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SUBJECT: Employer Health Plans--Church Plan Status or ERISA Election Vis-à-vis Immoral State Law Coverage Mandates

EXECUTIVE SUMMARY

Most dioceses and religious institutes and many Catholic Charities, Catholic hospitals, Catholic colleges, and other Catholic ministries have employee health and retirement plans with church plan status. In earlier years, this made good sense as it exempted those plans from regulation under the Employee Retirement Income Security Act of 1974 (ERISA).

A cascade of over 440 immoral state and local insurance and employment law mandates related to abortion, abortifacients, contraceptives, infertility coverages, transgender services, reproductive health, infertility treatment, and sterilization invite reconsideration of whether church-plan status still makes sense and whether it might be better to opt into ERISA. This is because ERISA offers the significant benefit of preempting such immoral state mandates. Accordingly, Catholic employers with church plans located in states with immoral mandates should evaluate whether to opt into ERISA. If they decide to do so, they should make a bifurcated 410(d) election putting their health plan under ERISA but not their retirement plan.

This memorandum provides detailed analysis of the relevant laws and, in Part 8, provides step-by-step guidance on assessing whether to give up church plan status and opt into ERISA.

FREQUENTLY ASKED QUESTIONS

1. THE BASICS

1.1. Are an employee benefits plan and an insurance contract the same?

No. It is important to distinguish between an employee benefit plan and a contract for insurance coverage between an employer and an insurance company.

1.2. What is an employee benefit plan?

An employee benefit plan is a promise an employer makes to its employee. Generally, an employee benefit plan takes the form of the employer offering some type of benefit to certain employees when certain conditions are met. For example, an employee benefit plan could be an employer offering no-cost dental insurance to full-time employees after sixty days of work.

1.3. What is a plan document?

A plan document is an employer-created, internal document that details what is included in and excluded from an employee benefits plan. It generally does not discuss delivery details like deductibles, co-pays, the insurer's identity, or maximum out-of-pocket limits.

1.4. What is an insurance contract?

Some employers choose to administer and pay for the benefits themselves, while others choose to contract with an insurance company to administer and fund the benefits. An insurance contract is not an employee benefit plan. It is one method for an employer to fulfill the promise of benefits it has made to its employees in its plan document. It is a financial agreement between an insured entity and the insurance company.

1.5. What is the difference between a fully-insured contract and a self-funded plan?

A fully-insured contract is an agreement between the employer and an insurance company in which the insurance company assumes financial risk. Many larger employers choose to assume some or all of the financial risk through a self-funded plan. Most employers with self-funded plans utilize stop-loss insurance contracts to insure against losses that might occur when one or more employees experience excessively large medical expenses.

2. ERISA BASICS

2.1. What is ERISA?

ERISA is a federal law that sets standards for employer health plans (also called “welfare plans”) and for employer retirement plans (also called “pension benefit plans”).¹ ERISA

¹ 29 U.S.C. § 1001.

defines standards for participation, benefit accrual, funding, fiduciary responsibilities, notices to beneficiaries, grievances, and more.

2.2. Does ERISA apply to both health and retirement plans?

Yes. It applies to any employee benefit plan.²

2.3. Does ERISA apply both to self-funded and fully-insured employee health plans?

Yes, unless the plan is exempt.

3. CHURCH PLAN EXEMPTION FROM ERISA

3.1. Are church plans exempt from ERISA?

Yes.³

3.2. What is a church plan?

All three branches of the federal government (Congress, the Department of the Treasury, and the Supreme Court) have provided input attempting to clarify the definition of “church plan” and what type of entities may sponsor a church plan.⁴

A “church plan” is defined as “a plan established and maintained . . . for its employees . . . by a church or by a convention or association of churches,”⁵ or as a “plan maintained by a principal-purpose organization . . . regardless who established it.”⁶

3.3. How does ERISA define a “church”?

If a Catholic plan sponsor is organized within the Catholic Church, shares common religious bonds and convictions with the Catholic Church, and takes actions congruent with the Catholic faith and in furtherance of its mission within the Catholic Church, then it can be considered a “church” for the purposes of sponsoring a church plan.⁷ Thus, dioceses, religious institutes, and Catholic Charities qualify as ERISA “churches” and, depending upon the circumstances, Catholic hospitals, colleges, and other ministries may as well.

² 29 U.S.C. § 1003(a)(1-3).

³ 29 U.S.C. § 1003(b)(2).

⁴ *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1654, 1657 (2017).

⁵ 29 U.S.C. §§ 1002(33)(A), 1002(33)(C)(i).

⁶ *Advocate Health Care*, 137 S.Ct. at 1663.

⁷ 29 U.S.C. §§ 1002(33)(C)(iv), 1002(33)(C)(ii)(II).

