Gender Discrimination in Employer Health Care Benefits: Whether Title VII and the Pregnancy Discrimination Act Require Employers to Include Prescription Contraceptive Coverage in their Health Plans

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Introduction

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any individual, with respect to his [or her] compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." [1] Title VII was amended in 1978 to prohibit sexual discrimination based on "pregnancy, childbirth, or related medical conditions." [2] This amendment is referred to as the Pregnancy Discrimination Act ("PDA") and was enacted by Congress to ensure that a "woman affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations."[3] Both Title VII and the PDA have been instrumental in affording women more opportunities in the workplace and discouraging discriminatory employer practices.[4] Despite these strides, the question remains as to the extent to which such laws require an employer to accommodate the needs of women. Such questioning has recently arisen in the area of employer health care benefits for women employees. More specifically, should Title VII and the PDA compel an employer to include coverage for prescription contraceptives for women employees in its comprehensive prescription health plan?

Such a question was first addressed in *Erickson v. Bartell Drug Co*.[5] In *Erickson*, the District Court for the Western District of Washington held that the employer's decision not to cover prescription contraceptives in its prescription plan was in violation of Title VII and the Pregnancy Discrimination Act.[6] The court reasoned that the employer's decision amounted to sexual discrimination because it provided less complete coverage for female employees than

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[1] 42 U.S.C. 2000e-2(a)(1)(2000).
[2] http://www.eeoc.gov/facts/fs-preg.html (accessed February 6, 2007).
[3] *Id.*
[4] Michelle Zaptin, *Comment: Erickson v. Bartell Drug Company: Requiring Coverage of Prescription Contraceptives,* 76 St. John's L. Rev. 423 (2002).
[5] 141 F.Supp.2d 1266 (W.D. Wash 2001).
[6] *Id*. at 1276-77.

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male employees.[7] Underlying the court's reasoning were policy considerations such as the negative consequences of unplanned pregnancies and the government's interest in providing affordable contraception to negate such problems.[8] Upon examination of this issue, the Equal Employment Opportunity Commission ("EEOC") has made a similar decision.[9]

There is no doubt that unintended pregnancies are a major concern for our nation. Studies show that unintended pregnancies account for 60% of pregnancies in our country each year.[10] It has also been shown that women with unplanned pregnancies are less likely to receive adequate prenatal care, and in turn, run the increased risk of infant mortality.[11] While the mandated inclusion of prescription contraceptive coverage through employer health plans can help provide affordable health care and, thereby, mitigate the "unintended pregnancy problem," the *Erickson* court and EEOC overstepped their boundaries in making such a mandate.

First, the primary purpose of the Pregnancy Discrimination Act is to protect pregnant women from discrimination in the course of employment, not non-pregnant women hoping to avoid pregnancy. There is a significant distinction between a pregnant employee and a non-pregnant employee who is actively guarding against becoming pregnant via contraception.[12] Second, it has been advanced that an employer who does not cover contraception in its prescription plan is treating both male and female similarly and is, therefore, not violating Title VII. More specifically, a male employee's spouse, who would usually be a dependant under the

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[7] *Id.*
[8] *Id.* at 1273.
[9] *U.S. Equal Employment Opportunity Commission ("EEOC"), Commission Decision,* http://www.eeoc.gov/policy/docs/decision-contraception.html (accessed March 10, 2007). A Commission Decision is a "formal statement of commission policy as applied to a certain set of facts. *Id.* Aside from their persuasive nature, such decisions generally do not have a binding effect on a court. *Id.*
[10] E. Renee Backmeyer, *Lack of Insurance Coverage for Prescription Coverage by an Otherwise Comprehensive Plan as a Violation of Tile VII as Amended by the Pregnancy Discrimination Act – Stretching the Statute Too Far,* 37 Ind. L. Rev. 437, 445 (2004).
[11] *Id.* at 464.
[12] *Id.* 445-447.

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health plan, would also not receive the benefit.[13] Finally, the court in *Erickson* and the EEOC did not consider the financial and practical consequences of their respective holdings.[14] Mandating Employer health coverage to include contraception could lead employers to eliminate health coverage altogether because of its increased costs and possible exposure to increased demands for coverage of gender-specific treatments.[15] Moreover, such a mandate runs directly into conflict with a religious employer's exercise of its 1st amendment right to freedom of religion by deciding not to distribute or use contraception because of its closely held beliefs.[16] This paper will argue, therefore, that the imposition of a prescription contraception mandate will chill our nation's goal of providing affordable health care to all citizens.

Parts I and II of this paper will examine the holding and subsequent reasoning of the *Erickson* and EEOC decision, which found the exclusion of prescription contraceptive coverage to be in violation of Title VII and the PDA. Part III will propose that not only is prescription contraception not within the purview of Title VII's plain language and legislative intent, but also that its exclusion from health care coverage does not constitute "discrimination" as defined by Title VII. Part IV of the paper will consider the negative implications of mandating contraception coverage which would subsequently hinder an employer's ability to provide affordable health care to its employees. These include increased cost burdens and exposure to increased demands for prescription coverage of gender-specific treatments, such as infertility drugs. Finally, Part V of this paper will examine the 1st amendment constitutional issues that the requirement of prescription contraception coverage poses for religious groups whose faith prohibits the promotion or use of contraceptives to prevent pregnancy.

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[13] *Id.* at 452-453.
[14] Zaptin, supra note 3, at 434-435.
[15] *Id.* at 430-432.
[16] Maureen K. Bailey, *Contraceptive Insurance Mandates and Catholic Charities v. Superior Court of Sacramento: Towards a New Understanding of Women's Health,* 9 Tex. Rev. Law & Pol. 367, 375-378 (2005).

