

06/06/10 - Abortion Coverage

Background

Since 1976,[1] federal appropriations law has imposed limits on the use of federal funds to finance abortions. These limits are found in federal appropriations measures covering annual spending under authorized federal health care programs such as Medicaid, CHIP, community health centers, and the health insurance coverage for federal employees, members of the military, and their families. The extent of abortion restrictions has varied over the years;[2] the FY 2010 federal appropriations statute prohibits the use of federal funds in connection with the provision of abortion services except in the case of rape or incest and in cases in which a physical condition places a woman's life in danger if a pregnancy is continued.[3] Collectively these limits are often referred to as the Hyde Amendment after their original sponsor, Congressman Henry J. Hyde of Illinois.[4] The Hyde Amendment also expressly reserves the power of state and local governments to spend their own funds for abortions;[5] as of June 2010, 10 states voluntarily financed at least some non-federally assisted abortions for Medicaid beneficiaries, while an additional 13 states provided funding for such abortions pursuant to court orders.[6]

Federal appropriations laws governing health insurance for federal employees place similar limits on the use of federal funding for abortions. The annual appropriations statute that funds the Federal Employee Health Benefits Program prohibits the use of funds to either cover, or administer health benefit plans in connection with, abortion procedures, except in cases of rape or incest or where the life of the mother would be endangered were the fetus carried to term.[7] Similar limits can be found in the federal appropriations statute governing the TriCare program, which provides health insurance to military employees and their dependents.[8]

The Employee Retirement Income Security Act (ERISA), which governs health benefit plans sponsored by private employers, does not place restrictions on coverage of abortions by group benefit plans, thereby permitting tax-preferred treatment of such plans regardless of whether they provide abortion-related coverage. Similarly, the Public Health Service Act, which sets federal standards for the state-regulated health insurance market, does not address abortion coverage. As of June 2010, five states maintained insurance laws that imposed at least some restrictions on abortion coverage in either the individual policy or group plan markets.[9] These states also permitted individuals to purchase separate insurance coverage for abortion services. Twelve states have restrictions on insurance coverage of abortion for public employees.[10] Many states have passed new laws

in 2010 regulating or restricting abortion, ranging from limits on state employees' coverage to an outright ban on abortion after 20 weeks.[11]

Changes Made by the Health Reform Law

Pub. L. 111-148, Pub. L. 111-152

The legislation establishes restrictions on abortion coverage in the case of individual and group health plans sold in state exchanges. The law:

- Allows states to "prohibit abortion coverage in qualified health plans sold through an Exchange" in the state if the state "enacts a law to provide for such prohibition"; also allows states to "repeal" abortion prohibition laws.[12]
- Establishes a "special rule" allowing qualified health plans to refuse to "provide coverage" of abortion services "for any plan year," including both abortion services for which public funding is prohibited and services for which public funding is allowed.[13] Requires health plans to determine "whether or not the plan provides coverage of services" for "the plan year." [14]
- Classifies as "abortions for which public funding is prohibited" abortions "for which the expenditure of federal funds appropriated to the Department of Health and Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved." [15]
- Classifies as "abortions for which public funding is allowed" abortions "for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is permitted" based on the "law as in effect as of the date that is 6 months before the beginning of the plan year involved." [16]
- In the case of health plans that cover abortions for which federal funding is prohibited, bars the use of federal funds "attributable" to either the advance refundable tax credit or cost-sharing reduction under the Act. [17]
- Requires the "establishment of allocation accounts" in the case of health plans that cover abortions for which public funding is prohibited. [18] Plan issuers must collect from each "enrollee in the plan (without regard to the enrollee's age, sex, or family status)" separate payments equaling (I) the portion of the premium paid by the enrollee for covered services other than prohibited abortions, and (II) "amount equal to the actuarial value of the coverage of" prohibited

abortion services.[19] Health plans must provide a separate deposit system for enrollees whose coverage premiums are "paid through an employee payroll deposit."