3.4. What is a “convention or association of churches”?

This term refers to a cooperative endeavor among separate churches, which can be of the same or different denominations.⁸ It also includes entities that share “common religious bonds and convictions with [the] church or convention or association of churches.”⁹

3.5. What is a “principal purpose organization”?

This category of plan sponsors—also called “PPO’s”—includes “an organization . . . the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches.”¹⁰ Thus, “certain plans for the employees of churches or church-affiliated nonprofits count as ‘church plans’ even though not actually administered by a church.”¹¹ An example is a network of Catholic hospitals¹² or a diocesan pension board that the sponsor forms to oversee the benefits.

3.6. How does a plan acquire status as a church plan?

There is no affirmative step required to acquire church plan status. A plan that is sponsored by a qualifying entity is automatically regarded as a church plan. It is a church plan without filing any application or other paperwork. As discussed in Part 6 below, a church plan loses its church plan status only by its sponsor making a 410(d) election into ERISA.¹³

4. ADVANTAGES OF CHURCH PLAN EXEMPTION FROM ERISA

Important note. ERISA imposes obligations on health plans and retirement plans.¹⁴ It requires extensive reporting, disclosure, funding, management, and insuring of retirement plans. However, it imposes few requirements on health plans aside from making plan documents and disclosures available to covered employees only upon request. Because the immoral state mandates of concern in this memorandum are imposed only on health plans and because a plan sponsor has the option to make a bifurcated election,¹⁵ this Part 4 and Part 5 below discuss the advantages and disadvantages of church plan status only with regard to employee health plans.

⁸ Rev. Rul. 74-224, 1974-1 C.B. 61.

⁹ 29 U.S.C. § 1002(33)(C)(iv).

¹⁰ 29 U.S.C. § 1002(33)(C)(i).

¹¹ *Advocate Health Care*, 137 S.Ct. at 1656.

¹² *Id.* at 1663.

¹³ 26 C.F.R. § 1.410(d)-1(c)(3).

¹⁴ ERISA-regulated retirement plans include 401(k), 403(b), defined benefit pensions, and others.

¹⁵ A “bifurcated election” consists of opting into ERISA for one’s health plan while retaining church plan status for one’s retirement plan. *See* Part 8, *infra*.

4.1. What are the advantages of church plan status?

Because church plans are exempt from ERISA, another way of asking this question is: “what are the ERISA-related burdens on employee health plans that a sponsor avoids through church plan status?”

Church plans avoid these ERISA requirements.

- Employee notice and disclosure requirements. *See* discussion in section 4.2.
- COBRA continuation coverage. *See* discussion in section 4.3.
- Filing of Form 5500 annual report with the Employee Benefits Security Administration (EBSA). Health plans that cover fewer than 100 participants are generally exempt from this filing.
- Department of Labor oversight and potential DOL investigations and plan audits.
- Annual audit by a qualified plan auditor.

4.2. What are the employee notice and disclosure requirements for ERISA health plans?

An ERISA health plan is required to create, keep on file, and provide certain documents to employees upon request. These include Summary Plan Descriptions (SPD),¹⁶ Summary of Material Modification (SMM),¹⁷ Summary Annual Report (SAR),¹⁸ Notification of Benefit Determination (Claims Notices or “Explanation of Benefits”),¹⁹ Plan Documents,²⁰ among others. These are administrative requirements that can be met with disclosure documents that are held in a centralized human resources office, provided upon various triggering events throughout the year, and provided to plan beneficiaries upon request. While the overall ERISA compliance cost and administrative burden to keep these documents on file is low, there is a small cost to create, manage and provide these documents in a compliant manner.

Conversely, a health plan that holds church plan status is entirely free from these requirements and therefore is not required to prepare or provide these documents at all.

4.3. Are ERISA plans subject to providing COBRA continuation benefits?

ERISA plans are subject to the Consolidated Omnibus Budget Reconciliation Act (COBRA).²¹ COBRA requires employee health plans to provide a continuation of group health coverage for 18-36 months that otherwise might be terminated. COBRA requires this for covered employees, their spouses, their former spouses, and their dependent children

¹⁶ *See* 29 C.F.R. § 2520.102-2 (1977).

¹⁷ *See* 29 C.F.R. § 2520.104b-3 (2002).

¹⁸ *See* 29 C.F.R. § 2520.104b-10(d) (2015) (narrative summary of the Form 5500).

¹⁹ *See* 29 C.F.R. § 2560.503-1 (2017).

²⁰ *See* 29 C.F.R. § 2520.104b-1(b)(3) (2002).