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I. Erickson v. Bartell Drug Company

In *Erickson*, a woman employee brought a class action against her employer, Bartell Drug Company.[17] The employee alleged that the exclusion of prescription contraceptives from Bartell's "generally comprehensive" prescription plan constituted discrimination on the basis of sex.[18] More specifically, the plaintiff employee asserted that Bartell's decision not to cover prescription contraceptives such as birth control pills, Norplant, Depo-Provera, intra-uterine devices, and diaphragms under its prescription benefit plan violated Title VII, as amended by the PDA.[19] While Bartell's benefit plan did not cover prescription contraceptives, it did cover other traditional prescription drugs, including some preventative drugs such as blood pressure and cholesterol-lowering drugs, prenatal vitamins, and drugs to prevent allergic reactions.[20]

In its defense, Bartell cited multiple reasons why its exclusion did not violate Title VII or the PDA.[21] First, Bartell argued that contraceptives are a "voluntary" and "preventative" measure and since they do not treat or prevent an illness or disease, they do not pose an adequate healthcare issue.[22] Second, fertility control is not "pregnancy, childbirth, or related medical conditions" as termed by the PDA.[23] Third, Employers should be allowed to control the cost of employment benefits through limitation of the scope of health coverage.[24] Fourth, Bartell's exclusion from its prescription plan of all "family planning" drugs and devices is facially

[17] 141 F.Supp.2d at 1268.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 1268 n1.
[21] *Id.* at 1272.
[22] *Id.*
[23] *Id.*
[24] *Id.*

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neutral.[25] Finally, no court has ever found that excluding contraceptives is sexual discrimination in the history of Title VII.[26]

The *Erickson* court did not find Bartell's argument compelling and granted summary judgment for the plaintiff, holding that Bartell violated Title VII and the PDA.[27] In so holding, the court ordered Bartell to "cover each of the available options for prescription contraception to the same extent, and on the same terms, that it covered other drugs, devices, and preventative care for non-union employees."[28] In making its judgment, the court reasoned that Bartell's decision to exclude contraceptives from its prescription plan was discriminatory because it provided less complete coverage for its female employees than its male employees and therefore left a "[…]fundamental and immediate health care need [for women] uncovered."[29] The court also expressed that when an employer offers a certain health plan "it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes."[30]

Although the court's decision in *Erickson* is inspirational in the movement towards ending workplace discrimination, the reasoning behind the decision is substantially flawed. The court did not consider the negative implication of such a decision. First, the court did not directly address Bartell's challenge that fertility control is not within the purview of Title VII the PDA. Instead, the court based its holding on a broad assertion that the goal of Title VII "[…]was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion or national origin, on equal footing in how they were treated in the workforce."[31]

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[25] *Id.*
[26] *Id.*
[27] *Id*. at 1276-77.
[28] *Id*. at 1277.
[29] *Id.*
[30] *Id*. at 1272.
[31] *Id*. at 1269.

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Therefore, employers could not exclude prescription contraception because it would discriminate on the basis of sex.[32] The court, however, did not address how the plain language of Title VII or the PDA warrants application to prescription contraception. In fact, the court admits that "Having reviewed the legislative history of the PDA, it is clear that in 1978 Congress had no specific intent regarding coverage for prescription contraceptives."[33]

Second, the court's decision has been widely criticized on the basis that it did not adequately consider the negative implications of its decision. In broadly interpreting Title VII and the PDA, the *Erickson* decision paves the way for claims based on similar theories of disproportionate impact on a particular gender. For example, the decision may lead to increased claims for coverage of infertility treatments and other treatments that only affect women.[34] Moreover, the court did not consider the fact that the PDA does not compel an employer to provide any health benefits at all. If the government mandates employers to include contraceptive coverage in their health plan, an employer may decide to eliminate its health benefits offer altogether due to its increased costs.[35]

Finally, the *Erickson* court seems to justify its decision by alluding to our nation's problem of unintended pregnancy.[36] While mandating prescription contraception coverage may help mitigate this problem by making contraception more affordable, courts should not base their holding on such policy considerations while dismissing the other social implications of their

[32] *Id.*
[33] *Id*. at 1274.
[34] *Id.* 430
[35] See infra text at 15-18.
[36] *Erickson*, 141 F. Supp. 2d at 1273. The court noted that over half of the pregnancies in the U.S. are unintended. Moreover, the court observed that "A woman with an unintended pregnancy is less likely to seek prenatal care…and more likely to deliver a low birthweight, ill, or unwanted baby." *Id.*

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decision. Instead, such decisions should initiate from the legislature who are better equipped to consider and weigh public policy and different implications of such a mandate.[37]

II. The EEOC Commission Decision

In December 2000, the EEOC issued a Commission Decision finding that the PDA applies to prescription contraceptives.[38] Therefore, an employer who excludes prescription contraceptives under a health plan which includes other "preventative drugs" violates Title VII, as amended by the PDA.[39] This decision was mainly hinged on the Supreme Court decision in *Int'l Union, UAW v. Johnson Controls.*[40]

In *Johnson Controls*, at issue was an employer policy that excluded women who were pregnant or capable of bearing children from having jobs which would expose them to lead.[41] The Court held that the employer policy created a "facial classification based on gender and explicitly discriminate[d] against women on the basis of their sex[…]under Title VII."[42] Moreover, the court noted that referring to a woman's capacity to bear children "[…]explicitly classifies on the basis of potential for pregnancy, which classification must be regarded, under the PDA, in the same light as explicit sex discrimination."[43]

