

March 24, 2004

## RESEARCH MEMO

### TIC INTERNATIONAL CORPORATION

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To: MANAGERS, CONSULTANTS, OTHER PROFESSIONALS  
From: DAVID LIVINGSTON, DIRECTOR OF RESEARCH  
Re: UPDATE ON CONTRACEPTIVE LITIGATION AND SETTLEMENTS

. . . *GRADUAL MOVEMENT TOWARD COVERAGE OF FEMALE CONTRACEPTIVES BY GROUP HEALTH PLANS*

#### Introduction

In *Research Memo 2002-44* (11/8/02) the TIC Research Department promised to keep you up-to-date about any litigation or settlements following the EEOC's ruling in late 2000 that an employer's failure to provide insurance coverage for prescription contraceptives when it covers other prescription drugs, devices and preventive care, constitutes unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 (PDA). For text of the EEOC ruling, see:

<http://www.eeoc.gov/policy/docs/decision-contraception.html>

This ruling was followed shortly thereafter by a U.S. district court decision in *Erickson v. Bartell Drug Company* which applied the EEOC decision to a situation in which a non-union employee filed a class action suit against Bartell Drug Company alleging that the exclusion of coverage for female contraceptives from the Company's comprehensive self-funded health plan constituted sex discrimination under the Civil Rights Act of 1964, as amended by the PDA of 1978.

The district court concluded that:

Bartell's prescription drug plan discriminates against Bartell's female employees by providing **less complete coverage** than that offered to other employees. Although the plan covers almost all devices and drugs used by men, **the exclusion of [female] prescription contraceptives leaves a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate health care need unanswered.** (emphasis added)

The district court issued the following directive to the Bartell group health plan:

Bartell is hereby ordered to cover each of the available options for prescription contraceptives **to the same extent and on the same terms**, that it covers other drugs, devices, and preventative care for non-union employees. It is further ordered that Bartell shall offer coverage for contraception-related services, including the initial visit and any follow-up visits or outpatient services, to the same extent and on the same terms as it offers coverage for other outpatient services, for its non-union employees.

This decision, although limited to the Western District of the State of Washington, has provided a strong stimulus for a number of subsequent federal district court cases as well as out-of-court settlements which have generally favored the position that the Civil Rights Act, as amended by the PDA, provides a sufficient statutory basis for mandating coverage of female contraceptives **if a group health care plan extends coverage for other preventive prescription drugs**. (For details on the Bartell decision, see *Research Memo 2001-26*, 6/12/01.)

**The remainder of this Memo highlights the legal developments in 2002-2004 (since the Bartell decision) and looks ahead as to what to expect in the near future on the contraception issue starting with a case pending against Wal-Mart.**

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| <b>PENDING LITIGATION</b> |
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## **WAL-MART WAGES A TOUGH BATTLE AGAINST MANDATORY CONTRACEPTIVE COVERAGE**

On August 23, 2002 the U.S. District Court for the Northern District of Georgia **certified a class action suit** by a group of female Wal-Mart employees challenging the retailer's policy of excluding all female contraceptives in the Company's health plan. The class action suit **represents all child-bearing female employees of Wal-Mart nationwide** (approximately 28,000) who are covered or have been covered by Wal-Mart's group health plan **at any time after March 8, 2001** and who used prescription contraceptives during this time period. This group represents about 28% of Wal-Mart's one million employees.

Originally the suit was filed by Linda Mauldin, a service manager at the Wal-Mart store in Atlanta, on behalf of all female employees and all spouses and adult children of male employees. The suit sought back-pay to cover the cost of oral contraceptives excluded from coverage (estimated at about \$300 per year) plus compensatory and punitive damages. **However, the judge rejected as part of the class action any females who did not actually use oral contraceptives as well as spouses of male employees and also rejected any claims for compensatory and punitive damages.**

**Although the suit was initially filed in October of 2001, it has undergone numerous challenges from both sides before going to trial (including the issue of what class of employee may be represented in the suit, an issue which was finally resolved on August 23, 2002). To date no trial date has been set.**

According to an SEC made filing by Wal-Mart of December 11, 2003, (footnotes 7 and 10), Wal-Mart is involved in a class action suit that seeks amendment of the Plan to include coverage for prescription contraceptives, back-pay for all class members in the form of reimbursement for the cost of prescription contraceptives from March 8, 2001 to date, pre-judgment interest, and attorneys fees.