²¹ 29 U.S.C. § 1161-1168.

when group health coverage is lost due to: (1) death of a covered employee, (2) termination or reduction in the hours of a covered employee's employment for reasons other than gross misconduct, (3) divorce or legal separation from a covered employee, (4) a covered employee's becoming entitled to Medicare, and (5) a child's loss of coverage under the plan.²²

While church plans can avoid the federal COBRA requirement, there is little saved by doing so both because the employer may require an employee to pay up to 102% of the premium for continuation coverage²³ and because most states impose their own continuation coverage requirements even if the employer is exempt from federal COBRA.²⁴

5. ADVANTAGES OF AN ERISA PLAN OR DISADVANTAGES OF CHURCH PLAN EXEMPTION

5.1. What are the disadvantages of church plan status?

Because church plans are exempt from ERISA, another way of asking this question is: what are advantages of surrendering church plan status by opting into ERISA?

Opting into ERISA has these advantages:

- There are over 440 state and local laws that directly or effectively mandate coverage of abortion, contraceptives, “gender-affirming” care, reproductive health, infertility treatment, and sterilization. The number of such mandates will continue to grow. State mandates for physician-assisted suicide are likely in the future. **ERISA preempts such state laws.** See Part 7 (describing immoral state law mandates) and in section 5.3 (discussing ERISA preemption).
- Plan sponsors operating in more than one state need only comply with one set of federal laws, as opposed to different laws in different states.
- In ERISA cases, a plaintiff generally prevails only if the judge determines that the plan administrator “abused its discretion.” This is a generous standard that favors plan sponsors.
- Damages for ERISA violations are much more limited compared to potential damages for violation of state laws that may include treble or punitive damages and

²² 29 U.S.C. § 1163.

²³ 29 U.S.C. § 1164; U.S. Dept. of Health and Human Services, *COBRA Continuation Coverage Fact Sheet* (May 20, 2019) at https://www.hhs.gov/guidance/document/cobra-continuation-coverage-factsheet#Paying_for_Coverage.

²⁴ For a summary of the various states' mini-COBRA laws, see Louise Norris, *What Is State Continuation of Health Insurance?*, Very Well Health (August 4, 2022) at <https://www.verywellhealth.com/state-continuation-coverage-4773045>.

attorney's fees. Thus, plaintiff contingent fee attorneys have less incentive to bring ERISA claims than claims based on state law.

- ERISA trials are decided by a federal judge. State court trials tend to be decided by a jury, and juries tend to find in favor of employees over their employers.
- Because ERISA plans are required to include the same claims and appeals procedures, this furthers uniformity in plan administration.

5.2. Does ERISA itself impose any mandates contrary to Catholic values?

No. If ERISA were later amended to include immoral mandates, the Catholic Benefits Association would likely seek injunctive relief for its members under the Religious Freedom Restoration Act ("RFRA"). RFRA applies against federal laws but not state laws.²⁵

5.3. What is ERISA preemption?

A church plan's election into ERISA provides the significant benefit of preempting immoral state laws. ERISA supersedes "all State laws insofar as they relate to any employee benefit plan."²⁶ The Supreme Court has interpreted the preemption clause broadly to carry out the Congressional objective of nationally uniform rules for employee benefits plans. It holds that ERISA preempts state laws that either refer explicitly to ERISA plans or have a substantial financial or administrative impact on them.²⁷ The state laws preempted by ERISA include state employment discrimination laws related to any employment benefit plan.²⁸

5.4. Do self-funded plans need ERISA preemption to avoid state laws?

Yes. Congress added the "deemer clause" to ERISA to ensure that any employee benefits health plan--even those with church plan status--funded solely by the employer (a "self-funded plan") would not be subject to state regulation.²⁹ However, immoral state law mandates derive from both state insurance laws and state employment anti-discrimination laws. Because the latter apply to employers and employers do not become exempt from state employment laws by merely adopting self-funded plans, Catholic employers seeking exemption from health plan coverage mandates derived from state employment laws should consider opting into ERISA.

²⁵ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

²⁶ 29 U.S.C. § 1144(a).

²⁷ *D.C. v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992) ("ERISA pre-empts any state law that refers to or has a connection with covered benefit plans . . . even if the law is not specifically designed to affect such plans, or the effect is only indirect, and even if the law is consistent with ERISA's substantive requirements" (cleaned up)).

²⁸ *Shaw v. Delta Airlines, Inc.*, 103 S.Ct. 2890, 2900 (1983).

²⁹ 29 U.S.C. § 1144(b)(2)(B).

