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OAG - 1- 04

Ms. Helene Nelson
Secretary
Wisconsin Department of Health and Family Services
1 W. Wilson St.
P.O. Box 7850
Madison, WI 53707-7850

Dear Secretary Nelson:

You have asked whether the exclusion of contraceptives from an employer or college or university sponsored benefits program that otherwise provides prescription drug coverage violates Wisconsin law prohibiting sex discrimination in employment and in higher education. It is my opinion that such exclusion does violate Wisconsin law, specifically the Wisconsin Fair Employment Act (WFEA), Wis. Stat. §§ 111.31-111.395, and Wis. Stat. §§ 36.12 and 38.23 relating to the University of Wisconsin System and the Wisconsin Technical College System, respectively.

Section 111.36(1)(a) of the WFEA defines employment discrimination because of sex as “[d]iscriminating against any individual in . . . terms, conditions or privileges of employment . . . on the basis of sex where sex is not a bona fide occupational qualification.” WFEA further expressly forbids discrimination “against any woman on the basis of pregnancy, childbirth, maternity leave or related medical conditions by engaging in any of the actions prohibited under s. 111.322, including, but not limited to, actions concerning fringe benefit programs covering illnesses and disability.” Wis. Stat. § 111.36(1)(c). The latter language was added to the WFEA by ch. 334, s. 22, Laws of 1981. It was intended to codify existing Wisconsin case law. *See Rice, The Wisconsin Fair Employment Act and the 1982 Amendments*. Wis. Bar. Bull. (Aug. 1982).

[=OAG 1-04, 1-2]Wisconsin courts have held that the WFEA prohibits provisions in employer-sponsored insurance plans from treating pregnancy-related leave differently from other short-term disability leave. *See Wisconsin Telephone Co. v. ILHR Dept.*, 68 Wis. 2d 345, 228 N.W.2d 649 (1975), *Ray-O-Vac v. ILHR Dept.*, 70 Wis. 2d 919, 236 N.W.2d 209 (1975) and *Goodyear Tire v. ILHR Dept.*, 87 Wis. 2d 56, 273 N.W.2d 786 (Ct. App. 1978). It is irrelevant whether the employer intended to discriminate or not. *See Wisconsin Telephone Co.*, 68 Wis. 2d at 368 (“the broad purpose of the [WFEA] is to eliminate practices that have a discriminatory impact as well as practices which on their face amount to invidious discrimination”); *Ray-O-Vac*,

70 Wis. 2d at 930 (“The relevant question here is whether . . . the effect of the benefits program is to provide disparate treatment for men and women employees”).

The United States Supreme Court has held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, prohibits sex and pregnancy discrimination in employee benefits programs. *See Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). Similarly, the United States Court of Appeals for the Seventh Circuit has ruled that Title VII requires employers to provide the same leave benefits to husbands with pregnant wives as they provide to employees whose spouses are sick or injured. *See EEOC v. Joslyn Mfg. & Supply Co.*, 724 F.2d 52 (7th Cir. 1983). These state and federal cases, in conjunction with the provisions of the WFEA, demonstrate a clear direction in the law to prohibit discrimination against women because of their unique pregnancy-related medical needs.

The United States Equal Employment Opportunity Commission (EEOC) has addressed specifically the issue that you raise, and has held that denying prescription drug coverage for contraceptives constitutes sex discrimination under Title VII, the federal counterpart to the WFEA. [*See Decision on Coverage of Contraception, the U.S. Equal Opportunities Commission*, dated December 14, 2000.] The EEOC found that the exclusion of prescription contraceptives from a plan that otherwise provided for prescription drug coverage constitutes sex discrimination regardless of whether the contraceptives are used for birth control or other medical purposes. The exclusion amounts to sex-based discrimination, according to the EEOC, because prescriptive contraceptives are available only to women and only women can become pregnant.

