

The HHS Mandate and Religious Freedom
A Brief Overview
By Jack Painter
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1. What does the HHS mandate do?

- The recent Department of Health and Human Services (HHS) mandate says health plans must cover contraceptives, abortion inducing drugs, and sterilization procedures.
- The Obama Administration takes the position that unintended pregnancy is like an illness or disease for which prevention and treatment is needed, and the mandated drugs are part of the prevention. Ironically, the HHS mandate does not address infertility, which really is an illness.
- The mandate provides a narrow exemption for plans offered by organizations that can show they are a "religious employer."
- To qualify for that exemption, though, you have to show not only that your purpose is the inculcation of religious values but that you primarily hire *and* serve people who share your religious tenets.
- Most church-affiliated charities, schools and hospitals don't meet that test. In the case of the Catholic Church, the test would require Catholic hospitals to hire primarily Catholic employees and serve primarily Catholic patients. And it would require Catholic charities to serve primarily Catholics in need. This is inconsistent with the way Catholics view their religious mission. As the Catholic Church has said, when people come to it, it doesn't ask "Are you Catholic?" It asks only, "Are you hungry?" That would no longer be permitted.
- In fact, the test for the exemption is so narrow that Jesus and his twelve disciples would not have been exempt from the mandate because they served people of different faiths.
- The Obama Administration says it will solve this problem with the exemption by implementing new rules by August 2013 that will require insurance companies to offer and pay for the objectionable coverage in the case of non-profit, religious organizations. But that doesn't solve the problem:
 - Many religious organizations self-insure. Those employers will still be forced to offer objectionable services, and they and their employees will pay directly for those services.

- For organizations that don't self-insure and instead purchase insurance from an insurance company, the insurance company will pay for the cost of the objectionable services through employer and employee premiums it receives.
- And even if the government can find some way to avoid that, it is still requiring employers to maintain health plans they find morally objectionable.
- Finally, the supposed accommodation leaves out a whole class of organizations and people who don't qualify for the accommodation. This includes for-profit religious-oriented businesses, such as publishers, and non-profit organizations that don't meet the narrow test of a "religious" organization, such as The Knights of Columbus and church-affiliated insurance companies. It also includes secular employers (such as pro-life people who own businesses) and individual employees who don't want to participate in or finance the objectionable coverage.

2. How does the HHS mandate violate religious freedom?

- Religious charities, schools, and hospitals act on and express their faith in two ways. One is through good works. The other is by following the tenets of their faith in conducting their operations.
- The Administration is telling these institutions they cannot do both. If they want to express their faith through good works, they must now violate their faith by providing their employees contraceptives, abortion-inducing drugs, and sterilization procedures.
- This is true whether the government forces employers to pay directly for the drugs and procedures in question or forces employers to hire insurance companies that provide them for free. Either way, the employer is being limited in its ability to act on and express its religious faith.

3. Does the HHS mandate violate the U. S. Constitution?

- The Constitution says, "Congress shall make no law . . . prohibiting the free exercise" of religion.
- Thomas Jefferson said, "No provision of our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."
- In the recently-decided *Hosanna* case, the Supreme Court unanimously rejected an attempt by the Administration to give the government a say in the hiring and firing of ministers. In effect, the government claimed it could

decide who qualifies as a minister for purposes of the application of anti-discrimination laws.

- Here, the government is saying it can decide what acts qualify as a religious ministry. The question is whether good works are a religious ministry and therefore are entitled to protection as a free exercise of religion.
- Ironically, at the National Prayer breakfast earlier this year, President Obama justified tax increases on the rich on religious grounds. He said that raising taxes "coincides with Jesus' teaching that 'for unto whom much is given, much shall be required.'" In other words, he took the position that good works are the essence of religiosity. He is now taking the opposite position.
- Several organizations have filed lawsuits challenging the HHS mandate, and presumably the Supreme Court will eventually decide the issue.
- It should be noted, though, that the issue might become moot if the Supreme Court strikes down the entire health care reform law.

4. Does the HHS mandate violate other federal laws?

- Until the HHS mandate was issued, no federal law required anyone to purchase, sell, sponsor, or be covered by a private health plan that violates his or her conscience.
- Opponents claim that, at the very least, the HHS mandate violates the spirit of longstanding federal laws that protect freedom of religious conscience. For example a 1973 law says no individual is required to take part in any government funded health service program or research activity that is "contrary to his religious beliefs or moral convictions." (42 USC 300a-7(d)).
- Opponents also argue that the HHS mandate violates the express terms of the 2004 Hyde-Weldon Conscience Amendment, which banned discrimination against health care organizations that object to abortion. That's because one of the mandated drugs, which is called "Ella," is chemically and functionally similar to the morning after pill, RU-486, and apparently works after an embryo is implanted seven to ten days after fertilization. In other words, it induces an abortion.
- Finally, it appears the HHS mandate also violates the Religious Freedom Restoration Act. This law bars all federal agencies from imposing a substantial burden on a person's exercise of religion unless the burden is the least restrictive means to further a compelling government interest. Here, the decision to decline coverage of medical services that violate sincere religious beliefs is an "exercise of religion," the threat of fines for noncompliance with the HHS mandate is a "substantial burden" and, based on existing court

decisions, the HHS mandate does not further a compelling government interest.

- Legislation has been introduced in Congress called the "Respect for Rights of Conscience Act" that would prevent health care reform from being used to violate insurers' and purchasers' moral and religious beliefs.

5. Isn't this really about access to contraceptives for women?

- The Obama Administration says this isn't about religious freedom - It's about access to contraceptives by women. People who oppose the mandate are engaged in a "war on women."
- It's hard to square that argument with the fact that women already have wide access to affordable contraceptives.
 - According to the Guttmacher Institute, nine out of ten health insurance plans currently cover contraceptives.
 - In the few cases where a woman wants access to contraceptives but doesn't have insurance coverage for that, she can purchase it. (A generic brand of the pill costs about \$9 a month.)
 - If she can't afford that, the government provides subsidized (or often free) contraception through Title X government-funded family planning clinics. (The federal government spent \$2 billion on domestic family planning programs in 2011.)
 - In any event, women are always free to attend school or work for a non-religious organization.
- Even if you accept the Obama Administration's argument that this controversy is about access to contraceptives, the Administration is really saying that the right to contraception is more important than religious freedom. This issue came up recently in connection with Congressional testimony on the HHS mandate by Sandra Fluke, a third year law student at Georgetown University. Ms. Fluke argued that Congress should require Georgetown to provide her with free birth control pills. One commentator summed it up as follows: "Should Ms. Fluke give up a cup or two of coffee at Starbucks each month to pay for her birth control, or should Georgetown give up its religion?"

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