5.5. Does the Reta Trust offer another way to avoid state law?

Yes. The Reta Trust is a non-profit healthcare trust for employers listed in The Official Catholic Directory. Formed in 1976, it has sixty “trustors” that, most often, are dioceses or religious institutes. The Reta Trust is a self-funded ERISA plan that has single employer legal status (i.e., not a “MEWA”) because of a private letter ruling it acquired years ago from the U.S. Department of Labor. As such, it is a self-funded, single employer, ERISA plan that preempts immoral state mandates. Reta Trust trustors are subject to federal mandates unless they join the CBA. **The two best options for avoiding immoral state and federal mandates are either to join both the CBA and the Reta Trust or to join the CBA and opt into ERISA.**

6. OPTING INTO ERISA

6.1. How does a plan sponsor opt into ERISA?

A plan administrator opts into ERISA by making a 410(d) election.³⁰ This is accomplished either through a statement attached to the plan’s initial Form 5500 annual report or by filing a request for a determination letter under Internal Revenue Code § 401(a).³¹ Filing an initial Form 5500 is simpler than acquiring a determination letter.

While it is clear that church-sponsored retirement plans may opt into ERISA with a 410(d) election, it was not originally clear that church-sponsored health plans could do so because the Department of Labor and the Internal Revenue Service issued a 1995 Advisory Opinion that church health and welfare plans are not eligible to make a 410(d) election.³² However, several courts have rejected the DOL’s position and have held that a church health plan may make a 410(d) election.³³

³⁰ See 26 U.S.C. § 410(d); Treas. Reg. § 1.410(d)-1(a, c(1), 4).

³¹ *Id.*

³² U.S. Dept. of Lab., Employee Benefits Security Admin., Advisory Op. 1997-077A (March 6, 1995).

³³ *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F.Supp. 2d 77 (D. Me. 2004); *Flynn v. Ascension Health Long Term Disability Plan*, 73 F. Supp. 3d 1080, 1084-86 (E.D. Mo. 2014); *Medellin v. CommunityCare HMO, Inc.*, 787 F. Supp. 2d 1259, 1264-65 (N.D. Okla. 2011); *Robinson v. Metropolitan Life Ins. Co.*, 2013 WL 1281868, at *4 (E.D. Cal. 2013). Nearly twenty-eight years after its Advisory Opinion, the DOL has not formally changed its position on 410(d) elections for health plans. Nonetheless, in addition, a number of courts have stated in dicta, or taken for granted the fact, that a 410(d) election may be made with respect to a health plan. See *Flynn*, 73 F. Supp. 3d at 1084 (listing cases); *Welsh v. Ascension Health*, 2009 WL 1444431, at *7 (N.D. Fla. 2009).

6.2. After an employer opts into ERISA, can it change its mind? Can it reclaim church plan status?

No. After an election is made, it is irrevocable.³⁴

6.3. Can an employer opt into ERISA for its health plan while retaining church plan status for its retirement plan?

Yes, an employer may elect into ERISA on a plan-by-plan basis.³⁵ When an employer chooses to elect one plan into ERISA while maintaining another plan as a church plan, this is commonly referred to as a “bifurcated election.”

A bifurcated church plan / ERISA election under IRC Section 410(d)—where the retirement plan retains church plan status and the health plan opts into ERISA—could provide a viable solution for religious organizations that want, on the one hand, to enjoy preemption of immoral state mandates, without having to adhere to ERISA’s burdensome retirement plan requirements.

After a 410(d) election is properly made for only the health plan, the health plan is governed by ERISA and state law is preempted. This is a massive advantage for the health plan because the majority of legal liability for the health plan derives from state law. This means that the plan is not subject to state statutes that mandate specific benefits that are contrary to Catholic morals. This also means that the plan is not subject to state law causes of action but is only subject to the limited causes of action and remedies enumerated in ERISA. The claims and corresponding remedies available under ERISA are generally limited to recovering benefits due under the plan, enforcing the participant’s rights under the plan, and clarifying rights to future benefits.

7. IMMORAL STATE LAW HEALTH PLAN COVERAGE MANDATES

7.1. What state laws impose health plan coverage requirements contrary to Catholic values?

Catholic employers with church-plans should evaluate, with the help of their local counsel, whether their state insurance and employment laws directly or indirectly impose immoral coverage requirements on them or their employee benefit plans. Such mandates arise in at least seven key areas: (1) abortion, (2) gender transition services also called “gender affirming care,” (3) contraceptive coverage, (4) infertility coverage, (5) sterilization, (6) reproductive health care, and (7) infertility treatment. Below is state-by-state information regarding each of these categories prepared by others.

³⁴ Treas. Reg. § 1.410(d)-2(b). *See also*, 26 U.S.C. 410(d)(2)

³⁵ *See Flynn*, 73 F. Supp. 3d at 1086

Abortion coverage. The following chart composed by the pro-abortion Guttmacher Institute lists abortion-coverage provisions by state.³⁶ It specifically notes that private insurance plans in California, Illinois, Maine, Maryland, Massachusetts, New York, Oregon, and Washington must provide coverage for abortion. The states of Indiana, Texas, and Utah may also mandate abortion coverage in limited situations that would be contrary to Catholic values. Catholic employers with church plans in these eleven states should review their state law and consider ERISA election to avoid any state abortion coverage mandates.