Courts in other states that have addressed the issue have likewise signaled that insurance plans cannot exclude contraceptives. The most comprehensive ruling to date has been in the State of Washington, in *Erickson v. Bartell Drug Company*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001). There the district court held that the selective exclusion of prescription contraceptives from prescription drug coverage constituted sex discrimination under Title VII. The court rejected numerous employer arguments, including the contention that contraceptives differ from other prescriptions in that they are voluntary and not medically necessary. Instead, the *Erickson* court reasoned that prescription contraceptives may indeed be medically necessary given the evidence that they can prevent a litany of physical, emotional, economic, and social consequences associated with unintended pregnancies. *See Erickson*, 141 F. Supp. 2d 1273.

[=OAG 1-04, 2-3]Additional cases touching on the issue include *Catholic Charities of Sacramento, Inc. v. The Superior Court of Sacramento County*, 10 Cal. Rptr.3d 283 (2004) (statute providing that prescription drug plans must include contraceptives is constitutional even when applied to an employer affiliated with a church whose tenets prohibit the use of contraceptives), *Mauldin v. Wal-Mart Stores, Inc.*, 2002 WL 2022334 (N.D. Ga.) (certifying class action challenging Wal-Mart’s practice of excluding prescription contraceptive coverage), and two decisions denying an employer’s motion to dismiss Title VII challenges to contraceptive

exclusions: *EEOC v. United Parcel Serv. Inc.*, 141 F. Supp. 2d 1216 (D. Minn. 2001) and *Cooley v. Daimler-Chrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003).

Wisconsin courts have long followed federal decisions interpreting Title VII, except where they have extended to employees even greater protection under the WFEA. *See Tatum v. Labor and Industry Review Com'n*, 132 Wis. 2d 411, 420, 392 N.W.2d 840 (Ct. App. 1986), and *Marten Transport, Ltd. v. Department of Industry, Labor, and Human Relations*, 176 Wis. 2d 1012, 1020-21, 501 N.W.2d 391 (1993) (“Considering that the WFEA and Title VII serve identical purposes, it is appropriate to consider federal decisions...”). Additionally, the WFEA must be liberally construed to accomplish its purpose. *See* Wis. Stat. § 111.31(3); *Wisconsin Telephone Co.*, 68 Wis. 2d at 366-67 and *Ray-O-Vac*, 70 Wis. 2d at 930-32. It is likely that Wisconsin courts would follow the EEOC, and the federal courts in Washington, Minnesota, and Missouri, and rule that excepting prescription contraceptives from otherwise comprehensive prescription drug plans violates the WFEA.

You have also asked about the applicability of this issue to Wisconsin institutions for higher education. Sections 36.12 and 38.23 of the Wisconsin Statutes, which apply to the University of Wisconsin System and the Wisconsin Technical College System, respectively, provide that “[n]o student may be denied . . . the benefits of, or be discriminated against in any service, [or] program . . . because of the student’s . . . sex” Wis. Stat. §§ 36.12(1) and 38.23(1). As with the WFEA, no Wisconsin court has examined these statutes in the context of contraceptive coverage, but the discrimination analysis would likely not be any different than the analysis the courts perform under the WFEA. As such, a court would likely find that if a Wisconsin state-run university or technical college provides prescription drug coverage for its students, it must also provide coverage for contraceptives.¹

[=OAG 1-04, 3-4] Prescription contraceptives are not used exclusively to prevent pregnancy. They are also used as a medication to treat various conditions that may be life-threatening. In certain cases, a woman’s health could be seriously harmed from becoming pregnant. Given these medical realities, the number of cases finding discrimination where coverage is excluded, the dearth of cases finding that such exclusions are not discriminatory, and the intent and broad construction of the WFEA when applied to women’s health, I am confident that Wisconsin law prohibits

¹ There does not appear to be a similar statute prohibiting discrimination in higher education by non-public colleges or universities in Wisconsin. These institutions might be covered by federal mandates relating to this issue if they receive federal funding, but that discussion is beyond the scope of this opinion.

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employers as well as state colleges and universities from excluding prescription contraceptives from benefit plans that provide prescription drug coverage.

Very truly yours,

Peggy A. Lautenschlager
Attorney General

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