entities. After the *Hobby Lobby* decision and the Administration's response, nearly every health plan, with the exception of certain plans sponsored by churches and religious orders and "[grandfathered](#)" plans,<sup>1</sup> provided contraceptive coverage at no cost sharing to enrollees, but some provided this coverage through the accommodation.

Despite the accommodation provided, some religious organizations argued that even notifying the Administration of their objections substantially burdened their exercise of religion. In their view, this made them complicit in the provision and use of contraceptives. Instead of an accommodation, these organizations sought a full exemption that was only available to churches and houses of worship. One such organization, the Little Sisters of the Poor, a religious order that maintains homes for low-income elderly individuals, challenged the accommodation on this ground. Their case, [Little Sisters of the Poor Home for the Aged v. Burwell](#), reached the Court of Appeals for the Tenth Circuit in 2015. The Tenth Circuit found that the accommodation process was not enough to substantially burden the exercise of religion of the Little Sisters of the Poor, and their claim was denied.

Several other religious non-profits like the Little Sisters filed similar challenges in other jurisdictions, and these claims were largely denied on comparable grounds. At this point, the Supreme Court consolidated *Little Sisters* with six other similar cases and agreed to hear their cases in [Zubik v. Burwell](#) (2016). Ultimately, the Supreme Court did not make a substantive

<sup>1</sup> This refers to health plans that remained in effect when the ACA was passed. These plans are exempt from certain ACA requirements, include the mandate to provide preventive benefits without cost sharing.

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determination of the issue. Instead, the Court vacated the decisions of the lower courts and sent them back to their respective originating jurisdictions, in the hope that the parties would settle and find a method whereby contraceptive coverage could be provided to the religious organizations' employees, without the organizations having to notify the Administration or their health plans. However, neither the Obama Administration nor the Trump Administration found a way to amend the accommodation process in this manner.

## President Trump's Executive Order and Administrative Rulemaking

On May 4, 2017, President Donald Trump issued an [executive order](#) titled "Promoting Free Speech and Religious Liberty." With respect to the contraceptive coverage requirement, the executive order directs the Administration to "consider issuing amending regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate. . ." The Administration's intentions were quite clear, as the Little Sisters of the Poor joined President Trump for a Rose Garden celebration of the executive order. Indeed, shortly after this order was issued, Secretary of Health and Human Services (HHS) [Tom Price](#) issued a [statement](#) clarifying that HHS would carry out the executive order by reexamining the contraceptive coverage requirement. On May 23, 2017, the [Office of Management and Budget](#) posted a [notice](#) indicating that they are reviewing an interim final rule<sup>2</sup> designed to carry out President Trump's executive order and substantially weaken the contraceptive coverage requirement.

While the final details of the rule may change, a [leaked draft](#) of the rule, dated May 23, 2017, provides insight into how the Administration plans to change the longstanding requirement that most health plans provide contraceptive coverage at no cost to women. The interim final rule would broadly expand the exemption currently available only to churches and houses of worship to any employer that objects to providing contraceptive coverage on religious *or* moral grounds. In contrast to the accommodation process discussed above, any organization with religious or moral objections may obtain a full exemption, entirely releasing them from any obligation to provide coverage of contraceptives to their employees. Objecting employers would be under no obligation to notify the Administration of their objections, but must clearly state in their health plan documents that they do not cover contraceptives. This would substantially widen the exemption to every kind of employer, including large publicly traded companies, universities, and more. As the [National Women's Law Center](#) notes, this rule may cause hundreds of thousands of women to [lose access](#) to no-cost contraceptives they currently have under the ACA.

This represents a dramatic shift away from the previous Administration's efforts to ensure that women have access to the services they need to control their reproductive health. The Trump Administration's willingness to expand the narrow exemption from the contraceptive coverage requirement indicates that the Administration places the religious and moral values of employers over access to care for their employees. This underscores the importance of the need for advocates to closely watch the Administration for any regulatory changes that may undermine access to care. President Trump's executive order, and the Administration's actions implementing it through this interim final rule, shows that the Administration is willing to use any tool at its disposal to dismantle the ACA piecemeal, even if the majority in Congress is temporarily stalled in their push to repeal and replace the ACA with the American Health Care Act. As such, advocates should continue to monitor and respond to developments by the Administration and not become solely focused on Congress and the American Health Care Act.

## Potential Litigation Challenges to the New Rule

As noted above, the Trump Administration's change is expected to be released in the form of an interim final rule. As such,

<sup>2</sup> An interim final rule becomes effective after publication, and does not go through the advance notice and comment period that most regulations are subject to. A public comment period will follow publication of the rule.

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it would be effective upon issue, and while there would most likely be a comment period, the Administration is under no obligation to make subsequent changes or respond to comments received from the public. It is likely, then, that advocates wishing to combat the rule will have to pursue litigation.