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³⁶ See <https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion>.

Current Policy Status Table

Insurance Coverage of Abortion				
State	Coverage required	Coverage banned or restricted to specified exceptions		
	All private insurance plans	All private insurance plans	Specific to health exchanges	Insurance policies for public employees
Alabama			Life, rape, incest	
Arizona			Life, severe health [†]	Life, severe health [†]
Arkansas			Life, rape, incest [‡]	
California	X*			
Colorado				No coverage
Florida			Life, rape, incest [‡]	
Georgia			Life, severe health [†]	Life
Idaho		Life [‡]	Life, rape, incest	Life [‡]
Illinois	X*			
Indiana		Life, rape, incest, severe health ^{†‡}	Life, rape, incest, severe health [†]	Life, rape, incest, severe health ^{†‡}
Kansas		Life [‡]	Life	Life
Kentucky		Life [‡]	Life ^{‡,Ω}	No coverage
Louisiana			No coverage	
Maine	X*			
Maryland	X*			
Massachusetts	X*			ξ
Michigan		Life [‡]	Life [‡]	Life [‡]
Mississippi			Life, rape, incest	Life, rape, incest, fetal impairment
Missouri		Life [‡]	Life	Life
Montana			▽	
Nebraska		Life [‡]	Life	Life [‡]
New York	X*			
North Carolina			Life, rape, incest	Life, rape, incest
North Dakota		Life [‡]	Life ^{‡,Ω}	Life
Ohio			Life, rape, incest	Life, rape, incest
Oregon	X*			
Oklahoma		Life [‡]	Life [‡]	Life [‡]
Pennsylvania			Life, rape, incest [‡]	Life, rape, incest
Rhode Island				Life, rape, incest
South Carolina			Life, rape, incest	Life, rape, incest, severe health [†]
South Dakota			Life, severe health [†]	
Tennessee			No coverage	
Texas		Life, severe health [†]	Life, severe health [†]	Life, severe health [†]
Utah		Life, rape, incest, severe health [†] and fetal impairment	Life, rape, incest, severe health [†] and fetal impairment	Life, rape, incest, severe health [†] and fetal impairment
Virginia				Life, rape, incest, fetal impairment
Washington	X*			
Wisconsin			Life, rape, incest, severe physical health [Ⓚ]	Life, rape, incest, severe physical health [Ⓚ]
TOTAL	8	11	25	22

* Cost-sharing is prohibited for abortion coverage.

† The health exception applies to a “substantial and irreversible impairment of a major bodily function.”

‡ Abortion coverage beyond exceptions specified is available only through the purchase of a separate rider at additional cost.

β A plan must cover abortion with no copayments.

Ω Although the law does not specifically refer to the ACA, the restriction applies to plans offered in the health care exchange.

* A plan must cover abortion if it covers prenatal care.

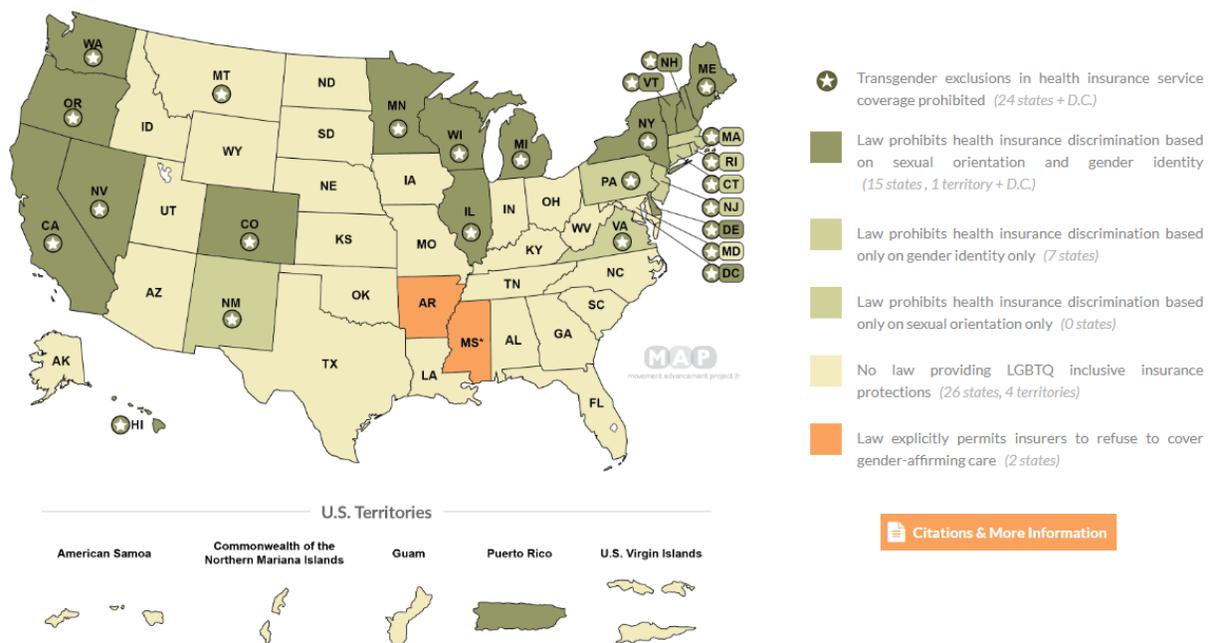
ξ State specifically prohibits coverage of postviability “partial-birth” abortions except in cases of life endangerment and “substantial risk of grave impairment of [the patient’s] physical or mental health.”

