ETHICS & MEDICS
A Commentary of The National Catholic Bioethics Center on Health Care and the Life Sciences

OPTIONS FOR NON-EXEMPT EMPLOYERS UNDER PPACA

On February 15, 2012, the Department of Health and Human Services (HHS) promulgated the Final Rule concerning what is known as the contraception mandate.[1] Employers who offer group health insurance in a business of any size must comply for all employee health plan years beginning on or after August 1, 2012. The mandate requires that all non-grandfathered group health plans (including student health insurance plans) and health insurance issuers provide the full range of U.S. Food and Drug Administration (FDA)-approved contraceptive methods, patient education, and counseling as "preventive services" for women, as specified under the Patient Protection and Affordable Care Act (PPACA).[2] These FDA-approved contraceptives include potential abortifacients, such as so-called emergency contraception and intrauterine devices, as well as surgical sterilizations. No co-payments are to be charged to beneficiaries. The mandate applies to all non-exempt group health plans, including self-insured plans under the Employee Retirement Income Security Act.[3]

The mandate contains a narrowly crafted exemption for a religious employer from purchasing coverage for its employees if it

> (1) has the inculcation of religious values as its purpose;
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> (2) primarily employs persons who share its religious tenets;
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> (3) primarily serves persons who share its religious tenets; and
>
> (4) is a non-profit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.[4]

At the same time, HHS created a "safe harbor" year, until August 1, 2013, postponing compliance by religious employers who do not meet these criteria and who have not offered contraception, abortifacient, and sterilization coverage to their employees since February 10, 2012. However, even such an accommodation is premised on the notion that the federal government has the power to define what constitutes a religious organization, in direct violation of the First Amendment to the Constitution.

We support and encourage the many lawsuits challenging this injustice and expect them to be successful before the Supreme Court. We recall the recent Court decision in *Hosanna-Tabor v. EEOC*,[5] in which the federal government's misinterpretation of the First Amendment was rejected in a unanimous 9 to 0 decision that joined both the liberal and conservative wings of the Court. Most importantly, we are impelled to recall the distinct moral obligation of all persons of conscience, and especially Catholics, to resist unjust laws. This duty was outlined explicitly by our Holy Father, Pope John Paul II, in his encyclical *Evangelium vitae*: "There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection. . . . In the case of an intrinsically unjust law, . . . it is therefore never licit to obey it, or to 'take part in a propaganda campaign in favour of such a law, or vote for it.'"[6]

On March 15, 2012, HHS sought comment concerning "alternative ways to fulfill the requirements of section 2713 of the Public Health Service Act and companion provisions under the Employee Retirement Income Security Act and the Internal Revenue Code when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraception for religious reasons and that is not exempt under the final regulations published February 15, 2012."[7] Nonetheless, as the public waits for a response by HHS to their comments and for the proposed amended final regulations, non-exempt employers of conscience who object to providing such coverage to their employees are currently left with no recourse.

Furthermore, the mandate requires insurance companies to provide such coverage even if objections are raised by the insurer, the contracting employer, or the insured.[8] It is through this provision of the mandate that objecting colleges and universities, for example, are compelled to include contraceptives, abortifacients, and sterilizations in their student health plans if they offer health insurance coverage to their students. However, colleges and universities have the option of not offering insurance coverage to their students, who could remain on their parents' plans until they reach twenty-six years

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of age. The non-exempt employer of conscience has no such alternative.

The non–faith-based employer of conscience is left with the following options:[9]

- **Willingly assent.** Comply with the provision of the morally objectionable insurance coverage.
- **Provide morally non-objectionable insurance.** Refuse to comply by continuing to provide non-objectionable insurance coverage through a plan that does not include coverage of contraceptives, abortifacients, or sterilizations, running the risk of serious financial and legal repercussions.
- **Drop all coverage.** Refuse to comply by dropping all health insurance coverage for employees while providing fair compensation for lost benefits.
- **Temporarily comply under protest.** Refuse to fully comply while voicing opposition to the unjust mandate, actively pursuing legal avenues to eliminate its substantial burden on the free exercise of religion, and tolerating a group health plan that contains the morally objectionable coverage only until January 2014, at which time employees in every state will have access to affordable insurance exchanges.

The analysis below does not include a discussion of options for the non-exempt religious employer whose obligations are governed by canon law, such as Catholic charities and Catholic hospitals, particularly as their obligations relate to acts of administration, the use of ecclesiastical goods, and the avoidance of scandal.

Moral Analysis

We employ the standard categories of cooperation in our analysis. A basic distinction may be drawn between formal cooperation, in which "one does . . . intend the sin whose external commission one is aiding," and material cooperation, in which "one . . . does not intend the sin whose external commission one is aiding."[10] While both types of cooperation are sinful in principle, certain forms of material cooperation may be licit under temporary extenuating circumstances, so long as the cooperator manifests resolute opposition to the evil and takes all reasonable action to limit and ultimately eliminate that cooperation. This is a key difference between licit toleration and tacit approval, or formal cooperation, which is always morally illicit.