In its Commission decision, the EEOC concluded that the court's holding in *Johnson Controls* stood for the proposition that the "PDA's prohibitions cover a woman's potential for

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[37] *See* Kahleen A Bergin, Contraceptive Coverage Under Student H*ealth Insurance Plans: Title IX as a Remedy for Discrimination*, 54 U. Miami L. Rev. 157, 159 (1998). Bergin argues that sex discrimination in health insurance coverage is common in the insurance industry and should not be found discriminatory of federal discrimination laws. *Id*. at 157.
[38] EEOC, supra note 8.
[39] *Id.* EEOC's reference to "preventative drug" coverage includes "prescription drugs; vaccinations; preventive medical care for children and adults, including pap smears and routine mammograms under women; and preventive dental care." *Id.*
[40] 499 U.S. 187, 199 (1991).
[41] *Id.*
[42] *Id.*
[43] *Id.*

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pregnancy, as well as pregnancy itself."[44] Based on this assertion, the EEOC jumped to the conclusion that prescription contraception warrants coverage under the PDA because "contraception is a means by which a woman controls her ability to become pregnant."[45]

Upon close review of the *Johnson Controls* decision, however, it is clear that EEOC's conclusion was unsubstantiated. In *Johnson Controls*, "fertile men, but not fertile women, [were] given a choice as to whether they wish to risk their reproductive health for a particular job."[46] Therefore, the employer's distinction of excluding women with child-bearing capacity from lead-exposed jobs was not a permissive "facial classification based on gender."[47]

The *Johnson Controls* case, however, is distinguishable from this case involving the exclusion of prescription contraceptives in an employer health plan. In this case, we are not concerned with the state of pregnancy or child-bearing capacity as in *Johnson Controls*; instead we are concerned with "sexual activity" and prevention of pregnancy during such activity.[48] Moreover, unlike *Johnson Controls* where the employer policy clearly focused on and differentiated based on a women's child-bearing capacity, the issue of sexual activity and contraception in our case is not exclusive to women.[49] This is an issue faced by both genders, involving consequences to be faced by both genders. Furthermore, contraception is not only available for women, but also available for men. The fact that prescription contraception is currently only available to women does not mean that men have less of an interest in avoiding the unintended pregnancy of their partner.[50] Therefore, the EEOC's decision to require employers to include prescription contraceptives in their comprehensive health plans cannot be

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[44] EEOC, supra note 8.
[45] *Id. See also* Backmeyer, supra note 9, at 445.
[46] 499 U.S. at 197.
[47] *Id.*
[48] Backmeyer, supra note 9, at 449.
[49] *Id.*
[50] *Id.*

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justified based on the *Johnson Controls* holding. The facts, issues, and concerns presented in the *Johnson Controls* case are too discernible from our case to warrant such a result.

The EEOC also based its conclusion on the fact that the language of the PDA specifically exempts employers from an obligation to offer health benefits for abortion. Congress specifically excluded abortion from the PDA but did not mention a similar exclusion for prescription contraception. Therefore, the EEOC reasoned that Congress must have intended that the PDA apply to contraception.[51] Such a conclusion is flawed. According to the court in *Erickson*, it is clear from the legislative history of the PDA that "Congress had no specific intent regarding coverage for prescription contraceptives." Therefore, how can we conclude that Congress intended the PDA to cover contraception if the historical record is silent on this issue? We cannot simply assume that the failure to exclude a certain category necessarily indicates a congressional intent to include it, especially when such inclusion would not be consistent with the plain language of the law.

III. Prescription Contraception is Not Within the Purview of the PDA or Title VII

A. Prescription Contraception is not Covered by the Plain Language or Legislative Intent of the PDA.

The PDA, by its terms, prohibits discrimination because of "pregnancy, childbirth, or related medical conditions."[52] The court in *Erickson* and the EEOC believed that the reading of the PDA warrants the inclusion of prescription contraceptives.[53] However, upon examination of

[51] *Id.* at 446.
[52] 42 U.S.C.S § 2000(e)(k).
[53] *See Erickson*, 141 F.Supp.2d at 1271. *See also* EEOC, supra note 8.

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the plain language of the PDA and its legislative history, it is clear that prescription contraception is not within the purview of the PDA.[54]

A landmark case interpreting the plain language of the PDA and determining its reach is *Krauel v. Iowa Methodist Medical Center*.[55] In *Krauel*, the Eighth Circuit Court of Appeals focused on whether infertility was within the PDA.[56] The court subsequently concluded that it was not.[57] In so holding, the court concluded that "the plain language of the PDA does not suggest that related medical conditions should be extended to apply outside the context of pregnancy and childbirth.[58] Pregnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception."[59] The court also noted that the general term "medical conditions" as used in the PDA, "[…]should be understood as referring to conditions related to 'pregnancy' and 'childbirth,' specific terms[…]."[60]

Although the *Krauel* decision focused on infertility and not contraception, the court's reasoning can be applied to both because of the similarity of the terms.[61] Like infertility, contraception prevents pregnancy.[62] Moreover, like infertility, contraception is a state of being which precedes conception.[63] Therefore, contraception, like infertility, is different from "pregnancy and childbirth, which occur after conception."[64]

Also, it has been pointed out by many that the choice to use contraception applies to both males and females, while pregnancy and childbirth only apply to females. Contraception may be

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[54] Backmeyer, supra note 9, at 446-47.
[55] 95 F.3d 674 (8th Cir. 1996).
[56] *Id.* at 675.
[57] *Id*. at 679.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Backmeyer, supra note 9, at 447.
[62] *Id.*
[63] *Id.*
[64] 95 F.3d at 679. *See also* Maureen K. Bailey, supra note 15, at 381-382 (arguing that Contraception is not a "medical condition" as termed in the PDA, nor is it related to "childbirth.")

