ETHICS & MEDICS
A Commentary of The National Catholic Bioethics Center on Health Care and the Life Sciences

HEALTH INSURANCE OPTIONS AND THE ETHICS OF THE HHS MANDATE

Summary: *We update our previous moral analysis of the HHS mandate, offering additional relevant considerations to assist in understanding how employers and individuals may decide, through health care exchanges or private plans, to provisionally purchase health insurance coverage for themselves and/or their employees without illicitly cooperating in evil. We also discuss how employers and individuals must consider a number of important moral and practical concerns as the exchanges become available, including provisions for coverage of direct abortion, uncertainties surrounding implementation, physicians who decline to accept exchange-based insurance, the escalation of costs within and outside the exchanges, the potential impact of scandal, and the serious duty to take action and remain steadfast in opposing the HHS mandate.*

Since October 1, 2013, the federal and state-subsidized health insurance exchanges called for by the Patient Protection and Affordable Care Act of 2010 (ACA) have been open for enrollment. In August 2012, the NCBC published a moral analysis[1] of the options for non-exempt employers facing decisions about health insurance for their employees in light of the regulations established by the Department of Health and Human Services (HHS). These regulations, commonly known as the HHS mandate, require the inclusion of morally objectionable health insurance coverage for surgical sterilization, contraceptive and abortion-inducing drugs and devices, and contraceptive counseling, as specified by the Health Resources Service Administration.[2]

Purpose of the Present Statement

Our moral analysis of August 2012 has not substantively changed. What follows is further clarification in light of the developments over the past year. We hope to better aid the prudential judgments of certain employers on this important matter while continuing to emphasize their obligation to oppose the unjust infringement of religious liberty caused by the mandate. Furthermore, we seek to address the situation of individuals who obtain insurance through an employer or who purchase it on their own.

Neither the original moral analysis nor the present update addresses the situation of supposedly "accommodated" but non-exempt ministries owned or operated by the Catholic Church, such as Catholic charities, schools, and hospitals. We are keenly aware of the danger that George Weigel has so aptly described: "Thus *it is imperative that great care should be taken to avoid undermining the prospects for a satisfactory judicial resolution of the matter* . . . by the imprudent airing of interesting but abstract theological questions that will inevitably be interpreted by the media and the public, and may be interpreted by the administration and the courts, as an attempt to justify a way out of the current conflict or, worse, to legitimate a surrender under duress. This is a legal and political battle, not a university seminar in moral theology, and it must be approached as such."[3] We are convinced that these pitfalls can be avoided while offering direction in a real-world situation where practical moral guidance is required.

Original Analysis and New Developments

Our original moral analysis set out four options: (1) "willingly assent" to the mandate, (2) provide morally non-objectionable insurance, (3) drop all coverage for employees, or (4) temporarily comply with the mandate under protest in order to continue to provide health insurance coverage for employees. Only the first—willing assent to the provision of objectionable coverage—constitutes formal cooperation with evil and is not justifiable. Any of the others might be licit for an employer who is neither exempted nor accommodated under the HHS mandate. Options 2 and 3 would involve no cooperation with evil at all. Option 4 could be "mediate material" cooperation.

Option 2, we said, seems highly impracticable since no insurers appear willing to violate the provisions of the law by offering non-compliant insurance coverage. Even if it were possible, the fines of one hundred dollars per employee per day would be too crippling to make it feasible for many employers, especially for small and mid-sized companies. Options 3 and 4 remained as the two more probable options. All things being equal, option 3 would be preferable to option 4 since it involves no cooperation[4]; however, we concluded that a sufficient reason

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could justify the mediate material cooperation outlined in option 4 through January 1, 2014, when it was understood that affordable insurance of comparable quality would be available on the subsidized insurance exchanges.

Recent developments have spotlighted concerns about the quality and affordability of the exchange plans and payments for abortion coverage under the ACA. These factors affect the determination of whether there is a sufficiently weighty reason to tolerate the evils accompanying the purchase or provision of morally objectionable health insurance coverage.