- For those enrollees who receive tax credits or cost sharing subsidies, qualified health plan issuers must segregate the separate payments above into "allocation accounts" that separate funds used to pay for covered plan services from funds used to pay for abortions for which federal funding is prohibited.[20]
- Requires qualified health plan issuers that cover abortions for which federal funding is prohibited to "estimate the basic per enrollee, per month cost" of coverage on "an average actuarial basis." [21] In estimating this cost, the issuer "may take into account the impact on overall costs of the inclusion of such coverage, but may not take into account "any cost reduction estimated to result from" coverage of abortions for which federal funding is prohibited, such as prenatal, delivery, or postnatal care.[22] Issuers must also "estimate such costs as if such coverage were included for the entire population covered"[23] and may not set the cost of coverage at less than \$1 per enrollee per month.[24]
- Requires state insurance commissioners to ensure that health plans and issuers comply with the law's segregation requirements "in accordance with applicable provisions of generally accepted accounting requirements, circulars of funds management of the Office of Management and Budget, and guidance on accounting of the Government Accountability Office." [25]
- Requires qualified health plans that provide coverage of abortions for which federal funding is prohibited to "provide a notice to enrollees" of coverage, but "only as part of the summary of benefits and coverage explanation," at the time of enrollment.[26]
- Specifies that notices provided to enrollees, advertisements about qualified plans, information provided by Exchanges, and any other information specified by the Secretary, must provide information "only with respect to the total amount of the combined payments for services" covered by the plan and in connection with abortions for which federal funding is prohibited.[27]
- Prohibits qualified health plans from discriminating against any health care provider or any health care facility because of its "unwillingness to provide, pay for, provide coverage of, or refer for abortion." [28] Similar protection is not provided for those who are willing to provide, pay for, provide coverage of, or refer for abortion.
- Requires that the Office of Personnel Management (OPM) ensure

that at least one multi-state plan does not cover abortions for which federal funding is prohibited.[29]

- Specifies that the health reform law does not affect other federal laws relating to:

- provider "conscience protection," providers' "willingness or refusal to provide abortion," and "discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion."

- "the rights and obligations of employees and employers under Title VII of the Civil Rights Act of 1964."

- laws related to emergency services as required by state or federal law, including the Emergency Medical Treatment and Labor Act (EMTALA).[30]

- Specifies that the health reform law does not affect state laws "regarding the prohibition (or requirement of) coverage, funding, or procedural requirements on abortions."

Executive Order

Concurrent with the U.S. House of Representatives passage of the health reform bill, the President issued Executive Order 13535 (EO) (March 24, 2010),[31] providing a Statement of Administration policy regarding enforcement of the law, which:

- Specifies the establishment of "an adequate enforcement mechanism to ensure that" federal funds are not used for prohibited abortion services and "a comprehensive, government-wide set of policies and procedures."

- Presents an overview of the key elements of the law and identifies HHS, OMB, and OPM as principal agencies charged with implementation.

- Specifies the responsibility of state insurance commissioners in overseeing the funds segregation process.

- Directs the OMB director and the Secretary of HHS to develop, within

180 days of the date of the order, a "model set of segregation guidelines" for use by state health insurance commissioners "when determining whether exchange plans are complying" with the law's segregation requirements and specifies that the guidelines "shall also offer technical information that states should follow to conduct independent regular audits of insurance companies."

- Directs the Secretary of HHS, upon completion of the model guidelines, to "promptly initiate a rulemaking to issue regulations, which will have the force of law, to interpret the Act's segregation requirements, and shall provide guidance to state health insurance commissioners on how to comply with the model guidelines."
- Specifies that federally funded community health centers must comply with the Hyde Amendment as a program that receives federal appropriations; clarifies the applicability of Hyde Amendment restrictions to the health center trust fund separately established under health reform.

