



Ensure all FDA-Approved Contraceptive Drugs, Devices and Related Outpatient Services are Covered by all Insurance Products Offered in Colorado

With women's child-bearing years ranging from ages 13 to 44, the average woman who wants two children will spend approximately 30 years trying to avoid pregnancy, two years trying to get pregnant, and two years carrying her pregnancies to term. Of those reproducing women, 98 percent will use contraceptives at some point during this time, and over 50 percent will use methods for which prescriptions are necessary.¹ Research also shows that women are more likely to pay out-of-pocket for contraceptives because they often use methods that complement their lifestyles, even if those methods are not covered by their insurance. As a result, women spend more money than men on out-of-pocket health care costs in part because of expenses associated with accessing contraceptives. To mitigate cost as a barrier to consistent contraceptive use, Prevention First Colorado recommends all FDA-approved contraceptive drugs, devices and related outpatient services be covered by all insurance products offered in Colorado.

THE NEED FOR UNIVERSAL CONTRACEPTIVE COVERAGE

Original research carried out by Prevention First Colorado found that compared to women with private insurance, uninsured women and women covered by Medicaid were more likely to have sex without birth control – even when they did not want to become pregnant.² Among all women who reported having had sex without birth control, 17 percent of those with private insurance, and 19 percent of those without insurance at all, said either birth control cost too much or that their insurance didn't cover birth control.³ Comparatively, only 9 percent of women on Medicaid reported one of those reasons for not using birth control.⁴ Because fewer women on Medicaid identified cost as a barrier to contraceptive use and because Medicaid fully covers family planning services, that population's needs are not addressed in this recommendation. Please refer to the companion recommendation, "Streamline Access to and Use of Family Planning Services Provided through Medicaid," on page 24 of this report for strategies to mitigate barriers faced by women on Medicaid.

Regardless of insurance status or type, high percentages of women (48 percent of those with private insurance and 52 percent without insurance) reported using contraceptive methods that are easily accessible without insurance but are less effective at pregnancy prevention – such as spermicidal foam or jelly, a sponge, or condoms.⁵ Of those with private insurance, nearly one out of every five women (18.9 percent) reported using no contraceptive at all the last time they had sex, and less than half (44 percent) reported that they currently use a form of contraceptive typically covered by insurance.⁶

Insurance coverage in and of itself cannot be considered an

absolute indicator of women's ability to access affordable birth control options. The scope of services covered by a woman's health insurance benefits is a more reliable indicator. This is particularly true when it comes to contraceptives and related services. Nationally, a study released in 2004 by the Kaiser Family Foundation and the Health Research and Educational Trust revealed that 89 percent of workers employed by 1,925 private and public companies surveyed received coverage for oral contraceptives, up from 70 percent in 2000.⁷

On first glance, this increase seems promising. However, the survey was limited only to those covered by employer-provided health plans. While the majority of Americans receive health insurance through employer-sponsored plans, Colorado-specific data show that more than one-third of women aged 19 to 64 do not.⁸ Moreover, there is a lack of data detailing both the extent to which Colorado women who do receive health insurance through employers have plans that include coverage for all contraceptive drugs, devices and related services and, if such coverage is provided, the level of coverage and any associated out-of-pocket costs. Currently, there is no requirement for all health insurance plans offered in Colorado to cover all contraceptive drugs, devices and related services. Moreover, the impact of any such mandate would be limited because only a portion of health insurance sold in Colorado is subject to state law. These and other challenges to ensuring health insurance plans provide comprehensive contraceptive coverage are discussed in greater detail in the "Barriers to Implementation" section of this recommendation.

Another shortcoming of the Kaiser Family Foundation survey was that it reported on coverage only for oral contraceptives, rather than the full spectrum of contraceptive options.

Medical experts agree that it is critical to ensure that women have access to the full range of contraceptive drugs, devices and related outpatient services to ensure use of a contraceptive method that is appropriate to women’s circumstances. Some women, for example, cannot use hormonal birth control because of adverse side effects. Likewise, research indicates that women most at risk for unintended pregnancy – such as parenting teens, women with unsteady incomes, or women in relationships with partners who object to contraceptives – benefit from longer-term, reversible methods of birth control like intrauterine devices and injectables.

OTHER STATES AND NATIONWIDE

As of January 2008, 23 states had laws mandating comprehensive coverage for contraceptive drugs and devices approved by the U.S. Food and Drug Administration (FDA).⁹ Generally, those laws require that health insurance policies that are issued in these states

“[...] provide coverage for prescription drugs generally, must provide coverage for any prescription drug or device that has been approved by the [FDA] for use as a contraceptive. Most also require that if an insurance policy provides coverage for outpatient health care services, it must provide coverage for outpatient contraceptive services [...]. Most of the laws further provide that any deductible, copayment (sic), or coinsurance (sic) that is applied to contraceptives may not be greater than [those] applied to other prescription drugs.”¹⁰