Non-exempt, Non-accommodated Employers

A non-exempt, non-accommodated employer who must decide whether to offer HHS mandate-compliant insurance to employees or leave them to their own devices—which in many cases could mean the government-subsidized insurance exchanges—must consider what risks, harms, burdens, or benefits are involved with both options. The impact on business survivability as well as the impact on employees must be taken into account, and these may well be interrelated.

The NCBC maintains that temporary compliance under protest by selecting and financing "prepackaged" insurance plans designed by a third party may be licit on these conditions: (1) there are no alternatives that meet the employees' health care needs and do not contain the objectionable coverage; (2) a sufficiently weighty reason can be demonstrated, taking into account the proportion between the goods intended (e.g., the provision of adequate health care coverage to employees in need) and the harms expected (e.g., the undermining of religious liberty); and (3) scandal is avoided by conveying the employer's opposition to the evils and by making known his or her moral convictions, and, most importantly, by the employer's ongoing engagement in prudentially appropriate efforts to combat the injustice and secure due protection for religious liberty and conscience, especially on the legal and political fronts.

If these conditions are met, such temporary compliance would represent licit mediate material cooperation with evil, which would be licit only by exception and on a temporary basis. These conditions ensure that there is no complacency, negligence, or settled compromise and that the will of the cooperator never acquiesces to the injustice. Regular reassessment of the conditions is needed to determine whether a sufficiently weighty reason remains for continued cooperation.

An important factor that should weigh into the assessment of proportionate goods and harms is the potential long-term impact of providing insurance with the objectionable coverage: it might cause a serious setback in the struggle for religious liberty and could harm the likelihood of future legal successes on matters of conscience and religious freedom. The larger or more high-profile the organization, the more harm may be caused in the long run by even temporary compliance.

Another consideration is the abortion coverage that may be included in many health plans available on the exchanges. The ACA requires that only one plan per exchange not include abortion by 2017; all of the other plans may or may not cover abortion. In order to circumvent certain restrictions on government funding for abortion, the ACA requires that persons holding an exchange policy which includes abortion pay a private surcharge of at least twelve dollars per year specifically for the abortion coverage. It must be segregated from the portion of the premium payment to which tax credits are applied.[5]

Furthermore, the ACA prohibits insurers from telling potential enrollees whether a plan under consideration includes abortion. It allows the abortion surcharge and its amount to be disclosed only at the time of enrollment and prohibits insurers from itemizing it on premium bills. While many states have enacted opt-out laws prohibiting the inclusion of abortion coverage in exchange plans, twenty-six states and the District of Columbia have not.[6] Thus, if private employer-sponsored coverage is dropped, an employee seeking coverage on an exchange in one of these states could be reasonably expected to inadvertently choose a plan that includes the specifically allocated abortion surcharge. This sort of subterfuge raises additional moral concerns.

Leaving employees to the exchanges could expose them to serious moral and material harms. They may face uncertainty about whether a chosen exchange plan includes abortion coverage and the consequent moral concerns about paying a surcharge for it if they learn it is included. If they could identify the abortion surcharge and refuse to pay it, this would create serious concerns about the continuation of their coverage and other potential legal repercussions. If they chose to seek coverage outside of the exchanges to avoid the abortion surcharge, their plans would not qualify for subsidies and they may face added financial hardships that the employer could not meet through salary compensation.

In the event that a non-exempt, non-accommodated employer makes the prudential decision to continue providing health insurance coverage for employees, practical steps must be taken to demonstrate sufficient reason and to avoid scandal. For example, employers could convey their objections to contraception, sterilization, and abortion, which may help curb the use of the harmful covered items by their employees. This would also show support for the goods that they offend: human life, bodily integrity, marriage and conjugal intimacy, and family.

Weighing the specific circumstances of employers and employees is important to a correct prudential judgment about dropping coverage or temporarily complying while working to end the injustices. Particularly in small companies where difficult health or financial situations of employees may be known to the employer, it could be more appropriate to temporarily comply. However, barring such case-specific extenuating circumstances, it may be preferable to cease offering coverage rather than provide it with objectionable inclusions.

