
After *Dobbs*, Departments Emphasize ACA Contraceptive Coverage Requirements

August 2022

In the wake of the Supreme Court decision in *Dobbs v. Jackson*, newly issued frequently asked questions (FAQs) from the U.S. government emphasize that health insurers and employers sponsoring non-grandfathered group health plans must provide coverage for contraceptive items and services, including Food and Drug Administration (FDA)-approved products and emergency contraceptives under the Affordable Care Act (ACA) preventive care requirements.

The FAQs, issued by the Departments of Labor, Treasury, and Health and Human Services (the Departments), contain guidance to assist plans and issuers to help individuals obtain access to such services without cost-sharing.

Coverage of Contraceptive Products and Services

Integral Services. Plans and issuers are required to cover items and services that are integral to the furnishing of a preventive service recommended under the Health Resources and Services Administration (HRSA)-supported Women's Preventive Services Guidelines, regardless of whether the items or services are billed separately. Examples given are coverage for anesthesia for a tubal ligation procedure and pregnancy tests administered prior to providing an intrauterine device.

FDA-Approved, Cleared, or Granted Products and Services. The 2021 HRSA-supported guidelines require that plans cover in-network and without cost at least one form of contraception in each of the following categories:

- Sterilization surgery for women
- Implantable rods
- Copper intrauterine devices
- Intrauterine devices with progestin (all durations and doses)
- Injectable contraceptives
- Oral contraceptives (combined pill)
- Oral contraceptives (progestin only)
- Oral contraceptives (extended or continuous use)
- The contraceptive patch
- Vaginal contraceptive rings

- Diaphragms
- Contraceptive sponges
- Cervical caps
- Condoms
- Spermicides
- Contraception (levonorgestrel)
- Emergency contraception (ulipristal acetate)

The 2021 HRSA guidelines are effective for plan years that begin on or after December 30, 2022 (e.g., January 1, 2023, for calendar year plans). While most of these categories remain the same as the 2019 HRSA-supported guidelines, a notable change is the coverage of male condoms without cost in-network with a prescription. This coverage must include the clinical services needed for provision of the product or service, including patient education and counseling.

Coverage without cost-sharing is also required for contraceptive services and FDA-approved, cleared, or granted contraceptive products determined to be medically appropriate for an individual, regardless of whether the specific service or product is specifically identified in the HRSA-supported guidelines.

Medical Management. The FAQs also reiterate the guard rails applicable to medical management. Medical management must be reasonable and is a facts and circumstances determination. The Departments will scrutinize medical management techniques such as denial of coverage of all or a particular brand name contraceptive, fail-first policies, or age-based restrictions. Plans and issuers are to defer to a medical necessity determination given by an individual's medical provider. An exceptions process that is easily accessible, transparent, sufficiently expedient, and not unduly burdensome to the individual must also be available for any medical management techniques applied within a category of contraceptives. The exceptions process will be considered easily accessible and transparent if relevant information is contained within the plan documents and other materials, such as a Summary Plan Description or formulary. A requirement to initiate an adverse benefit determination appeal through the plan's internal claims and appeals process would be considered unduly burdensome and is therefore inappropriate to use for an exception request.

Plans are allowed to use reasonable medical management techniques to determine coverage for products and services not included in the HRSA-supported guidelines if multiple, substantially similar products and services are available and are medically appropriate for the individual as determined by the attending provider. At least one service or product must be covered without cost-sharing if medical management techniques are used for multiple, substantially similar services or products.

Over-the-Counter (OTC) and Emergency Contraception. Emergency contraception, including OTC products, are required to be covered without cost-sharing when prescribed by an attending provider regardless of whether they are prescribed for advanced provision. A health savings account, health flexible spending arrangement, or health reimbursement arrangement may reimburse an individual for

OTC contraceptives purchased without a prescription, but only to the extent that cost is not paid or reimbursed by other coverage.

Other Recommendations. Although not required, the FAQs encourage plans and issuers to cover OTC emergency contraceptive products with no cost-sharing when purchased without a prescription. The FAQs also recommend plans and issuers cover a 12-month supply of contraceptives (without cost-sharing) to increase the likelihood of continuing use and cost savings.

Enforcement. The FAQs emphasize that the Employee Benefits Security Administration will be the enforcement agency with respect to ERISA-covered plans and the Centers for Medicare & Medicaid Services will enforce the preventive services requirements with respect to health insurers and non-ERISA plans. Contact information is given for consumers to report violations of the preventive services requirements, both at the state and federal levels.

Preemption of State Laws. The FAQs note that where a state law conflicts with or prevents the application of a provision of the Public Health Service Act or ERISA Part 7, it will be preempted by the federal law. The Secretary of Health and Human Services also has the ability to enforce provisions of the Public Health Service Act, including enforcement of the requirement to cover contraceptives under federal law, where a state has a conflicting law.

Resources

A news release is available [here](#).

FAQs Part 54 can be found [here](#).



About Aon:

[Aon plc](#) (NYSE: AON) exists to shape decisions for the better — to protect and enrich the lives of people around the world. Our colleagues provide our clients in over 120 countries with advice and solutions that give them the clarity and confidence to make better decisions to protect and grow their business.

Follow Aon on [Twitter](#) and [LinkedIn](#). Stay up-to-date by visiting the [Aon Newsroom](#) and sign up for News Alerts [here](#).