Implementation

Agency

OMB and HHS are charged with developing the accounting process that will support funds segregation, while state insurance commissioners are charged with oversight of insurer compliance with the federal process. The Department of Health and Human Services is separately charged with issuing regulations governing abortion coverage under qualified health plans sold in state exchanges. The regulations also will address the role of states in oversight of federal requirements related to abortion coverage by qualified health plans operating in state exchanges.

The Office of Personnel Management is charged with oversight of abortion coverage practices among multi-state plans and thus would be involved in assuring compliance with federal standards related to abortion coverage, actuarial cost estimates, sales, and notice to enrollees.

Because state exchanges will also serve employers in the small group market that purchase coverage through state exchanges, the U.S. Departments of Labor and Treasury could be expected to be involved because of the interaction between the exchange market and ERISA.

Key Dates

Under the EO, guidelines on funds segregation must be issued by September 24, 2010. The EO further directs HHS to "promptly" follow such guidelines with a formal rulemaking on the specific issue of funds segregation. Because the law's abortion coverage provisions operate as a special standard applicable to the sale of qualified health plans in state exchanges, it is not clear whether the funds segregation regulations also would fully address abortion coverage, insurer actuarial and sales practices, as well as provisions related to notice, or whether these matters instead will be addressed as part of broader regulations applicable to exchanges and the sale of qualified health plans in exchanges.

Process

Given the provisions of the law and the EO, the process used to develop standards related to abortion coverage, pricing, sales practices, notice, and account allocation and funds segregation will involve significant interaction among HHS, OMB, Treasury, DOL, and state insurance commissioners. Presumably, the Office of Personnel Management also will be involved given OPM's obligations to assure participation in exchanges by at least one multi-state plan that does not offer abortion services as defined in the law. (OPM has no similar obligation to assure participation by at least one plan that does cover abortions.)

It is also possible that the standards that are negotiated may change over time, since the abortion coverage standard under the law is linked to the most current Hyde Amendment standard, which itself has evolved over time.

Key Issues

- *"Attributable" funds.* Health plans that cover prohibited abortions are prohibited from using "any amount attributable" to tax credits or cost-sharing reduction "for purposes of paying for [abortion] services." What "purposes" will be considered related to paying for abortions and thus fall within the prohibition against expenditures?
- *The role of states and state law.* The law authorizes states to prohibit abortion coverage entirely in the exchange market. Will federal regulations establish standards for states that enact such prohibitions and that govern matters such as notice to individual and group purchasers and the sale of additional coverage riders? With respect to states that do not ban coverage altogether but instead seek to regulate it, what will be the interaction between state and federal law? Will

states be required to adhere to federal standards for fund allocation and segregation or will states be permitted to enact alternative approaches to segregation and allocation? Will federal standards regarding accounting, sales and notice be considered preemptive or will states have the power to impose separate standards?

Since the enactment of health reform, at least three states (Arizona, Mississippi, and Tennessee) have adopted laws restricting abortion coverage in health plans offered through state-run health insurance exchanges, as of June 2010. In Florida and Missouri, legislators have passed similar abortion bans that are awaiting approval from the state's governor. Several other states, including Louisiana and Ohio, are either considering or have already introduced legislation that seeks to restrict abortion coverage in the new state exchanges. Only one state, Oklahoma, passed legislation restricting abortion coverage that was subsequently vetoed by the governor. The veto, however, was based on the additional burdens the bill would place on women seeking abortions as a result of rape or incest. The governor did not express any reservations about prohibiting abortion coverage in the state exchange.[32]

- Qualified plans that elect to sell abortion coverage. How will federal (and potentially state) standards address account allocation, funds segregation, notice, sales, and actuarial practice issues? For example, will plan issuers be expected to provide separate filings on the methods used to derive the cost of abortion coverage? What process, if any, might the federal or state governments require as a means of demonstrating or verifying the reasonableness of actuarial estimates? What standards will be used to assure compliance with the provider non-discrimination standard? Conversely, what standards will be used to assure that plans covering abortions include in their networks (or permit access on an out-of-network basis to) providers that furnish abortion procedures?

