

**Special point of interest:**

- **CONTRACEPTIVE COVERAGE EXCLUSION**
- **COBRA AND ANNUAL ENROLLMENT**

## **Contraceptive Coverage Exclusion**

Source: EBIA Weekly 3/29/07  
www.ebia.com

EIGHTH CIRCUIT HOLDING THAT PDA DOESN'T ENCOMPASS CONTRACEPTION REVIVES CONTRACEPTIVE COVERAGE EXCLUSION

[In re Union Pac. R.R. Employment Practices Litig., 2007 U.S. App. LEXIS 5914 (8th Cir. 2007)]

For a copy:

<http://www.ca8.uscourts.gov/opndir/07/03/061706P.pdf>

In a 2-1 decision, the Eighth Circuit has concluded that the Pregnancy Discrimination Act (PDA) "does not encompass contraception," reversing a trial court decision. The employer in this case provided health benefits that excluded both male and female contraceptive methods when used for the sole purpose of contraception. Contraception was only covered when medically necessary for a noncontraceptive purpose such as regulating menstrual cycles. In a class-action lawsuit brought by female employees who used prescription contraception for contraceptive purposes, the trial court found that the employer's failure to cover prescription contraception violated Title VII, as amended by the PDA.

Analyzing the PDA claims on appeal, the Eighth Circuit noted that the statute prohibited employers from discriminating against individuals regarding benefits "because of or on the basis of pregnancy, childbirth, or related medical conditions," and that "women affected by pregnancy, childbirth, or related medical conditions" should be treated the same for benefits purposes "as other persons not so affected but similar in their ability or inability to work." Following an earlier Eighth Circuit decision involving infertility treatments, which held that "related medical conditions"

referred only to medical conditions associated with pregnancy and childbirth, the court concluded that "contraception is not 'related to' pregnancy for PDA purposes because, like infertility treatments, contraception is a treatment that is only indicated prior to pregnancy." Reasoning that, like infertility, contraception is gender-neutral, the court held that the employer didn't discriminate against its female employees in violation of the PDA. In so holding, the court rejected as "unpersuasive" an EEOC decision interpreting the PDA to require employers to cover prescription contraceptives for women if they cover "other prescription drugs and devices, or other types of services that are used to prevent the occurrences of other medical conditions." The court also denied a Title VII claim of disparate treatment based on sex discrimination, concluding that the coverage provided to women was no less favorable than that provided to men.

EBIA Comment: The Eighth Circuit is the first (but likely not the last) federal appellate court to address the controversial question of whether the PDA requires coverage for contraception. The dissent argued that the majority's view was inconsistent with the U.S. Supreme Court's holding in Johnson Controls that discriminating against women on the basis of "potential pregnancy" violated Title VII, as amended by the PDA. Specifically, the dissent reasoned that a woman controls her potential pregnancy with prescription contraception and that once pregnant only the woman's health is affected, while infertility describes a number of medical conditions affecting both men and women. Consequently, "women are uniquely and specifically disadvantaged by [the employer's] failure to cover prescription contraception."

## **COBRA and Annual Enrollment Questions**

Source: EBIA Weekly 3/29/07 [www.ebia.com](http://www.ebia.com)

**QUESTION:** At annual enrollment for our company's group health plan, some employees drop dependents and spouses from the plan. We provide those individuals dropped from coverage with a HIPAA certificate of creditable coverage and COBRA election materials. But we just signed a contract with a COBRA TPA, and they are telling us that we don't have to provide a COBRA election notice to dependents and spouses just because they are dropped from coverage at annual enrollment. Must our plan offer COBRA coverage to all spouses and dependents who are dropped at annual enrollment?

**ANSWER:** In most cases, no. Dependents and spouses who are dropped from coverage must be provided with a HIPAA certificate of creditable coverage--this must be provided anytime employer-sponsored coverage is lost (or would have been lost but for a COBRA election). In contrast, however, COBRA requires a plan to offer continuation coverage to qualified beneficiaries only if coverage is lost as a result of certain listed triggering events, including (1) termination of the covered employee's employment or a reduction of hours; (2) divorce (or legal separation) from the covered employee; (3) death of the covered employee; and (4) a dependent child's ceasing to be a dependent under the plan. (When a triggering event results in a loss of coverage, it is called a COBRA "qualifying event.") Many times, an employee will drop a spouse or dependent from coverage for reasons entirely unrelated to the listed COBRA triggering events--for example, because these individuals have enrolled in a plan sponsored by the spouse's employer or because the family cannot afford the employee's share of premiums for family coverage. These losses of coverage are not COBRA qualifying events, so they do not give rise to an obligation to provide a COBRA election notice.

But plan administrators must exercise caution because sometimes (such as in the circumstances discussed below) dependents or spouses are dropped from coverage as the result of one of the COBRA triggering events.

For example, dependents may be dropped from coverage because they have ceased to be dependents under the terms of the plan. Similarly, spouses or dependents may be dropped from coverage because of a divorce or legal separation (if legal separation will cause a loss of coverage under terms of the plan). Because a child's ceasing to be a dependent and a divorce (or legal separation) are both COBRA triggering events, these losses of coverage may be COBRA qualifying events that give rise to an obligation to offer COBRA coverage. Of course, a plan is generally not required to provide a COBRA election notice unless the plan administrator is notified of a divorce (or

legal separation) or a child's ceasing to be a dependent within 60 days after the event occurs (provided that information regarding the 60-day notice requirement is communicated through the plan's SPD and COBRA initial notice).

Nevertheless, if a plan has independent information available to it indicating that a qualifying event (such as a divorce) has occurred, the plan administrator may wish to act on that information and provide a COBRA election notice immediately, even without any notice from the qualified beneficiary. First, sending the election notice will start the 60-day COBRA election period for the spouse or dependents running at the earliest possible time. Second, it is possible that a court would hold a plan administrator responsible for providing COBRA election notices to qualified beneficiaries when the plan administrator knew or should have known that a qualifying event occurred, even if the required notice was not provided to the plan administrator within 60 days.

As another example, an employee may drop a spouse from coverage because he or she anticipates a divorce (or legal separation). When plan coverage has been eliminated or reduced "in anticipation of" a triggering event such as a divorce or legal separation, COBRA must be offered to the spouse beginning with the date of the actual divorce or legal separation, even though the spouse was not covered immediately before the divorce and did not lose coverage as a result of the divorce. This rule can create serious administrative and legal complexities, and plan administrators will need to consult with their legal counsel and insurers in applying this anticipation rule to particular situations.