Willingly Assent

A willing assent to the mandate constitutes formal cooperation with the provision of contraceptives, mutilating sterilizations, and abortion-inducing drugs. Willingly accepting, approving, and funding insurance plans for employees as a means to ensure employee access to health care and business survival under the mandate would be invoking a good end to justify an illicit means. Such cooperation would not be explicitly formal, whereby "the end intended by the cooperator (*finis operantis*) is the sin of the principal agent";[11] rather, it would be implicitly formal: "The cooperator does not directly intend to associate himself with the sin of the principal agent, but the end of the external act (*finis operis*), which for the sake of some advantage or interest the cooperator does intend, includes from its nature or from circumstances the guilt of the sin of the principal agent."[12] Catholic moral teaching, which demands opposition to unjust laws that conflict with the natural law on which human laws are based, does not admit this form of cooperation as morally licit under any circumstances: "This cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it."[13]

Provide Morally Non-objectionable Insurance

Providing an insurance plan that does not include the mandated coverage for contraceptives, sterilizations, and abortifacients would subject the employer to the exorbitant penalties of $100 per day per employee, as well as the potential legal actions taken by employees and by the federal government.[14] A business with only fifteen employees would face roughly *half of a million dollars in fines per year*. If these fines are paid, many businesses will be forced to close, causing significant harm to both the employer and the employees, who could end up losing both their livelihoods and their health insurance coverage. If these fines are not paid, as a form of legitimate civil disobedience against the unjust governmental mandate, employers will face hefty legal risks that could equally threaten the livelihoods of all involved.

Although providing an alternative health care plan could be a moral course of action, if one could access a plan that does not contain the mandated coverage,[15] it would not appear in most circumstances to be prudent. Though businesses may not be persons, their owners have a responsibility to safeguard their religious beliefs and moral consciences as well as a duty of stewardship toward the individuals whose livelihoods depend on the organization. In this light, the punitive nature of the penalties must be emphasized: the fines specifically target employers with religious convictions and are designed to compel them either to comply or risk losing their businesses and harming their employees and their families. That the federal government would threaten the good of the community for the sake of an ideological agenda intolerant toward the rights of conscience and the free exercise of religion is a profoundly threatening development that ought to dismay all citizens of the United States.

Drop All Coverage

Dropping all coverage appears to be the most morally sound approach. However, beginning in January 2014, an employer with more than fifty full-time equivalent employees could incur a penalty of approximately $2,000 per employee per year beyond the first thirty full-time employees not offered a health plan, as well as incur the potential legal actions taken by employees and the federal government.[16] This option has the disadvantage of shifting the cost, burden, and quality of health care coverage for employees and their families onto the employees them-

selves. The principles of stewardship and justice require employers to care for their employees; by virtue of the way in which health insurance is generally provided in the United States, this care typically includes health insurance coverage. A sudden change in this approach could leave many employees and their families uninsured or underinsured with little time to adjust and find affordable, quality alternatives.

At a minimum, justice would require fair compensation for lost benefits in the form of a salary increase or other economic benefit and adequate notice to allow employees to find individual coverage before losing their employer-sponsored coverage. Given the advantageous rates employers negotiate for group policies, it would be virtually impossible for the individual to find comparable coverage at a price equivalent to the amount that the employer pays per employee, making this option far from ideal. In addition, after January 2014, a large employer, in fairness to himself, would seem justified in deducting the $2,000 tax imposed on him by the law from any salary increase to the employee. If the employer increases the salaries of employees, both employer and employee will face additional taxes that are currently avoided through employer-provided health insurance tax exemptions.

This course of action would shift the moral concern and awareness of conscience restrictions to individual voters, encouraging them to raise their voices in a way that they might not if the more "impersonal" business entity were left to suffer the undue burden on conscience and the free exercise of religion. While the federal government has argued that a secular business cannot claim a substantial burden on its free exercise of religion,[17] there can be no doubt that forcing individuals to pay for immoral practices does burden their free exercise of religion. Individual persons will now be forced to act against their own moral convictions and religious beliefs in order to obtain health insurance. This shows once again how the mandate unjustly uses the coercive power of the federal government to infringe on the rights of conscience and free exercise of religion.

An apparent problem with this approach is that the employee, who is left to his own resources, is only likely to find insurance plans that suffer from the same injustice the employer faces. Virtually all insurance plans are subject to the mandate. Therefore, the employer's compensation for lost insurance coverage might arguably be construed as material cooperation with the employee's probable purchase of insurance containing the same morally illicit coverage.[18] However, the compensation would not be specifically established for such use. The moral connection between the employer, the funds, and possible illicit coverage would be remote; thus, that compensation would not be illicit. As unfortunate as it is, this approach appears to be the most morally sound and fiscally survivable option for the employer at present.

Temporarily Comply under Protest

Here the employer would comply with the mandate on a temporary basis on the grounds that he cannot feasibly or in good conscience, based on specific prudential assessments, replace his employees' insurance coverage with fair compensation. Employer-provided insurance coverage is often a life-saving measure, since employers can purchase better coverage at a lower cost for their employees than employees can purchase privately. Many employees depend on access to medications and treatments that are necessary to preserve their health or even their lives. When the federal government forces employers and individuals to violate their own moral convictions, it puts the health and very lives of its citizens at risk. Employers are asked to choose between the rights of conscience and the well-being of those who are in their employ. Forcing such a terrible choice on people of conscience is a grave injustice, which underscores the unjust nature of the mandate.