There are a number of factors that could justify continued temporary compliance beyond the January 1, 2014,

deadline discussed in our earlier article. Some of these include the increasingly evident complexities of the ACA and the uncertainty that continues to surround its implementation, including ongoing and unpredictable federal rulemaking modifying the law's provisions; higher premiums and out-of-pocket expenses even with exchange plans; the questionable adequacy of the subsidized exchanges in light of the troubled enrollment process; the chances of one's doctors refusing the new insurance; the uncertainties surrounding the inclusion of separate and hidden abortion coverage payments in exchange plans in some states; and the significant cost of unsubsidized individual insurance outside of the exchanges. Continuity of reliable health insurance coverage for employees in challenging medical or financial situations may constitute a proportionate good in the face of such an unpredictable and complicated situation.

From a moral perspective, the NCBC maintains that no employer may design a plan to specifically include the objectionable coverage, as in the case of some types of self-insurance. As the legal and political realities continue to unfold, the precise temporal extent of any toleration of prepackaged insurance coverage with legally mandated objectionable items will become clearer.

Moral Analysis for Individuals

Purchasing an insurance plan through the subsidized exchanges without knowledge of whether the plan will include abortion coverage presents a moral conundrum since that coverage may require the individual make a distinct monthly payment specifically for the abortion coverage. The following analysis applies to the purchase of prepackaged insurance plans that are known to exclude abortion coverage, whether through exchanges in opt-out states or directly through insurers who fully disclose coverage before enrollment. Plans not purchased on the exchanges have the disadvantage of not providing subsidies to low-income individuals and families.

Faithful individual Catholics who oppose the evils of contraception, sterilization, and abortion-inducing drugs and devices, and who must make decisions regarding health insurance policies for themselves and their families, are in a more remote situation of mediate material cooperation with evil than employers if they opt to purchase prepackaged plans containing the objectionable mandated coverage or if they make contributions to an employer-sponsored plan with such coverage.

As with employers, individuals must demonstrate a sufficiently weighty reason for cooperation, such as a lack of reasonable alternatives, even as they articulate the Church's teachings and their opposition to the evils and engage in practical efforts to rectify the grave injustice that the mandate represents.

Morally, the individual purchasing a prepackaged insurance plan that is known to include objectionable items would have a stronger proportionate reason for this sort of mediate material cooperation than an employer. First, the individual has a stronger moral obligation than the employer to protect his or her own health and the health of family members. Additionally, the individual's material contribution to an individual or family plan that includes objectionable coverage is much smaller than an employer's material contribution to a group plan that covers a large number of employees and families. Finally, even a small employer would be making the objectionable coverage available to a significantly larger number of individuals (and their families), some or many of whom could be expected to utilize the objectionable coverage without the employer having sufficient influence to limit such use.

The individual would instead be able to curtail the use of the objectionable coverage for him- or herself and would have significant influence over the decisions of family members. In short, the individual has a stronger obligation to secure adequate health care coverage, contributes less materially, and has greater influence over actual moral decisions pertaining to the use or non-use of objectionable coverage, which can translate into moral certitude that the objectionable coverage will not in fact be used.

Moral Obligation to Oppose

The NCBC continues to maintain that there is a moral obligation to oppose the unjust HHS mandate through practical efforts appropriate to the circumstances of each person and organization, including legal opposition. This obligation becomes greater if the individual or organization is cooperating materially with evil even if in a temporary and licit manner. Their efforts should be prudent, reasonable, and appropriate to their state in life and possibilities, and should be ongoing for as long as the unjust situation persists.

The moral imperative is that objectionable coverage must be excluded as soon as reasonable, and that every appropriate effort must be made to fight the unjust provisions of the law until their repeal or modification restores respect for religious liberty and conscience rights.

The uncertainties, complexities, and harms associated with the federally subsidized exchanges indicate that there are not likely to be affordable, reliable, quality alternatives to employer-sponsored insurance as of January 1, 2014, and perhaps well beyond. As such, temporary compliance by individuals and non-exempt, non-accommodated employers beyond that date may be licit. The moral liceity of this cooperation must be continually reassessed in light of political and legal developments, reasonable alternatives, sufficient efforts to oppose the evils and avoid scandal, and the harms and benefits related to the specific situation of an organization or individual.