Wal-Mart defends its current policy of no coverage for contraceptive prescriptions on the grounds that the Civil Rights Act, as amended by the PDA, does NOT require a plan to cover contraceptives as long as exclusion is gender neutral (i.e., treats males and females alike) Wal-Mart contends that it is simply “making a prudent effort to balance coverage with affordability.”

According to Wal-Mart current law permits plans to exclude specific drugs from a group plan such as flu shots for both males and females or Viagra for males which are not currently covered by the Wal-Mart plan. These exclusions, according to Wal-Mart, are based primarily on cost considerations; there are only so many drugs that an employer can afford to purchase for its employees just as there are only so many medical procedures that a plan can afford. Except where federal law mandates a benefit (e.g., COBRA coverage, mastectomy coverage, in-hospital stays for mothers and newborns, same coverage for pregnancy as for other disabilities), Wal-Mart contends that group health plans must have the flexibility to extend coverage **based on their ability to pay for various benefits.**

**It will be interesting to see how far this line of reasoning goes with the U.S. district court in Georgia. One thing is certain at this time: Wal-Mart is doggedly committed to this litigation and an out-of-court settlement seems unlikely.**

### **STOCKING V. AT&T CORPORATION**

Susan Stocking, an AT&T employee, filed an amended class action suit on **January 1, 2004** alleging that AT&T’s health plan violated the Civil Rights Act, as amended by the PDA, and resulted in sex discrimination in that the plan does not provide women with the same health care and contraceptive reimbursement benefits given to males.

For example, Stocking was denied reimbursement for and provision of “any drugs or medications used solely for birth control, including oral contraceptives, jellies, foams, devices, implant or injections” while male employees were provided for and reimbursed for prescriptions to prevent the occurrence of a medical condition including sexually-related conditions.” Specifically, Viagra is reimbursed as well as vasectomies.

In **July 2003** AT&T began offering **oral contraceptives by mail, but by mail only.** However, the lawsuit is still pending **alleging that the company continues to exclude other forms of birth control,** including Depo-Provera, intrauterine devices and diaphragms. The attorneys representing the plaintiffs contend that:

Such discrimination against female employees is particularly egregious when AT&T covers sex-related prescriptions and treatments like Viagra and vasectomies for

men.... **This willingness to cover Viagra but not birth control pills captures the double standard in our society.** Apparently AT&T does not look at pregnancy on the same level as they do potency. (emphasis added)

**The outcome of this case will be far reaching implications because of the tens of thousands of female employees covered under the AT&T group health plans.**

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| <b>OUT-OF-COURT SETTLEMENTS</b> |
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**ALBERTSON GROCERY & PHARMACY AGREE TO A NATIONWIDE SETTLEMENT REQUIRING COVERAGE OF FEMALE CONTRACEPTIVES**

On **February 9, 2004** the Federal District Court in Phoenix granted final approval of a nationwide class-action settlement requiring that the Albertson Grocery and Pharmacy provide all of its female employees across the country (a total of about 200,000) with coverage for female contraception as part of their employee benefit plans. The far-reaching agreement was negotiated by attorneys at Planned Parenthood Federation of America and Planned Parenthood of Western Washington, the law firm of Goldstein, Demchak, Baller, Borgen and Bardarian, several local attorneys in Arizona, and the Phoenix office of the EEOC.

The settlement resolved complaints filed with the EEOC by six female employees regarding the denial of coverage for prescription contraception in their otherwise comprehensive prescription drug program. Rather than run the risk of incurring additional legal costs in a federal court, Albertson's decided to provide coverage for **all FDA-approved** prescription contraceptive drugs and devices, and all related medical services, according to the same general terms and conditions that it covers other preventive prescriptions, devices and medical services. The covered FDA-approved prescription birth control methods range from birth control pills and diaphragms, to Depo-Provera injections and other less commonly used devices.

Albertsons also agreed to provide reimbursement to certain past and present women employees **who incurred out-of-pocket expenses for prescription birth control pills while covered under Albertsons' health plan for more than 90 days** with at least a day of that coverage (as well as out-of-pocket expenses) occurring **after December 20, 2000**. Depending on the length of employment with Albertsons, an employee will be eligible for vouchers of \$50, \$100, or \$150.