In an additional three states – Michigan, Montana and Wisconsin – decisions by the states’ attorneys general and/or civil rights commissions found that exclusion of coverage for prescription-based forms of contraceptives violated the states’ non-discrimination statutes.¹¹

Research carried out by the Guttmacher Institute in 2001-2002 examined the impact of state-level contraceptive coverage mandates on employer-purchased insurance plans provided through health maintenance organizations (HMOs), preferred-provider organizations (PPOs) and point-of-service (POS) plans.¹² According to the research results, plans in states with mandates were “significantly more likely to cover” the diaphragm, one- and three-month injectables, intrauterine devices, and oral contraceptives, compared with plans offered in states without mandates. In fact, 91.6 percent of HMO plans, 92.2 percent of PPO plans and 86.9 percent of POS plans covered those five prescription methods and related services and supplies in states with contraceptive mandates, compared to just 60.7 percent, 47.1 percent, and 59 percent, respectively, in states without mandates. However, this survey excluded self-funded plans subject to federal regulations, which are discussed in more detail in the “Currently in Colorado” section of this recommendation.

A number of sex-discrimination cases have examined

employers’ obligation to include in employer-sponsored health plans the expenses for prescription contraceptives and related health care services. A series of state supreme and district court decisions have established denial of coverage as a clear violation of states’ non-discrimination statutes. Likewise, the U.S. Equal Employment Opportunity Commission found in 2000 that exclusion of coverage for prescription contraceptive methods violates Title VII of the federal Civil Rights Act as amended by the Pregnancy Discrimination Act. However, a conflicting federal appeals court decision issued in 2007 discounted this precedent and established an environment where competing analyses of the issue beg for resolution from the U.S. Supreme Court.¹³

CURRENTLY IN COLORADO

As with most other states, Coloradans may obtain health insurance through either taxpayer-funded (public) programs or private plans. Private plans are available either through an individual’s employer or by direct purchase through the individual market. (See Table 1 on page 31, “Type of Insurance Coverage for Colorado Women Aged 19 to 64 [2006-2007].”) Below is a brief description of plan types available in Colorado and information about whether those plans are regulated by state or federal law.

According to data collected by the Kaiser Family Foundation, 158,719, or 10 percent, of Colorado women aged 19 to 64 were insured by Medicaid or other public programs in 2006-2007,¹⁴ with Medicaid being the largest publicly funded insurance program for this demographic. Childless adults aged 19 to 64 are generally ineligible for Medicaid unless they are disabled, women who are pregnant, or women who are recently post-partum; all must meet strict income requirements. Yet as of 2006, an estimated 24,000 women aged 15 to 44 with incomes below the federal poverty level (FPL) were uninsured for a variety of reasons.¹⁵ (For 2006 the FPL for 1-person households was \$9,800; for 4-person households, \$20,000.) Because Medicaid is partially funded through federal dollars, coverage requirements are tied to federal regulations.

As mentioned above, private insurance is available through the individual market. The individual market allows individuals and families to purchase coverage directly from private

Table 1: Type of Insurance Coverage for Colorado Women Aged 19 to 64 (2006-2007)¹⁶

Insurance Type	Number of Women	Percent of Women
Employer-Sponsored	955,788	63%
Uninsured	270,357	18%
Individual Plans	134,159	9%
Medicaid	109,980	7%
Other Public Programs	48,739	3%

insurers. Individual-market plans often are selected by Coloradans who do not have other health insurance options. Those plans are subject to Colorado law and are regulated by the state Division of Insurance. Approximately nine percent, or more than 134,000, of Colorado women aged 19 to 64 were insured through the individual market in 2006-2007.¹⁷

Private insurance also is available through employer-sponsored plans. The Kaiser Family Foundation noted that 63 percent of Colorado women aged 19 to 64, or 955,788 women, were insured through employer-sponsored plans in 2006-2007.¹⁸ It's important to note that not all employer-sponsored plans fall under state regulation or are subject to state statute. Self-funded employer-sponsored plans occur when the employer assumes all health care costs for covered employees rather than purchasing coverage through an independent insurer. Those insurance plans are subject to the federal Employee Retirement Income Security Act (ERISA) enforced by the U.S. Department of Labor and are not regulated by state law. The Colorado Division of Insurance estimates that ERISA regulations apply to about 30 percent of all insured Coloradans, and about one-half of all Coloradans covered by employer-sponsored insurance plans.¹⁹

The remainder of Coloradans covered by employer-sponsored insurance are enrolled in plans where employers buy health care coverage offered by insurance companies that assume all health care costs. Those products are sold through the state's large- and small-group markets and are regulated by the Colorado Division of Insurance.

BARRIERS TO IMPLEMENTATION

A significant challenge to achieving comprehensive health insurance coverage for contraceptives is the fractured nature of Colorado's health insurance market. Not all insurance plans are subject to Colorado law. In fact, the state's Division of Insurance says,

"Colorado insurance laws do not apply to plans that are self-funded by employers and they do not apply to federal benefit plans, including federal employee benefit plans, Medicare and Medicaid. In many cases, Colorado insurance laws do not apply to an employer plan if the employer is headquartered in another state."²⁰

Because not all insurance plans offered in Colorado are subject to state law, a statutory mandate requiring coverage for contraceptives and related services would benefit only those women whose insurance plans are subject to Colorado statute.