The impact of scandal and the far-reaching effects on the battle for religious liberty must be taken seriously. Unlike certain non-profit faith-based employers, for-profit employers are neither "exempted" nor "accommodated" under the final rules governing the unjust mandate.[7] The federal government thereby manifests the belief that these employers have no right to express their deeply held religious or conscience convictions by the way in which they run a business—even if the essence of that business is explicitly faith-based, as in the case of Bible publishers

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or vendors of religious education materials. These employers have an unwavering obligation to fight this injustice, which pressures them to act in a manner contrary to their deeply held convictions.

Even employers who might elect to cease providing coverage, or who do not currently provide coverage, have a moral obligation, together with all citizens, to oppose this denial of employer conscience rights. They also have an obligation to oppose this administration's arbitrary determination that religion is merely private religious worship to the exclusion of ministries such as education, health care, and other charitable activities. Relying on this false presupposition, the HHS mandate undermines religious freedom and flouts the natural moral law as enshrined in the U.S. Constitution's guarantee of the free exercise of religion. It is a damaging law that must be opposed through all prudent and appropriate means. No organization or individual should give the impression that the present lack of a proper conscience exemption is acceptable. There is a moral obligation to guard against any dulling of conscience. Only the elimination of the injustice in the law can resolve this moral affront. In the words of Pope John Paul II,

> From the very beginnings of the Church, the apostolic preaching reminded Christians of their duty to obey legitimately constituted public authorities (cf. Rom 13: 1–7; 1 Pet 2:13–14), but at the same time it firmly warned that "we must obey God rather than men" (Acts 5:29). . . . It is precisely from obedience to God—to whom alone is due that fear which is acknowledgment of his absolute sovereignty—that the strength and the courage to resist unjust human laws are born. It is the strength and the courage of those prepared even to be imprisoned or put to the sword, in the certainty that this is what makes for "the endurance and faith of the saints." [8]

By the grace of God, we are not yet facing these extremes. Yet if the concrete moral obligation to oppose the injustice is underemphasized, the religious liberty of the Catholic Church and of all people of faith in the United States may be lost. We are called to take action and to remain steadfast in our opposition to the HHS mandate.

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[1] John M. Haas et al., "Options for Non-exempt Employers under ACA," *Ethics & Medics*, Special Issue (August 2012): 1–4.

[2] Health Resources and Services Administration, "Women's Preventive Services: Required Health Plan Coverage Guidelines," August 2011, http://www.hrsa.gov/womensguidelines/.

[3] George Weigel, "The Church and the Mandate," *National Review Online*, December 19, 2012, http://www.nationalreview.com/articles/335975/church-and-mandate-george-weigel/page/0/2, original emphasis.

[4] As noted in the original analysis, option 3 is arguably a type of material cooperation insofar as the employer would increase the salary of employees to compensate for dropped health care coverage, expecting employees to purchase their own health coverage (which would necessarily include the objectionable items). If this were material cooperation, it would be significantly more remote and simpler to justify than option 4, and therefore still preferable.

[5] Sarah Torre, "Obamacare's Abortion Surcharge and Taxpayer Funding of Abortion Coverage," Heritage Foundation, November 21, 2013, http://www.heritage.org/research/reports/2013/11/obamacare-s-abortion-surcharge-and-taxpayer-funding-of-abortion-coverage.

[6] Text updated January 14, 2014: see http://www.heritage.org/research/reports/2014/01/obamacares-many-loopholes-forcing-individuals-and-taxpayers-to-fund-elective-abortion-coverage.

[7] Department of Health and Human Services, "Coverage of Certain Preventive Services under the Affordable Care Act," Final Rules, 78 Fed. Reg. 39874, July 2, 2013, http://www.gpo.gov/fdsys/pkg/FR-2013-07-02/pdf/2013-15866.pdf.

[8] John Paul II, *Evangelium vitae* (March 25, 1995), n. 73, citing Rev. 13:10.

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