The claims for reimbursement are being handled by the TPA firm which processes health care claims for the plan. Past and present employees for whom Albertsons had a current address were automatically sent a "claim form" which they could use to seek reimbursement. To date about 1,500 employees have returned this form.

An 800 phone number was also made known to as many employees as possible in case they did not receive a reimbursement form so that they could request a claim form and further information about the reimbursement rules. All claim forms had to be received by **March 5, 2004** in order to be eligible for reimbursement.

**This settlement is very similar to that in the Bartell case** in that the pressure to impose a requirement for contraception coverage under a group health care plan originated with a relatively small group of female employees. Moreover, in each case, the final settlement called for the reimbursement of past and present female employees for the cost of contraception that had been used in previous years when the plan was not required to cover the cost, in whole or in part.

Albertson's female employees were given a lot of help in negotiating this out-of-court settlement by the Phoenix branch of Planned Parenthood which currently maintains a website specifically designed to help female employees initiate discussions with existing employers about making contraceptives available under their group health plan. The site provides names of local attorneys who will assist in drafting proposals along with medical and social science literature showing that the availability of affordable and effective contraceptives helps to prevent a litany of physical, emotional, economic and social consequences. Other groups supportive of contraceptive coverage under group health plans maintain similar websites. **It is reasonable to expect that the existence of these Internet resources are bound to generate more litigation and out-of-court settlements in the future.**

#### **AMANDA MEWBORN V. CVS PHARMACY**

On **January 13, 2002** Amanda Mewborn, a 23-year old single mother, filed a class action suit against CVS Pharmacy, a large nationwide pharmacy chain, for failure to cover her birth control pills under its drug plan while she was an employee. A cashier earning \$8 an hour, Ms. Mewborn indicated that she struggled to pay the \$32.59 a month for her birth control pills and that CVS' denial of coverage for the pills is gender discrimination under the Civil Rights Act of 1964 and a violation of the Pregnancy Discrimination Act of 1978. The lawsuit cites the decision in *Bartell v. Erickson* in support of its position.

**In June 2002, after what it described as a "regular review of company health benefits," CVS expanded its coverage to include contraception.** Ms. Mewborn left her CVS job last month but decided to continue her lawsuit seeking on behalf of all CVS female employees (present and former) compensatory damages for the insurance coverage denied for contraceptives before CVS changed its policy to include contraceptive coverage.

On **February 13, 2004** the district court judge rejected the latest filing by Ms. Mewborn on the grounds that she lacked standing to request the kind of relief that she was seeking because she is no longer employed by CVS and the relief requested was moot since CVS changed its plan on June 1, 2002, just six months after the initial suit was filed, to provide coverage for prescription oral contraceptives.

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| <b>COLLECTIVE BARGAINING SETTLEMENTS</b> |
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In **Spring 2003** the **American Federation of State, County, and Municipal Employees (AFSCME)**, with help from the Women's National Law Center, bargained for and secured contraceptive coverage for the female employees of the City of Eugene, Oregon.

In the recent negotiations with the **BIG THREE AUTOMAKERS**, the **UAW** was successful in winning coverage of female UAW workers at Chrysler after initially filing a class action lawsuit in a U.S. district court for the Eastern District of Missouri alleging that the failure of Daimler-Chrysler to extend drug plan coverage to female contraceptives violated Title VII of the Civil Rights Act, as amended by the PDA.

Initially Chrysler took the position that their group health plans did not violate these federal laws because the plan's coverage was "gender neutral," that is, the exclusion of contraceptive coverage extended to both males and females. However, the court rejected Chrysler's motion to dismiss the case and certified a group of female employees for class action.

**Several months later during negotiations, Chrysler agreed to include contraceptives in its group health care plan(s) for female employees.** Similar coverage will undoubtedly be sought by the UAW during the next round of negotiations with Ford and GMC.

After being sued in a U.S. district court, **Dow Jones and Company** agreed in **December 2002** to provide for all FDA-approved prescription contraceptives and related medical services in all of its health plans for its employees as part of a settlement of charges that had been filed with the EEOC by employees and their union.

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| <b>SETTLED BUT AGAINST FEMALE EMPLOYEES</b> |
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**MARTINA ALEXANDER V. AMERICAN AIRLINES**

On December 13, 2001 Martina Alexander filed a class action suit with a U.S. district court alleging that the standard group health plan options available to flight attendants employed by American Airlines did NOT cover pap smears, contraceptive medications and devices, or infertility medications and treatments. Alexander herself was especially interested in infertility treatment because she would like to have another child but could only conceive through reproductive technology.