Ⓚ Health exception applies when an abortion is necessary to “prevent grave, long-lasting physical health damage to the [patient].”

Source URL: <https://www.gutmacher.org/state-policy/explore/regulating-insurance-coverage-abortion>

Gender-transition or “gender-affirming care” coverage. According to the left-wing Movement Advancement Project, twenty-four states and the District of Columbia prohibit private health plans from excluding coverage for gender-transition or “gender-affirming

care” services if the health plan covers similar procedures in other contexts.³⁷ Those with church plans in these states should consider opting into ERISA to avoid these gender-transition services mandates. The states include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin. D.C. and Puerto Rico.



Contraceptives and Sterilization. The Guttmacher Institute states that “29 states and the District of Columbia require insurers that cover prescription drugs to provide coverage of FDA-approved prescription contraceptive drugs and devices.”³⁸ The FDA includes abortifacients within its definition of contraceptives. Eight states require male sterilization coverage, and fourteen require female sterilization coverage. Those with church plans in these states should consider opting into ERISA to avoid these mandates.

³⁷ See https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies.

³⁸ See <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

INSURANCE COVERAGE OF CONTRACEPTIVES									
Jurisdiction	Coverage required for:					Prohibits cost sharing	Prohibits restrictions and delays	Refusal provisions	
	Prescription methods	Over-the-counter methods	Extended supply	Male sterilization	Female sterilization			Scope	Enrollees notified by:
Federal	X	X			X	X		Broader§	
Arizona	X							Expansive	Employer
Arkansas	X							Broader	
California	X ^β	X	X	X	X	X	X	Limited	Employer
Colorado	X ^β		X						
Connecticut	X	X	X		X	X		Expansive*, †	Insurer
Delaware	X	X (excludes external condoms)	X		X	X	X	Expansive	Employer
District of Columbia	X ^β	X	X		X	X	X	Expansive [€]	Employer [€]
Georgia	X								
Hawaii	X [⊖]		X					Expansive †	Employer
Illinois	X	X (excludes external condoms)	X	X	X	X	X	Almost unlimited †, ‡	
Iowa	X								
Maine	X		X		X	X		Broader	Employer
Maryland	X ^β	X (drugs only)	X	X		X		Expansive	Employer
Massachusetts	X	X (excludes external condoms)	X		X	X		Broader	Employer
Michigan	X							Broader	
Missouri	X							Almost unlimited †, ‡	Insurer
Montana	X								
Nevada	X	X (only EC)	X		X	X	X	Expansive †	Insurer
New Hampshire	X [⊖]		X			X			
New Jersey	X	X (excludes condoms)	X	X	X	X		Broader	Employer
New Mexico	X ^β	X	X	X	X	X	X	Expansive	
New York	X	X	X	X	X	X	X	Limited †	Employer/ insurer
North Carolina	X							Broader	Insurer
Ohio			€						
Oregon	X [⊖]	X (excludes condoms)	X	X	X	X	X	Limited	
Rhode Island	X		X					Broader	Employer
Tennessee [⊖]									
Texas**									
Utah	β								
Vermont	X		X	X	X	X	X		
Virginia	X		X		X	X			
Washington	X ^β	X	X	X	X	X	X		
West Virginia [⊖]	X		X					Expansive †	Insurer
Wisconsin	X								
TOTAL	29 + DC	12 + DC	20 + DC	9	14 + DC	16 + DC	9 + DC	20 + DC	15 + DC

Note: EC=emergency contraception.

§ Regulations that offered an almost unlimited religious and moral exemption are currently blocked by the courts.

‡ Refusal clause applies to insurers.

β The state allows pharmacists to prescribe and dispense contraceptives, but insurance coverage of these services is not explicitly included in the law.* Religious insurers are not exempt from the mandate but may provide contraceptive coverage through a subcontract with another insurer or third-party entity.

