

CLIENT BULLETIN

EEOC Issues Updated Enforcement Guidance On Pregnancy Discrimination Which Affects Health Plans

The U.S. Equal Employment Opportunity Commission (EEOC) issued [Enforcement Guidance on Pregnancy Discrimination and Related Issues](#), along with other aids including a [Q&A document](#) and [Fact Sheet](#), available on the [EEOC's website](#).

According to the EEOC, this is the first comprehensive update of the Commission's guidance on the subject of discrimination against pregnant workers since the 1983 publication of a Compliance Manual chapter on the subject. This guidance supersedes that document and incorporates significant developments in the law during the past 30 years.

Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 to make clear that discrimination based on pregnancy, childbirth or related medical conditions is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (Title VII). By enacting the PDA, Congress sought to make clear that "*pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.*"

ERISA does NOT preempt other federal laws relating to employee benefit plans, so the Title VII rules would apply to self-funded ERISA health plans.

Of particular interest to *ERISA* covered self-funded health plans is the Guidance regarding the *provision of prescription contraceptives*, whether the contraceptives are prescribed for birth control or for medical purposes. The EEOC Guidance states that to comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy. While speaking in terms of an insured product, the same principles would apply to self-insured plans under Title VII. A plan's method of providing benefits does not impact whether such benefits are provided in a discriminatory manner.

EEOC [FAQ 15](#), issued with the Guidance, also addresses the subject of prescription contraceptives and states *"...if an employer's health insurance plan covers preventive care for medical conditions other than pregnancy, such as vaccinations, physical examinations, or prescription drugs to prevent high blood pressure or to lower cholesterol levels, then prescription contraceptives also must be covered."*

This updated Guidance on prescription contraceptives follows the EEOC decision in [Commission Decision on Coverage of Contraception](#) (December 14, 2000). Since prescription contraceptives are available only for women, an employer's explicit refusal to offer insurance coverage for them is a sex-based exclusion.

While the *Affordable Care Act (ACA)* requires that non-grandfathered group health plans offer contraceptive services as part of women's preventive health services, there was no similar requirement for grandfathered plans. With this EEOC Guidance, it appears that all *ERISA*-covered group health plans will have to cover prescription contraceptives in the same manner as coverage for prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.

Fund Counsel should evaluate this EEOC Guidance to determine if a plan needs to be amended to avoid a Title VII PDA discrimination violation. The EEOC Guidance discusses court cases addressing Title VII discrimination and prescription drug coverage.

For prior Research Department publications on the subject see:

- BNB 2003-12** - Recent Settlement With EEOC Is Likely To Encourage More Group Health Plans To Include Coverage For Contraceptives
- RM 2004-17** - Update On Contraceptive Litigation And Settlements - Six Decisions Reviewed
- BNB 2005-28** - District Court Certifies Class Action Against Union Health Plan For Alleged Discriminated Against Female Employees – *Plan Excluded Prescription Contraceptives From Its Benefit Package While Including Benefits For Other Preventative Medical Services*
- BNB 2005-33** - District Court Enters Judgment Against Union Pacific for Health Plan Discrimination Against Its Female Employees Excluding Prescription Contraceptives From Plans' Benefit Package While Including Benefits For Other Prescription Drugs and Preventive Services Held To Violate Title VII
- RM 2007-10** - Eighth Circuit Court of Appeals Holds Employer's Union Health Plan Was Not Discriminatory For Failing To Provide Female Contraceptive Coverage [*distinguished by EEOC Guidance at footnote 42*]

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