Measure of Last Resort

The ethicists of The National Catholic Bioethics Center believe that temporary compliance with the mandate, coupled with active opposition by all reasonable and legal means available, is a morally tolerable option only as a last resort, provided that this compliance ends once the insurance exchanges are available to employees in 2014. The reasonable hope of successful legal challenges bolsters the obligation to resist: Hercules Industries,[19] a Colorado-based family-owned business, has already succeeded in securing a temporary injunction against enforcement of the mandate based on the Religious Freedom Restoration Act of 1993. Temporary compliance under active protest avoids the concern of abandoning employees before the exchanges are set up without permanently submitting to the unjust mandate. Given the lack of just alternatives, it could constitute licit mediate material cooperation in an immoral action that would take place by virtue of the coerced insurance coverage. To avoid putting underinsured employees at substantial risk when fair compensation is not feasible is a sufficiently weighty reason to tolerate cooperation through January 2014. Once the insurance exchanges are made available, however, the danger of employees being unable to obtain reasonable health care coverage elsewhere would come to an end. So too would compliance with the mandate. Beginning in 2014, employers of conscience would drop all coverage, and those with fifty or more full-time equivalent employees would pay the $2,000 tax per employee for not offering insurance as mandated under the PPACA.

The only option that could not be morally licit is the first one outlined above, that is, willing compliance with the mandate. Other options outlined above could be morally licit depending on the circumstances faced by those being forced to comply.

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[1] "Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act," 77 Fed. Reg. 8725, 8728 (February 15, 2012). The Final Rule left unchanged the requirements of the Interim Final Rule of August 1, 2011, 76 Fed. Reg. 46621 (August 3, 2011).

[2] Health Resources and Services Administration, "Women's Preventive Services: Required Health Plan Coverage Guidelines," August 2011, http://www.hrsa.gov/womensguidelines/. A plan is "grandfathered" if it contains no substantial changes of certain kinds in the health plan since March 23, 2010.

[3] Hinda Ripps Chaikind, "ERISA Regulation of Health Plans: Fact Sheet," Congressional Research Service, March 6, 2003, http://www.allhealth.org/briefingmaterials/erisaregulationofhealthplans-114.pdf.

[4] Department of Health and Human Services, "Certain Preventive Services Under the Affordable Care Act," Advance Notice of Proposed Rulemaking, 77 Fed. Reg. 16501, 16502 (March 21, 2012).

[5] *Hosanna-Tabor v. EEOC*, 565 U.S. ___ (2012).

[6] John Paul II, *Evangelium vitae* (March 25, 1995), n. 73.

[7] DHHS, "Certain Preventive Services," 77 Fed. Reg. 16501.

[8] 42 U.S.C. § 300gg-22(b)(2)(C)(i).

[9] The following analysis does not constitute legal advice; failure to comply with the law could invoke not only penalties but also legal actions by employees and the federal government.

[10] John A. McHugh and Charles J. Callan, *Moral Theology: A Complete Course*, vol. 1 (New York: Wagner, 1958), 616.

[11] Ibid., 618.

[12] Ibid.

[13] John Paul II, *Evangelium vitae*, n. 74.

[14] 26 U.S.C. § 4980D (b)(1).

[15] It would appear that the only way to have access to such a plan would be by obtaining a self-insured plan that, although subject to the mandate, would violate the mandate and be subject to the aforementioned unjust and exorbitant fines.

[16] 26 U.S.C. § 4980H(c)(1) and (c)(2)(D)(i). As we understand it, employees must be eligible to receive a subsidy to their premium by the federal government for the penalty to be invoked.

[17] *Newland v. Sebelius*, no. 12-cv-01123-JLK (Colo. Dist. July 27, 2012). The merits of the argument have not yet been adjudicated.

[18] Because of the mandate, few if any insurance plans will be available without the illicit coverage.

[19] *Newland v. Sebelius*. It is important to note that this ruling applies only to Hercules Industries.

From "Our First, Most Cherished Liberty: A Statement on Religious Liberty"

United States Conference of Catholic Bishops
March 2012

Religious liberty is not only about our ability to go to Mass on Sunday or pray the Rosary at home. It is about whether we can make our contribution to the common good of all Americans. Can we do the good works our faith calls us to do, without having to compromise that very same faith? Without religious liberty properly understood, all Americans suffer, deprived of the essential contribution in education, health care, feeding the hungry, civil rights, and social services that religious Americans make every day, both here at home and overseas.

What is at stake is whether America will continue to have a free, creative, and robust civil society—or whether the state alone will determine who gets to contribute to the common good, and how they get to do it. Religious believers are part of American civil society, which includes neighbors helping each other, community associations, fraternal service clubs, sports leagues, and youth groups. All these Americans make their contribution to our common life, and they do not need the permission of the government to do so. Restrictions on religious liberty are an attack on civil society and the American genius for voluntary associations.

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