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used by both males and females in protecting against pregnancy.[65] Therefore, contraception is a gender-neutral characteristic, unlike pregnancy or childbirth which is gender-specific, applying only to women.[66] These differentiating characteristics further support the fact that prescription contraception does not fall within the realm of the PDA's protection.

Notwithstanding the foregoing argument, the *Erickson* court and EEOC stressed that prescription contraception is consistent with the congressional intent and legislative history of the PDA.[67] First, the *Erickson* court acknowledged that upon passage of the PDA, the Congress intended to protect pregnant women in the workplace who may be viewed as less reliable employees than men because their children would take time away from work.[68] Based on this assertion, the court felt it necessary to extend the PDA's protection to include a female's potential to get pregnant.[69] It is not readily apparent, however, how such a connection can be made. There is a significant distinction between pregnant employees that the PDA clearly intends to protect and those who are actively seeking not to become pregnant through the use of contraception.[70] For example, non-pregnant employees using contraception do not have to take maternity leave or miss work because of pregnancy related medical conditions as do pregnant employees. Therefore, it can be concluded that non-pregnant employees are not subject to the pregnancy related conditions that the PDA intended to address.[71]

The other congressional intent argument voiced by the EEOC is that the PDA's specific exclusion of abortion, without mentioning prescription contraception, is indicative of Congress'

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[65] Bailey, supra note 15, at 384.
[66] Backmeyer, supra note 9, at 447.
[67] *Erickson*, 141 F.Supp.2d at 1271. *See also* EEOC, supra note 8.
[68] 141 F.Supp. 2d at 1274.
[69] *Id.* at 1276-1277.
[70] Bailey, supra note 15, at 383.
[71] *Id.*

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intent to include contraception within the realm of PDA protection.[72] Such a conclusion, however, cannot be justified. First, the issue of abortion and contraception can be readily distinguished.[73] Like pregnancy and childbirth, abortion is an event that occurs after conception, whereas contraception precedes conception. The issue of abortion is a direct result of "pregnancy" which is the PDA's central focus. Based on these distinctions, it cannot be said that the exclusion of abortion from the PDA necessarily indicates Congress' affirmation of prescription contraception under the PDA. Moreover, Congress, in the past as well as currently, is considering legislation that would require health insurance plans which already cover prescription drugs to include coverage for prescription contraception.[74] If Congress did, in fact, intend for prescription contraception to be covered by the PDA, there would be no need to consider the passage of such legislation.[75]

B. Exclusion of Prescription Contraception is Not Sexual Discrimination under Title VII.

The *Erickson* court and the EEOC found that an employer's decision to exclude prescription contraception from its "otherwise comprehensive prescription plan" constituted sexual discrimination under Title VII because it provided less complete coverage to females.[76] Black's law dictionary defines the word discrimination as "differential treatment" or more specifically, "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored."[77] Upon consideration of such a definition, it

[72] EEOC, supra note 8.
[73] Backmeyer, supra note 9, at 447.
[74] *See* Equity Prescription Insurance and Contraception Coverage Act, H.R. 2174, 105TH Cong.
[75] Backmeyer, supra note 9, at 447. *See also* Lynda A. Rizzo*, The Equity in Prescription Insurance and Contraceptive Coverage Act: Will Congress Heed the Wake-Up Call of Erickson v. Bartell Drug Company?*, 9 Conn. Ins. L.J. 253 (2003) (The author urges Congress to pass nationwide legislation which will mandate prescription contraception coverage.)
[76] *See Erickson*, 141 F.Supp.2d at 1271. EEOC, supra note 8.
[77] Black's Law Dictionary (8th ed. 2004), discrimination.

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cannot be concluded that an employer's exclusion of prescription contraceptives constitutes sexual discrimination since such exclusion burdens both males and females.

As discussed above, the issue of contraception is not gender specific.[78] The desire to engage in sexual activity while avoiding conception is an interest that is shared by both men and women.[79] Moreover, there are many methods of contraception available for use by both men and women which do not require a prescription or medical supervision. In fact, studies show that 38% of married couples depend on male methods of contraception.[80] Accordingly, under the employer health plans considered by *Erickson* and EEOC, all of these methods of non-prescriptive contraceptives would be also excluded from health coverage.[81]

Proponents alternatively argue that since prescription contraception is currently only available to women and employer health plans explicitly exclude such drugs from coverage, there is a discriminatory impact on women pursuant to Title VII.[82] These proponents fail to consider, however, that just because women have more numerous methods to prevent pregnancy does not make the issue of contraception unique to females.[83] Prescription contraception is simply a sub-category of all other available contraception. It is one method available out of many used to prevent pregnancy. The fact that such a method is only available to women does not make its exclusion from an employer's health plan discriminatory under Title VII.[84] Moreover,

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[78] Bailey, supra note 15, at 385-386.
[79] *Id.*
[80] Janet Larsen, *Earth Policy Institute, Sterilization Is World's Most Popular Contraceptive Method*, at http://www.earth-policy.org/Updates/Update18.htm (accessed March 20, 2007).
[81] *Erickson*, 141 F. Supp.2d 1275. Bartell's health plan excluded all "family planning" drugs and devices. *Id.* The exclusion was not limited to prescription contraceptives. *Id.*
[82] *See* Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 373 (1998) (arguing that exclusion of prescription contraceptives from an employer's health plan constitutes Title VII discrimination based on sex.)
[83] Bailey, supra note 15, at 384.
[84] Backmeyer, supra note 9, at 450.