She contended that the exclusion of coverage for pap smears was a violation of Title VII of the Civil Rights Act of 1964; the exclusion for infertility treatment was a violation of the PDA and the ADA (Americans With Disabilities Act); and the exclusion of contraceptives was a violation of the PDA.

The district court concluded that none of the federal laws cited mandated the specific coverages cited by Alexander and that if Congress wanted pap smears to be covered or infertility treatments or medications, it would have said so in the legislation.

**With respect to contraceptives**, the court decided that Alexander did not have standing to file the suit because she never filed a claim for female contraceptives. In addition, the court concluded that:

**By no stretch of the imagination does the prohibition against discrimination based on “pregnancy, childbirth, or related medical condition” [as referred to in the PDA] require the provision of contraceptives.... Moreover, the plan does not cover provision of contraceptives to anyone, male or female. (emphasis added)**

In summary, this U.S. district court covering the Northern District of Texas did not see the Civil Rights Act, the PDA, or the ADA mandating that any particular kind of medicines or treatments must be provided by a group health care plan in order to avoid gender discrimination.

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| <p><b>UNIONS FOCUS ON CONTRACEPTIVES AS<br/>A COLLECTIVE BARGAINING ISSUE</b></p> |
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Last **December (2003)**, the AFL-CIO adopted a resolution at its national convention calling for “contraceptive equity.” The resolution calls for AFL-CIO affiliates to “quickly and vigorously work” toward contraceptive coverage **under union-negotiated health plans for union members and their dependents and that such plans:**

- Cover all FDA-approved prescription methods, including oral contraceptives, intrauterine devices, barrier methods, and the “morning-after” pill.
- Cover annual office visits with an obstetrician or gynecologist for preventive tests, counseling, contraception, and other gynecological issues.
- Require the same co-payments or deductibles that apply to other medical service.
- Protect patient confidentiality.

The resolution also calls for passage of a national law (currently S. 104 entitled *Equity In Prescription Coverage and Contraceptive Act* which is pending in the Senate) requiring all insurers, including employers who self-insure, to provide contraceptive coverage.

The AFL-CIO is not binding on affiliate unions but, the federation’s policy on the issue encourages unions “to follow through,” according to one AFL-CIO official. Complete text of the resolution may be downloaded at:

**<http://www.cluw.org/contraceptive-reslution.html>**

**A similar but somewhat more expansive resolution was passed by the International Brotherhood of Teamsters back in 2001 indicating that:**

It only took 7½ weeks for approximately one-half of available health insurance plans to cover prescriptions like Viagra, but it has been over 40 years since the availability of birth control pills and yet only one-third of the insurance plans available in the United States currently cover prescription for birth control pills.

The teamster resolution goes on to announce the intent of the International Brotherhood of Teamsters:

... to strive to negotiate national contracts that include fair and equitable health care coverage for all that will include coverage of life-saving preventive exams and reproductive products and services for women in an effort to promote overall health care equity in the United States.

Given the fact that many female employees in major industries are unionized (especially in the automobile, communications, and retail industries), it is reasonable to expect their unions to attach a new priority to bargaining for mandatory coverage of female contraceptives, especially given the importance of females as a second wage-earner in the typical family and the relatively low cost of contraceptives (minus deductibles and copays) versus the alternative health costs for child birth and child health maintenance.

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| <b>PENDING LEGISLATION</b> |
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Legislation has been introduced during almost every congressional session, primarily by Democrats, to amend the Pregnancy Discrimination Act to specifically prohibit the exclusion of prescription contraceptive drugs or devices approved by the Federal Drug Administration or generic equivalents **if a health care plan (insured or self-funded) covers benefits for other outpatient prescription drugs or devices** and to prohibit the exclusion of coverage for outpatient contraceptive services by a health care professional.

The proposed bills also generally prohibit a group health plan from providing any financial incentives to service providers designed to discourage the use of female contraceptives. **However, the bills introduced to date do NOT prohibit the application of different copays or deductibles or other cost-sharing arrangements from those applicable to other benefits provided under the same plan.**

To date none of these bills has been approved by a House or Senate committee. Apparently federally mandated coverage of contraceptives is a “hot button” issue for most Republican and Democratic legislators. There are just too many other issues crowding the legislative agenda to give high priority to contraception legislation. It appears many congressmen would prefer that this issue be resolved by the federal courts, but as this Memo points out, such litigation wends its

way through the federal court system very slowly and often the issue is resolved by an out-of-court settlement or through collective bargaining and no federal common law is developed.