## Procedural Challenges

One important part of this interim final rule is the urgency with which it is proposed to be implemented. The Trump Administration is proposing to put its new policy into effect immediately upon its publication without going through the normal process of “notice and comment” that generally applies to all new regulations. In anticipation of legal challenges to the new regulation, the leaked draft contains a justification for skipping this important procedural step. This justification rests on two primary grounds. The first cites to the extensive process that the prior rule was subjected to under President Obama. The second justification invokes what is called a “good cause” exception to the normal process. Under this exception, agencies are relieved from the normal procedural requirements when new regulations are needed to remedy some sort of emergency. In this case the Trump Administration is arguing that the existence of lawsuits around the country involving employers seeking to escape the ACA’s contraception requirements constitute just such an emergency.

Any potential challenge to this interim final rule is likely to attack both of these justifications as pretext. In the case of the first justification, plaintiffs will point out that prior notice and comment took place in substantially different circumstances. Comments elicited on the issue of a broad-based granting of exceptions to the contraceptive mandate would likely differ substantively from those reviewed in the prior process.

With respect to the second justification, challengers would likely distinguish the “good cause” offered here from prior instances where courts approved of exceptions in emergency circumstances. For example, the court in [Utility Solid Waste Activities Group v. E.P.A.](#) (2001) rejected an attempt to skip the normal notice and comment process for a new environmental regulation absent an indication that the current state of affairs, as it stood before the regulation, posed an immediate threat to environment or human health, or that some sort of similar, new emergency had arisen.

As the Court of Appeals for the D.C. Circuit noted in [Jifry v. FAA](#) (2004), a procedural challenge on these grounds will be aided by the general rule that “the ‘good cause’ exception to notice and comment rulemaking is to be ‘narrowly construed and only reluctantly countenanced.’” Nevertheless, a lawsuit brought on procedural grounds, even if successful, may only delay, rather than defeat the Trump Administration’s agenda here. As with the successful challenges to Trump’s executive orders on immigration, this species of challenge would only require the Administration to put the proposed regulations through a more thorough public vetting before they became effective.

## Substantive Challenges

While the effect of a successful substantive challenge would be far more profound, the prospect of such a lawsuit is less certain. Under the ACA’s anti-discrimination provision—known as [Section 1557](#)—discrimination in the health care setting is prohibited on the grounds enumerated in four different preexisting civil rights laws. This includes Title IX, which prohibits discrimination on the grounds of sex. Section 1557 applies to all health programs and activities, any part of which receives federal financial assistance from any federal agency. Challengers are likely to invoke the gender-based protections found in Section 1557 in any lawsuit brought against the interim final rule. The jurisprudence under this provision remains underdeveloped, and it is difficult to predict the fate of such a challenge. Nevertheless, in the regulatory rulemaking process around the [original interpretation of the ACA offered by HHS](#) in 2013 identified the “compelling government interest” in

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creating the contraceptive mandate in the first place:

*The government also has a compelling interest in assuring that women have equal access to health care services. Women would be denied the full benefits of preventive care if their unique health care needs were not considered and addressed. For example, prior to the implementation of the preventive services coverage provision, women of childbearing age spent 68 percent more on out-of-pocket health care costs than men, and these costs resulted in women often forgoing preventive care. The IOM found that this disproportionate burden on women imposed financial barriers that prevented women from achieving health outcomes on an equal basis with men. The contraceptive coverage requirement helps remedy this problem by helping to equalize the provision of preventive health care services to women and, as a result, helping women contribute to society to the same degree as men.*

One can easily see this articulation marshaled against HHS, if the new Administration follows through on its intent to change course. Such a clear expression of the impact on women of the contraceptive mandate may form the basis of a discrimination complaint founded in Section 1557.

Advocates have also threatened to invoke less well known sections of the ACA as the basis for a challenge to the interim final rule. For example, Gretchen Borchelt, from the National Women’s Law Center [told the New York Times](#) that her organization was considering legal action under 42 U.S.C. Section 18114, which prohibits HHS from promulgating any regulation that “creates unreasonable barriers to the ability of individuals to obtain appropriate medical care” or “impedes timely access to health care services.” This language—residing in a federal statute—certainly governs the ability of HHS to act and would supersede any regulatory effort. Nevertheless, a court considering a challenge to the interim final rule on this basis would be writing on a blank slate. And given the breadth of this statute’s directive, and the Supreme Court’s opinion in *Hobby Lobby*, it is difficult to predict how a court would perceive such a challenge. As with many such cases, a host of factors—from the judge, to the political circumstances, to the lawyering and legal technicalities—will figure in the final fate of such a lawsuit.

If the interim final rule is promulgated as reflected in the leaked draft, there is little doubt that it will be challenged in court. The lawsuits are likely to encompass the arguments catalogued here and others yet to be considered. As is usually the case, the litigation is likely to be long and drawn out, focusing as much on legal niceties and bureaucratic requirements as on the fairness of the rule or its likely effect. It will be up to determined advocates to keep fairness front and center, and to tell the stories of the countless health care consumers who stand to be hurt by such a rule.

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