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when an employer health plan excludes coverage of all contraception for both genders, as in *Erickson*, it cannot be said that it is discriminatory on the basis of sex.

There is a final consideration in concluding that exclusion of prescription contraception is equally burdensome on both male and female employees and is, therefore, not discriminatory. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the Supreme Court affirmed that when analyzing a discrimination claim based on an employer's benefit plan, dependants of employees must also be taken into consideration.[85] The Supreme Court further noted, "[…]since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees."[86] The Supreme Court's reasoning can be applied to our case where a male employee's spouse, who would usually be a dependent under the health plan, would also be denied the benefit of prescription contraceptive coverage.[87] Therefore, married male employees have the similar burden of paying "out-of-pocket" for prescription contraception, as female employees under the same health plan.[88]

IV. Consequences Beyond the Issue of Contraception

In addition to inappropriately interpreting the PDA to include prescription contraception, the *Erickson* court and EEOC failed to consider the implications of their respective decisions.

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[85] 462 U.S. 669 (1983). *See also EEOC v. United Parcel Service, Inc.,* 141 F. Supp. 2d 1216 (D. Minn. 2001). In this case, the employer's health plan failed to provide coverage for an employee's spouse's oral contraceptive. The oral contraceptive was necessary to treat the spouse's hormonal disorder, instead of being used as contraceptive purposes. *Id.* at 1217-1218. Moreover, the employer provided prescription coverage for male hormonal disorders. *Id.* at 1218. The court found that the employer wrongfully denied coverage under title VII. *Id.* at 1220. In so holding, the court concluded that an employer's liability for sexual discrimination is not limited to employees, but also dependants of employees. *Id.* at 1219.

[86] *Newport News*, 462 U.S. at 684.

[87] Backmeyer, supra note 9, at 450.

[88] *See United Parcel Service*, 141 F. Supp. 2d at 1216. The court found that the employer's health plan disadvantaged male employees as well as female employees when it held that the employer's exclusion of oral contraceptive coverage for a male employee's spouse was unconstitutional.

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Their decision does not only impact an employer's decision to offer health benefits in the first place due to increased costs associated with compliance, but also "opens the floodgates" as it leads to increased demands for coverage of treatments which affect a specific gender. Both concerns will be further examined below.

A. Costs Considerations

While advocates of the *Erickson* and EEOC decision argue that there should be a nationwide mandate of coverage for prescription contraceptives in an employer's health benefit plan, they fail to consider the increased cost implications associated with requiring additional coverage.[89]

Employer health care costs are increasing at an astonishing rate. In 2006, employer health care costs increased by eight percent.[90] The same rate of increase is expected for this year and in 2008.[91] Such a rapid rate of costs increase has led employers to cut their health benefits entirely, leaving millions of employees uninsured. The latest Kaiser Health Insurance data indicates that in a span of only three years, workers receiving health coverage from their employers fell from 65% to 61%.[92] This translated into a decrease of 5 million fewer jobs providing health care benefits.[93] In light of this cost crisis, it seems only logical that a government mandate requiring employers to provide additional coverage, such as prescription contraception coverage, would

[89] Zaptin, supra note 3, at 432-34.
[90] *Medical News Today, Employers Expect 8% Increase In Health Care Costs This Year, Survey Finds,* http://www.medicalnewstoday.com/medicalnews.php?newsid=63667 (accessed March 24, 2007).
[91] *Id.*
[92] Ceci Connolly, *Higher Costs, Less Care: Data Show Crisis in Health Insurance,* http://www.washingtonpost.com/wp-dyn/articles/A55301-2004Sep27.html (accessed March 24, 2007).
[93] *Id.*

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lead employers to eliminate their health plan altogether in order to avoid the increased costs of such a mandate.[94]

In responding to the "cost argument" made by the employer in *Erickson*, the court expressed that an employer's cost is not a defense to discrimination under Title VII. The court noted that an "[…]employer may cut benefits, raise deductibles, or otherwise alter coverage options to comply with budgetary constraints [as long as] the method by which the employer seeks to curb costs [is] not[…]discriminatory."[95] The court's guidelines, however, seem too broad. While it is true that an employer can alter its health benefits in order to offset the costs associated with the new mandate of increased coverage, it is unclear how such alteration can be done without a discriminatory effect. If an employer decides to offset its cost of increased coverage by raising its deductible or altering coverage, male employees are being discriminated against because they are now actually getting less insurance coverage than before by the way of an increased deductible or altered coverage. The fact that the male employees now have prescription contraceptive coverage is immaterial because there currently is no prescription contraception available for men. Therefore, since the aim of this mandate is to benefit female employees and women would reap the benefits from this coverage, it can be concluded that female employees would be receiving more complete coverage than males. Accordingly, in order to avoid the possibility of increased discrimination claims from its employees, employers will likely decide to cut health benefits altogether, thereby hindering our nation's goal of providing affordable health care to all American workers.

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[94] Zaptin, supra note 3, at 433-34.

[95] 141 F.Supp. 2d 1266, at 1274. *But see McGann v. H & H Music Co.*, 946 F.2d 401, 403 (5th cir. 1991) (holding that cost was an valid defense for employer limiting benefits payable to AIDS related claims after being notified that one of its employees was infected with the AIDS virus).