Women who receive health insurance through public programs funded in whole or in part by federal dollars are subject to conditions applied at the federal level, whether through Medicaid, Title X, or other programs. Women who receive health insurance through employer-sponsored plans subject to ERISA regulations would only benefit from a federal comprehensive contraceptive-coverage mandate.

However, the U.S. Equal Employment Opportunity Commission's 2000 decision regarding contraceptive benefits through Title VII of the Civil Rights Act as amended by the Pregnancy Discrimination Act applies to all Colorado employers with at least 15 employees, regardless of whether companies are public or private employers and companies' ERISA status. In Colorado, women who receive employer-sponsored insurance through companies with fewer than 15 employees benefit only to the extent that employers opt for insurance plans that include contraceptive coverage. State regulations require insurers to offer small employers at least two types of plans that must cover contraceptives, but employers are not obligated to select a plan that covers contraceptives.²¹

Colorado's Division of Civil Rights has the authority to consider violations to state law prohibiting discriminatory or unfair employment practices, including sex-based discrimination in compensation.²² According to statute, all employers in the state of Colorado must comply with the state's non-discrimination statutes *except* religious organizations or religious associations not supported in whole or in part by public funds. As such, religious employers may not be expected to comply with decisions from the Division of Civil Rights requiring coverage of contraceptives and related services under current statute. It should be noted that precedent exists for the state of Colorado, through the Division of Civil Rights, to consider the legality of omitting or limiting contraceptive coverage in employer-sponsored health care plans and to challenge religious exemptions to requirements for provision of universal contraceptive coverage.²³

FIRST STEPS

To address the challenges presented by Colorado's fractured insurance market, multiple steps are recommended to achieve comprehensive health insurance coverage for all FDA-approved contraceptive drugs, devices and related outpatient services. Specifically:

1. Carry out a statewide assessment of employer-sponsored health insurance plans to evaluate the extent to which FDA-approved contraceptive drugs, devices and related outpatient services are covered, including examining whether out-of-pocket fees and co-payments for contraceptives are consistent with fees and co-payments for other health care needs. The assessment should include sufficient sample sizes of employers with one to 15 workers, 16 to 50 workers, and 51 or more workers, to provide a statistically valid representation of employer-sponsored health insurance plans that are subject to state and federal regulations.
2. Colorado statute should be revised to require all insurance plans offered through Colorado's individual and small group markets, as well as any others subject to regulation by the Division of Insurance, to
 - a. include as a core benefit coverage for all FDA-approved

contraceptive drugs, devices and related outpatient services, including but not limited to consultations, examinations, insertions/removals and other procedures; and

- b. ensure that co-payments, deductibles, or co-insurance applied to all FDA-approved contraceptive drugs or devices and related outpatient services are not greater than those applied to other prescription drugs and outpatient services.

That statutory change will address the needs of women who obtain health insurance either through the individual market or through employer-sponsored insurance offered by companies with fewer than 15 employees.

3. Colorado's Employment Non-Discrimination Act should be revised to mirror the federal Pregnancy Discrimination Act with explicit language stating omission or limitation of coverage for contraceptive drugs, devices and related outpatient services is prohibited under the state's sex-discrimination laws, consistent with the 2000 decision issued by the U.S. Equal Employment Opportunities Commission. This statutory change will provide specific guidance should the state's Civil Rights Commission receive complaints alleging sex discrimination when employer-sponsored health insurance plans omit or limit coverage for FDA-approved contraceptive drugs, devices and related outpatient services.
4. Seek a decision from Colorado's Civil Rights Commission as to whether omission or limitation of coverage for contraceptive drugs, devices and related outpatient services in employer-sponsored health plans violates Colorado's non-discrimination laws. A favorable opinion would apply to *every* Colorado-based employer, regardless of whether the company is a state or federal agency, a private company, or subject to ERISA regulations. The 2000 decision issued by the U.S. Equal Employment Opportunities Commission explicitly rejected ERISA status as grounds for an employer to ignore civil rights statutes prohibiting sex discrimination in the workplace.
5. Support efforts at the national level to require public insurance programs that are at least partially funded by federal dollars to include coverage for all FDA-approved contraceptive drugs, devices and related outpatient services. Likewise, support federal efforts to ensure employers regulated by the U.S. Department of Labor under ERISA have similar universal contraceptive coverage requirements. Those changes at the federal level would ensure that women whose health insurance plans are sponsored by employers subject to ERISA regulations, as well as women who receive health coverage through Medicaid and other public programs, are not excluded from coverage requirements outlined in state law and/or administrative rulings.

The scope of the steps identified above necessitates a long-

term strategy to achieve comprehensive health insurance coverage for all contraceptive products. Moreover, all changes should be pursued within existing discussions regarding comprehensive health care reform at the state level.

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