† Enrollees have the option of obtaining coverage directly from insurer.

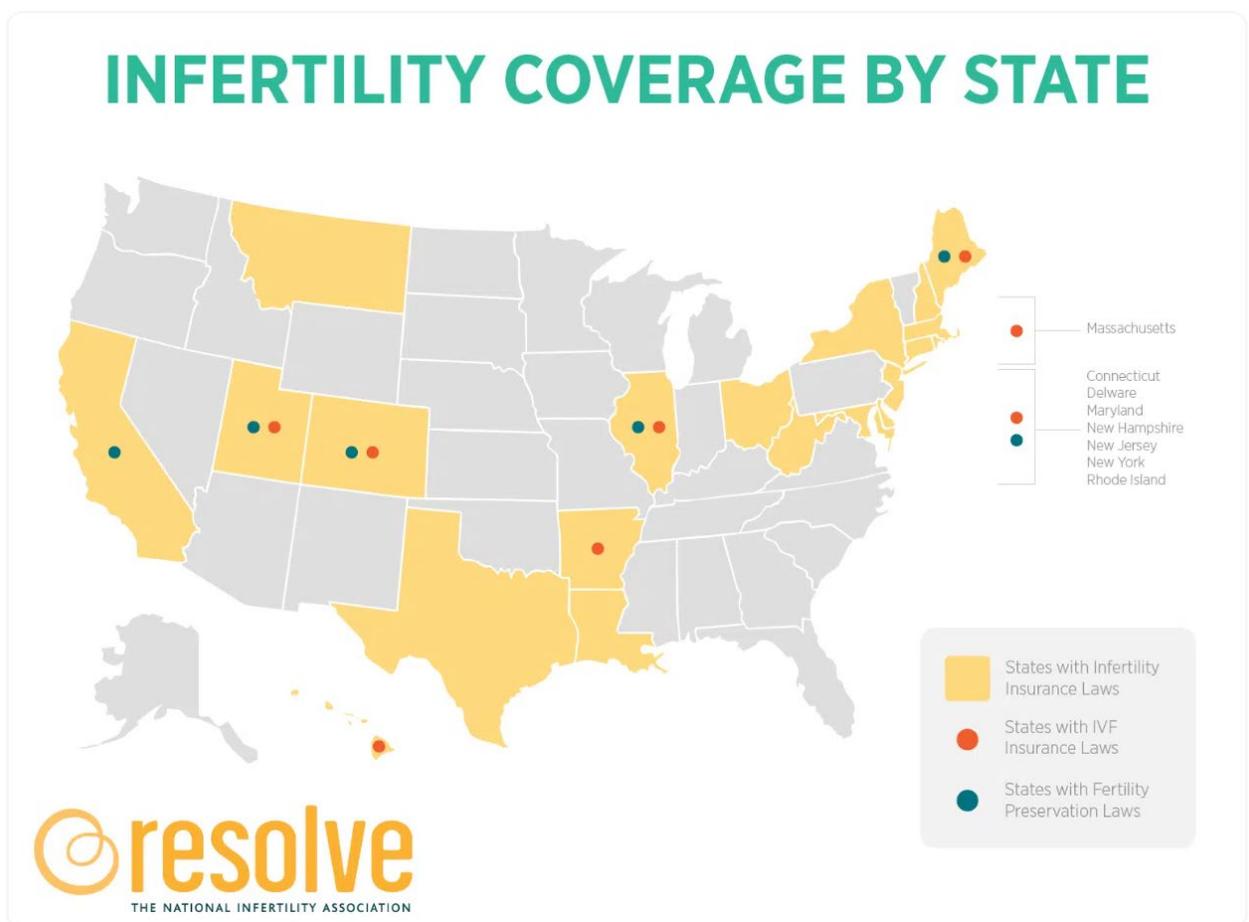
€ The state's law allows pharmacists to dispense the full amount of a prescription at one time, including contraception, but there is no requirement that health insurance plans cover the cost of accessing a year's worth of contraceptives at one time.

⊖ The state explicitly includes coverage for contraception that is prescribed and dispensed by a pharmacist.

** Employers must be offered the option to include coverage of contraceptives within the health plan.

Infertility treatments. Infertility or reproductive health care coverage varies substantially from state to state. It may include in vitro fertilization and sperm and oocyte cryopreservation. Counsel should verify its state regulations and whether they contain meaningful religious exemptions before electing into ERISA for this reason.