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Proponents have also argued that the costs associated with providing prescription contraceptive coverage to the employee is "minimal" and, therefore, exclusion of such coverage is "economically indefensible."[96] These proponents, however, fail to consider the retroactive cost implications of such a mandate for employers.[97] In reaction to the *Erickson* case, many employers have been sued by their employees for failure to include prescription contraceptive coverage in their health plan.[98] The plaintiffs in these suits usually seek back damages or reimbursement for the previous years of employment in which the employees were not provided contraceptive coverage.[99] When large employers face such lawsuits, their liability can be substantial. For example, in a class action case currently pending against CVS Pharmacy, the employer could be liable to pay as much as $38 million in back damages to its employees for its failure to include prescription contraceptive coverage in its comprehensive prescription plan.[100] Similarly, there is a comparative class action against Wal-Mart's health plan in which the employees are seeking reimbursement for the previous years in which they paid out-of-pocket for their own prescription contraceptives.[101] In light of such potential liability, the cost implications of a prescription contraception mandate cannot be said to be "minimal" or "economically indefensible" as coined by proponents.[102]

[96] Zaptin, supra note 3, at 432.
[97] Backmeyer, supra note 9, at 463.
[98] *Id.*
[99] Zaptin, supra note 3, at 432 – 33.
[100] *Id.*
[101] Backmeyer, supra note 9, at 463.
[102] *Id.* at 464.

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B. Increased Demands for Coverage of Other Treatments Disparately Impacting a Particular Gender

Aside from increased cost burdens to be borne by the employers, the *Erickson* and EEOC's sweeping interpretation of the PDA exposes employers to increased demands for coverage of other treatments which specifically affect a particular gender.[103] Such a threat will further chill an employer's effort and desire to provide affordable health benefits for its employees.

A particular treatment that has been the subject of much recent debate, in light of the *Erickson* decision, is prescription infertility drugs. For example, in *Krauel v. Iowa Methodist Medical Center*, discussed above, a female employee brought a claim against her employer who offered a health plan which excluded coverage for infertility treatments.[104] The court held that the "[…]plan did not violate the PDA because treatment for infertility is not treatment for pregnancy, childbirth, or a related medical condition."[105] A court following the *Erickson* line of reasoning, however, would most likely hold otherwise. If the court in *Erickson* could find that the issue of contraceptives was unique to women and therefore its exclusion from insurance coverage discriminated against women, then they would probably hold the same for infertility. Like contraception, infertility is unique to women because it is directly related to a woman's ability to get pregnant. In fact, an argument can be made that infertility treatments are more similar to the types of treatments traditionally offered under an employer's prescription plan because like these traditional treatments, infertility treatments are used to cure an "unnatural state" or "medical condition", namely infertility. On the other hand, the goal of contraception is

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[103] Such treatments include, but are not limited to, prescriptions for infertility, impotence, erectile dysfunction, and the like. Zaptin, supra note 3, at 434.
[104] 95 F.3d 674 (8th Cir. 1996).
[105] *Id.* at 676. *Accord Saks v. Franklin Convey Co.*, 117 F. Supp. 2d 318 (S.D.N.Y. 2000) (holding that the PDA does not compel an employer to include coverage for infertility treatment in its health plan).

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not used to cure an ailment or unnatural state. Rather, it prevents a natural state, namely pregnancy.

The demand for gender-specific treatments do not only hold true for women, but also men. Men could make a similar claim based on Viagra, a prescription drug designed to treat erectile dysfunction and impotency which are medical conditions suffered solely by men.[106] Scholars who advocate insurance coverage for such medical conditions have advanced the argument that Viagra is the male counterpart to prescription contraceptives for female.[107] One scholar in particular has specifically stated that both Viagra and female prescription contraceptives "are used by men and women to achieve the same 'vital human function,' the freedom to control their own sexuality."[108] Similarly, the court in *Erickson* alluded to the notion that employers may later be found liable for Viagra coverage under Title VII. The court noted that "Assuming [the employer in this case] is correct and its prescription benefit plan does not cover Viagra even when proscribed for the medical condition of impotency, such an exclusion may later be determined to violate male employees' rights under Title VII."[109] Since men are just as entitled to protection under Title VII as women, the *Erickson* and EEOC approach would compel an employer who provides coverage for prescription, also to provide coverage for Viagra. If they refuse to comply, they would be discriminating on the basis of sex.

If we interpret these above-mentioned treatments to be covered within the meaning of Title VII, where are we going to stop? Appropriating broad interpretation to Title VII will make it nearly impossible to make "well-reasoned" distinctions between those prescriptions that should

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[106] Nicole Haff, *Health Care Coverage: Contraception and Viagra*, 7 Geo. J. Gender & L. 1185, 1189 (2006). In light of the *Erickson* decision, the author argues for the coverage of Viagra in employer prescription benefit plans. *Id.*
[107] *Id.* at 1185-89.
[108] *Id.* at 1191.
[109] *Erickson,* 141 F. Supp. 2d at 1275, n.12.

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fall under Title VII's protection and those that do not.[110] Under *Erickson* and the EEOC's rationale, it seems that as long as the prescription drug in question is gender-specific, a strong Title VII argument can be made for its inclusion under an employer's prescription plan.[111] Such a sweeping interpretation will not only unduly burden an employer's ability to obtain affordable health coverage for its employees, but it will also displace Title VII's original intent of prohibiting "discrimination" in the workplace.[112] Although the inclusion of some of these treatments seems intrinsically "fair" or the "right thing to do", this is a decision to be reached by legislatures, who may properly balance all the social consequences involved in their decision, as opposed to the courts whose sole focus should be statutory interpretation.