Recent Agency Action

None.

Authorized Funding Levels

None with respect to abortion coverage by qualified health plans. The provisions of law are regulatory and are designed to bar the use of public funds for abortions.

<http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.html>).

[3] "Sec. 507(a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion. (b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which benefits are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion. . . . Sec. 508(a) The limitations established in the preceding section shall not apply to an abortion ? (1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." 123 Stat. at 802-803.

[4] George J. Annas, "Abortion Politics and Health Insurance Reform," *New England Journal of Medicine*, Vol. 361, No. 27 (Dec. 31, 2009).

[5] "Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds)." Sec. 508(b), 123 Stat. at 803.

[6] Four states voluntarily cover all or most medically necessary abortions while 13 states only cover such abortions pursuant to a court order. Six additional states provide coverage for abortion beyond the federal level only in limited cases, such as a fetal anomaly or to preserve maternal physical health. Guttmacher Institute, "State Funding of Abortion Under Medicaid," *State Policies in Brief* (June 1, 2010), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

[7] Omnibus Appropriations Act, Pub. L. 111-8 (2009).

[8] 10 U.S.C. §1093(a).

[9] Guttmacher Institute, "Restricting Insurance Coverage of Abortion," *State Policies in Brief* (June 1, 2010), http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf.

[10] *Id.*

[11] John Leland, "Abortion Foes Advance Cause at State Level," *New York Times*, June 3, 2010, A18.

[12] PPACA, §1303(a)(1) and (2) as amended by §10104(c).

[13] PPACA, §1303(b)(1)(A) and (B), as amended by §10104(c).

[14] PPACA, §1303(b)(1)(A), as amended by §10104(c).

[15] PPACA, §1303(b)(1)(B)(i), as amended by §10104(c).

[16] PPACA, §1303(b)(1)(B)(ii), as amended by §10104(c).

[17] PPACA, §1303(b)(2)(A), as amended by §10104(c).

- [18] PPACA, §1303(b)(2)(A) and (C), as amended by §10104(c).
- [19] PPACA, §1303(b)(2)(C)(i), as amended by §10104(c).
- [20] PPACA, §1303(b)(2)(C)(ii), as amended by §10104(c).
- [21] PPACA, §1303(b)(2)(D), as amended by §10104(c).
- [22] PPACA, §1303(b)(2)(D)(ii)(I), as amended by §10104(c).
- [23] PPACA, §1303(b)(2)(D)(ii)(II), as amended by §10104(c).
- [24] PPACA, §1303(b)(2)(D)(ii)(III), as amended by §10104(c).
- [25] PPACA, §1303(b)(2)(E), as amended by §10104(c).
- [26] PPACA, §1303(b)(3), as amended by §10104(c).
- [27] PPACA, §1303(b)(3)(B), as amended by §10104(c).
- [28] PPACA, §1303(b)(4), as amended by §10104(c).
- [29] PPACA, §1334(a)(6).
- [30] PPACA, §1303(c) and (d), as amended by §10104(c).
- [31] Executive Order 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," 75 Fed. Reg. 59 (Mar. 29, 2010), <http://edocket.access.gpo.gov/2010/pdf/2010-7154.pdf>. See also <http://www.whitehouse.gov/blog/2010/03/21/one-more-step-towards-health-insurance-reform>.
- [32] John Frank, Gov. Charlie Crist feeling pressure on abortion bill, Miami Herald, May 6, 2010, <http://www.miamiherald.com/2010/05/05/1615450/crist-feeling-the-pressure-on.html>; Ricardo Alonso-Zaldivar, Abortion Foes Capitalize on Health Law They Fought, ABC News, May 16, 2010, <http://abcnews.go.com/Business/wireStory?id=10659178>; Emily W. Pettus, Barbour signs law with 2nd ban on abortion funding, Associated Press, May 24, 2010, available at <http://www.newstimes.com/news/article/Barbour-signs-law-with-2nd-ban-on-abortion-funding-498506.php>; Okla. Gov. vetoes abortion bill on insurance, MSNBC, May 27, 2010, http://www.msnbc.msn.com/id/37370476/ns/politics-more_politics.