According to information as of May 2023 that is compiled by the Resolve National Infertility Association, Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Texas, Utah, and West Virginia require some form of coverage of infertility treatment by private health plans.^{39 40}



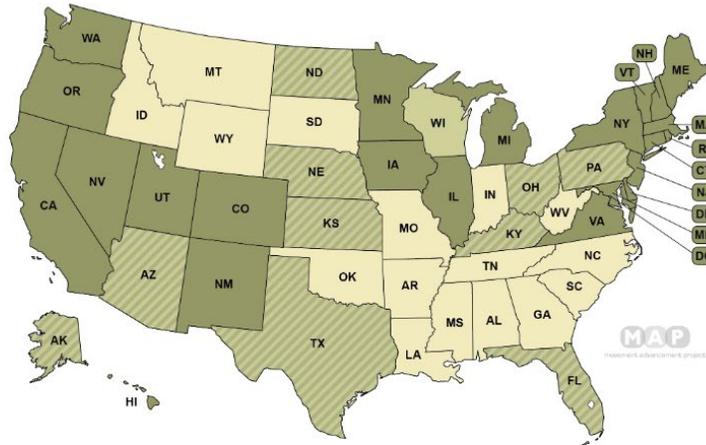
³⁹ See <https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/insurance-coverage-by-state/>.

⁴⁰ See <https://www.kff.org/womens-health-policy/state-indicator/infertility-coverage/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

State Antidiscrimination Laws. State employment antidiscrimination laws include restrictions on discriminating based on sex, sexual orientation, gender identity, and more.⁴¹ Almost all state employment anti-discrimination laws and many municipal human rights ordinances prohibit discrimination the basis of sex. Courts and state agencies may interpret such provisions as mandating health plan coverage for transgender services.

At least twenty-three states plus the District of Columbia prohibit SOGI (sexual orientation and gender identity) discrimination in employment. Over 225 municipal human rights ordinances prohibit gender identity discrimination in employment. Local counsel should assess these laws to determine the scope of their clients' problems with regard to immoral coverage mandates. Those with such problems should consider opting into ERISA.

STATES WITH SOGI DISCRIMINATION LAWS



As a result of a June 2020 U.S. Supreme Court ruling, people in all states can seek recourse for employment discrimination based sexual orientation and gender identity through the federal Equal Employment Opportunity Commission and federal courts.

- State law explicitly prohibits discrimination based on sexual orientation and gender identity (23 states, 3 territories + D.C.)
- State explicitly interprets existing prohibition on sex discrimination to include sexual orientation and/or gender identity (10 states)
- State law explicitly prohibits discrimination based on sexual orientation only (1 state)
- No explicit prohibitions for discrimination based on sexual orientation or gender identity in state law (16 states, 2 territories)

[Citations & More Information](#)



⁴¹ For Employment, see. https://www.lgbtmap.org/equality-maps/employment_non_discrimination_laws. (See also, <https://www.ncsl.org/labor-and-employment/discrimination-and-harassment-in-the-workplace>.)

For Housing, Public Accommodations, and Credit, see also, https://www.lgbtmap.org/equality-maps/non_discrimination_laws.

8. PROPOSED ANALYSIS

The local, state, and federal laws related to direct and indirect employee health plan coverage mandates are complex. These are the steps we recommend for Catholic employers seeking to avoid coverage mandates contrary to their Catholic values.

#1: Are you a member of the Catholic Benefits Association?

If yes, the federal government is enjoined from requiring you, your plan, your third-party administrator (“TPA”), or your insurer from covering contraceptives, abortifacients, gender transition services, and “gender-affirming care” under the federal regulations mandating the same and you should direct your TPA or insurer to exclude such coverages.⁴²

If no, join the CBA.

#2: Is your employee benefits plan a church plan?

If yes, seek local competent legal counsel to determine whether your state and local employment discrimination laws and insurance statutes mandate health plan coverage of contraceptives, abortifacients, abortion, gender transition services, “gender-affirming care,” infertility treatment, or physician-assisted suicide; and whether your state’s employment statutes (including anti-discrimination statutes) prohibit discrimination on the basis of termination of pregnancy or gay, lesbian, transgender, or gender identity status.

If no, you likely have an ERISA plan and ERISA preempts such state law mandates. If so, direct your TPA to exclude such coverages.

#3: If you have a church plan and your attorney determined that your state and local laws require your employee health plan to provide immoral benefits, evaluate the advantages and disadvantages of church plan versus ERISA status and strongly consider either opting into ERISA by making a bifurcated 410(d) election or placing your health plan with the Reta Trust. If you opt into ERISA, then direct your insurer or TPA to exclude such coverages.

#5: If you have a fully-insured ERISA plan and your insurer refuses to exclude the immoral coverages, contact the CBA to see if it can assist you in persuading your insurer to do so. If your insurer still refuses to exclude the immoral coverages, consider contracting with another insurer or adopting a self-funded plan.

⁴² Jason Coon, at the Catholic Benefits Association, can help you with the precise language for these exclusions.