V. Contraception & Religion

Many religious faiths prohibit the use of non-natural contraceptives, such as birth-control pills.[113] Specifically, in Catholicism, the use of contraceptives to prevent pregnancy is deemed to be "intrinsically evil" and "immoral."[114] Similarly, the faith of Judaism prohibits the use of such contraception because it "wastes the male seed" and runs contrary to the commandment to marry and have children.[115] Moreover, many faiths believe that the use of contraception actually produces abortion which is viewed as sinful.[116] Consequently, a state's mandate of prescription contraceptive coverage raises substantial issues regarding government entanglement with religion, thereby invoking the 1st amendment free-exercise and establishment clauses.[117]

[110] Backmeyer, supra note 9, at 461.
[111] Zaptin, supra note 3, at 430.
[112] Wikipedia, *Civil Rights Act of 1964,* http://en.wikipedia.org/wiki/Title_VII#Title_VII (accessed April 1, 2007).
[113] BBC, *Religion & Ethics – Ethics of Contraception,* http://www.bbc.co.uk/religion/ethics/contraception, (accessed April 1, 2007).
[114] *Id.*
[115] *Id.*
[116] Haff, supra note 87, at 1193.
[117] *Id.*

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Upon consideration of these constitutional issues, the 20 states that have passed statutes which require employers to include prescription contraception in their health plans generally include an exemption for "religious employers."[118] These exemptions allow religious employers to exclude prescription contraception from their health plan if it interferes with their religious faith.[119] While such a measure seems adequately to address a religious employer's first amendment rights, there has been substantial debate as to what constitutes a "religious employer" as defined by the exemption language appearing in such legislation.[120] In particular, the exemption language in these statutes have been challenged as being so narrowly drawn that they effectively disqualify many employers, who otherwise seem to be entitled to qualification for such exemption based on their activities.[121] The case of *Catholic Charities of Sacramento v. Superior Court of Sacramento* is best illustrative of this type of challenge.[122]

In *Catholic Charities*, the Supreme Court of California examined whether a nonprofit corporation affiliated with the Catholic Church, named Catholic Charities, was qualified as a religious employer under the California Women's Contraception Equity Act (WCEA).[123] The WCEA requires certain employer health and disability insurance plans that cover prescription drugs also to provide coverage for prescription contraceptives. The law contains an exception for a "religious employer" to request a policy that excludes coverage for "contraceptive methods that are contrary to the religious employer's religious tenets."[124]

To qualify as a "religious employer" under the WCEA, the employer must meet a four part test. First, the main corporate purpose of the employer must be the "inculcation of religious

[118] *Id*. at 1194-5.
[119] *Id.*
[120] *Id.*
[121] Bailey, supra note 15, at 375.
[122] 85 P.3d 67 (2004), cert. denied, 125 S.Ct. 53 (2004).
[123] *Id.*
[124] *Cal. Health & Safety Code § 1367.25(b)* & *Cal Ins. Code § 10123.196(d).*

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values."[125] Second, the employer must employ persons who share the same "religious tenets."[126] Third, the employer must serve "primarily persons who share the religious tenants of the entity."[127] Finally, the employer must be a non-profit organization.[128] The employer in this case did not meet the first and third prongs of this test because its main purpose was to provide social services to the poor and needy rather than the inculcation of religious values.[129] The court also found that the employer was in violation of the second prong of the test because it employed people of diverse religious backgrounds.[130] Consequently, the employer challenged the WCEA on the grounds that it violated the Establishment and Free Exercise Clauses of the Constitution.[131] The argument for each clause will be examined separately.

In their Establishment Clause claim, the employer challenged that the exemption language in the WCEA served an impermissible distinction between religious and secular activities of a religious institution.[132] More notably, the employer alleged that "[…]the Legislature undertook deliberate efforts to carve up the Roman Catholic Church into discrete segments, some of which the legislature capriciously regarded as 'religious' and some as 'secular.'"[133] The employer also argued that the WCEA's definition of "religious employer" was so narrowly drawn that some entities that one would think be regarded as religious employers would not be qualified under the exemption and instead would be deemed "secular."[134] The court discarded this argument by noting that it was necessary for the legislature to make a distinction between "religious" and "secular" employers in order to delineate between those who get the

[125] *Cal. Health & Safety Code § 1367.25(a) – (d).*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Catholic Charities,* 85 P.3d at 75.
[130] *Id.* at 76.
[131] *Id.* at 79.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 80.

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benefit of the exemption and those who do not.[135] The court substantiated this argument by citing other cases which upheld exemptions in other statutes that distinguish "separate" and "religious" entities.[136] In so doing, however, the court failed to specifically address the employer's argument that the WCEA defined "religious employer" in such a way that some activities are protected by an employer, while the others are not.[137] For example, a synagogue or church would be protected under the statute, but a college with a religious affiliation may very well not be.

The employer in *Catholic Charities* alternatively argued that the WCEA violated the Free Exercise Clause of the Constitution.[138] In making such a claim, the employer had to overcome the hurdles set by U.S. Supreme Court decision in *Employment Division v. Smith* which expressed that a law which is neutral and of general applicability is not otherwise in violation of the free exercise clause if the law has the incidental effect of burdening a particular religious practice.[139] Accordingly, the employer argued that the WCEA was not neutral because "its exemption for religious employers contains religious terms and terminology that lack any secular meaning or purpose."[140] Moreover, the employer argued that the law was not generally applicable because the legislative history of the WCEA indicated that the law's sponsors specifically intended to target Catholic Organizations, such as the Catholic Charities organization. The Court responded to these arguments by noting that the "WCEA applies to religious and nonreligious organizations equally[...][and][…][t]hose Catholic employers that do not qualify for exemption are treated precisely the same as all other employers in the state,

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[135] *Id*. at 79-80.
[136] *Id*. at 80.
[137] *Id*.
[138] *Id.* at 82.
[139] *Employment Division v. Smith*, 494 U.S. 872 (1990).
[140] *Catholic Charities,* 85 P.3d at 83.