See, e.g., Omnibus Appropriations Act, Pub. L. No. 111-8, 123 Stat. 524, 802-803 (Mar. 11, 2009). Heather D. Boonstra, "The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States," Guttmacher Policy Review, Vol. 10, No. 1 (Winter 2007), <http://www.guttmacher.org/pubs/gpr/10/1/gpr100112.html>. "Sec. 507(a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion. (b) None of the funds appropriated in this Act, and none of the funds in any trust fund to which benefits are appropriated in this Act, shall be expended for health benefits coverage that includes coverage of abortion. . . . Sec. 508(a) The limitations established in the preceding section shall not apply to an abortion ? (1) if the pregnancy is the result of an act of rape or incest; or (2) in the case where a

woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed." 123 Stat. at 802-803. George J. Annas, "Abortion Politics and Health Insurance Reform," *New England Journal of Medicine*, Vol. 361, No. 27 (Dec. 31, 2009). "Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds)." Sec. 508(b), 123 Stat. at 803. Four states voluntarily cover all or most medically necessary abortions while 13 states only cover such abortions pursuant to a court order. Six additional states provide coverage for abortion beyond the federal level only in limited cases, such as a fetal anomaly or to preserve maternal physical health. Guttmacher Institute, "State Funding of Abortion Under Medicaid," *State Policies in Brief* (June 1, 2010), http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf. Omnibus Appropriations Act, Pub. L. 111-8 (2009). 10 U.S.C. §1093(a). Guttmacher Institute, "Restricting Insurance Coverage of Abortion," *State Policies in Brief* (June 1, 2010), http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf. John Leland, "Abortion Foes Advance Cause at State Level," *New York Times*, June 3, 2010, A18. PPACA, §1303(a)(1) and (2) as amended by §10104(c). PPACA, §1303(b)(1)(A) and (B), as amended by §10104(c). PPACA, §1303(b)(1)(A), as amended by §10104(c). PPACA, §1303(b)(1)(B)(i), as amended by §10104(c). PPACA, §1303(b)(1)(B)(ii), as amended by §10104(c). PPACA, §1303(b)(2)(A), as amended by §10104(c). PPACA, §1303(b)(2)(A) and (C), as amended by §10104(c). PPACA, §1303(b)(2)(C)(i), as amended by §10104(c). PPACA, §1303(b)(2)(C)(ii), as amended by §10104(c). PPACA, §1303(b)(2)(D), as amended by §10104(c). PPACA, §1303(b)(2)(D)(ii)(I), as amended by §10104(c). PPACA, §1303(b)(2)(D)(ii)(II), as amended by §10104(c). PPACA, §1303(b)(2)(D)(ii)(III), as amended by §10104(c). PPACA, §1303(b)(2)(E), as amended by §10104(c). PPACA, §1303(b)(3), as amended by §10104(c). PPACA, §1303(b)(3)(B), as amended by §10104(c). PPACA, §1303(b)(4), as amended by §10104(c). PPACA, §1334(a)(6). PPACA, §1303(c) and (d), as amended by §10104(c). Executive Order 13535, "Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act," 75 Fed. Reg. 59 (Mar. 29, 2010), <http://edocket.access.gpo.gov/2010/pdf/2010-7154.pdf>. See also <http://www.whitehouse.gov/blog/2010/03/21/one-more-step-towards-health-insurance-reform>. John Frank, Gov. Charlie Crist feeling pressure on abortion bill, *Miami Herald*, May 6, 2010, <http://www.miamiherald.com/2010/05/05/1615450/crist-feeling-the-pressure-on.html>; Ricardo Alonso-Zaldivar, Abortion Foes Capitalize on Health Law They Fought, *ABC News*, May 16, 2010, <http://abcnews.go.com/Business/wireStory?id=10659178>;

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