### A LOOK AHEAD

As the preceding analysis indicates, there is still considerable uncertainty for group health plan sponsors as to what their legal liability may be if their plan does NOT currently cover female contraceptives. To date there are only two federal district court decisions (Erickson v. Bartell and Alexander v. American Airlines) that provide guidance on whether the Civil Rights Act, as amended by HIPAA, requires coverage of female contraceptives and the rulings are conflicting. There are no U.S. appellate court decisions to date (although one is pending in the Ninth Circuit). Moreover, new federal legislation designed to clear the air about what the Civil Rights Act, the Pregnancy Discrimination Act, and the Americans With Disabilities Act really have to say about female contraception seems unlikely in the near future.

**However, a couple of guidelines are available to help group health plan sponsors whether or not to cover contraception.** First, **23 states** have passed legislation mandating some level of required **insurance coverage** for contraceptives including: Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, Texas, Vermont, Virginia, Washington, and West Virginia. For details on the individual State mandates, see:

**<http://www.ncsl.org/programs/health/50states.htm>**

Most of these states require health insurance policies that cover prescription drugs to also extend coverage for prescription contraceptives. Some laws prohibit such plans from excluding any contraceptive services or supplies; other state laws are more specific about the types of female contraceptives which must be covered by group health plans such as oral contraceptives only.

**Thirteen states** include an exemption for employers who object to such coverage for **religious** reasons. **Three states** include coverage exemptions for insurers affiliated with religious organizations in their policies: Missouri, Nevada, and Texas.

Exemptions for religious employers or organizations can prove troublesome when it comes to applying the exemption to specific fact situations, as illustrated by a recent California case in which Catholic Charities of Sacramento challenged the constitutionality of a state law exemption for “religious employers,” under both the U.S. and State constitutions.

In 1999 California adopted the Women Contraception Equity Act (WCEA) which requires group health care plans that provide coverage for prescription drugs to also cover female contraceptives except for religious employers which are defined under the WCEA to include any entity which: (1) includes religious values; (2) primarily employs persons who share the same religious tenets; (3) primarily serves persons who share the religious tenets of the entity; and (4) is a nonprofit organization.

In this case the California Supreme Court concluded on **March 1, 2004** that Catholic Charities did not satisfy any one of these four criteria set forth in the WCEA for a definition of “religious employer” and that “the exemption is not sufficiently broad to cover all organizations affiliated with the Catholic Church.” According to the court, Catholic Charities is essentially a “secular” not a “religious” organization as evidenced by the fact that most of its 183 employees were non-Catholic and their work is primarily to provide food, shelter, and clothing to the poor (rather than to proselytize or promote specific religious tenets). Further: “Because most religions do not object to prescription contraceptives, most religious employers are subject to the WCEA.”

**As a result, if the group health care plan for Catholic Charities covers prescription drugs, it must cover female contraceptives; the only alternative, according to the California Supreme Court, is to provide no drug coverage at all.**

As this case suggests, any exemption for religious employers or religious organizations under state insurance law is bound to open the doors for litigation because the definition of “religious” is often allusive and may depend on what judge gets the case.

Plan sponsors of **self-funded plans in all 50 states** are free to choose whether they want to cover female contraceptives. Under current federal law, it appears that they have a number of options (subject to the advice of fund counsel). **One option** is to extend coverage without any exceptions or conditions after examination of the potential cost. **Another option** is to adopt a “wait-and-see attitude by taking no action at least until the cases currently pending (especially Wal-Mart and AT&T) are resolved.

**Another option** may be to authorize contraceptives only if the physician certifies them to be “medically necessary” and not primarily for the sole purpose of preventing pregnancy. Of course, this distinction may be difficult to administer because of the allusive nature of what is or is not “medically necessary.”

**Chances are we will still see more litigation as this saga continues to play itself out in the federal courts and at the collective bargaining table. The TIC Research Department will continue to keep you up-dated on the latest litigation and out-of-court developments, especially if a decision is rendered which provides some clear-cut guidelines as to whether or not an ERISA health plan must cover female contraceptives under federal law.**

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