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whether religious or nonreligious. Thus, while the WCEA may treat some Catholic employers more favorably than other employers, the WCEA does not under any circumstance treat Catholic employers less favorably than any other employers."[141] Consequently, the Court held that the law was in compliance with the Free Exercise Clause because it was neutral and generally applicable.[142]

The employer in *Catholic Charities* subsequently failed on both constitutional challenges. The court concluded that the WCEA met both the rational basis and strict scrutiny constitutional tests because it was narrowly tailored to serve the government's compelling interest of "eliminating gender discrimination" in health care benefits.[143] Like the *Erickson* and EEOC decision, the court in *Catholic Charities* substantiated its holding, in part, by referring to the high number of unintended pregnancies in our country and the need for affordable health insurance to mitigate this problem.[144]

Undoubtedly, government mandated insurance coverage for contraception raises a 1st amendment freedom of religion issue. Accordingly, states have attempted to address this issue by formulating an exemption for religious employers. As *Catholic Charities* illustrates, however, such a measure has yet to settle this constitutional issue. There is still substantial resistance against such insurance mandates by those employers who do not qualify for the exemption, but nevertheless hold strong religious belief against the use and distribution of contraception.[145] Of course, these employers have the choice of cutting health benefits from their employment program altogether, thereby immunizing themselves from this required coverage. However, what about those employers who strongly believe in maintaining a positive and healthy workforce

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[141] *Id.* at 85-86.
[142] *Id*. at 86.
[143] *Id*. at 83.
[144] *Id.*
[145] Haff, supra note 87, at 1194.

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through the provision of fair wages and health plans? These employees, such as the one in *Catholic Charities*, are left in the dark because of the state's narrowly drawn contraception coverage exemption for "religious employers."[146]

The other trouble with statues such as the WCEA which require prescription contraceptive coverage is that it allows state legislatures in delineating which employer activities are "religious" and which are "secular", something of which the Supreme Court has disapproved. In *United States v. Seeger,* the United States Supreme Court held that an individual may be exempt from serving in the military based on the individual's religious beliefs.[147] In so holding, the court noted that as long as a certain belief is "sincerely held" then it constitutes a valid religious belief and may not be challenged based on its validity.[148] In *Catholic Charities*, the employer argued that the delivery of social services to the poor and needy under the direction of the bishop was one of their religious tenets. The WCEA, however, classified their activities as "secular." Although, as the court in *Catholic Charities* pointed out, the legislature needs to make some distinction between those employers that get the benefit of the exemption and those who do not, the legislature should not be able to ferret out specific activities of a religiously-affiliated employer. Allowing such practice gives the legislature power to determine which activities are a result of "sincerely held beliefs" and therefore religious, and which are not. Such practice has been held invalidated by the *Seeger* decision and its predecessors.[149] As long as statues such as

[146] In *Catholic Charities*, one of the employer's strongly held religious commitments was the provision of fair wages to its employees. However, the WCEA was in direct conflict with such a commitment by requiring contraception coverage in an employer's health plan. 85 P.3d at 75. *See also Bailey,* supra note 15, at 377-378.
[147] 380 U.S. 163 (1965).
[148] *Id.* at 176. The court further notes that "this construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." *Id.*
[149] *See also United States v. Ballard,* 322 U.S. 78 (1944) (holding that the courts will determine whether the beliefs held are sincere enough to exempt someone because of their religious beliefs; not whether the beliefs are true or

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the WCEA persist and legislatures continue to distinguish between religious and non-religious employer activities in passing contraception coverage legislation, there will be continued substantial litigation regarding this issue by religiously affiliated employers who do not otherwise qualify. Such litigation will not only needlessly crowd the courtroom, but will also hinder the proposed benefits of contraception coverage legislation. Moreover, such legislation will continue to chill an employer's efforts in providing its employees affordable health care because of its closely held religious beliefs against contraception.

VI. Conclusion

Undoubtedly, women have unique health care needs and employers should not be oblivious to them. Prescription contraception may very well be one of these unique health needs. However, such needs come at substantial costs.[150] The question we face, therefore, is who should bear the costs of providing women with prescription contraception? While strong arguments can be made for the employer to include this coverage in his/her comprehensive health plan, we cannot be unmindful of the legal and social impact of such a decision.[151] Court decisions which stretch Title VII too extensively in order to compel prescription contraceptive coverage may lead to increased demands and subsequent litigation for the coverage of other gender-specific drug categories.[152] While the legislature may take over and mandate such coverage in order to avoid these aforementioned risks, it should not do so without first properly balancing the social implications of their decision. More specifically, the legislature should not formulate the mandate in such a way that would unduly burden an employer's ability to provide affordable

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false) & *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1981) (holding that dominant views in a faith are not determinative in assessing whether a particular belief is religious.)

[150] Backmeyer, supra note 9, at 438. Oral contraceptives cost approximately $540 a year. *Id.*

[151] Zaptin, supra note 3, at 429-30.

[152] *Id.* at 430.

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health care to its employees. Therefore, a well drafted legislative mandate will not only take into account an employer's financial burden in providing such contraceptive coverage, but also their 1st amendment right to freedom of religion. It is only at this point in which the government's and employers' interests in providing affordable health care to our citizens will properly align.

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