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Conscience Regs Are Totally Inadequate

Michael Sean Winters | Aug. 2, 2011 Distinctly Catholic

The Department of Health and Human Services released it new rule regarding mandated coverage, with no co-pays, for women?s health insurance policies. As a part of that rule, HHS included conscience protections for religious institutions, or at least HHS claimed to be doing so. In fact, the new rule is totally inadequate and the best that can be said about it is that it is provisional. HHS explicitly invited comment for sixty days before the rule is finalized.

Here is the key language governing the exemption for religious organizations: ?a religious employer is one that: (1) has the inculcation of religious values as its purpose;
(2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Code.? The rule notes that this language tracks with the language in 28 states that allow such exemptions on religious grounds. It states: ?The definition set forth here is intended to reasonably balance the extension of any coverage of contraceptive services under the HRSA Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions.?

This is presented as an effort to ?reasonably balance? interests. But, there is no balance. There is a First Amendment guarantee that Congress make no law restricting the free exercise of religion. Last time I checked, there is no First Amendment right to an insurance policy that covers contraception.

Of course, the First Amendment also prevents religious establishment, and some women?s advocates see the new rule as an unacceptable interference by religion. Judy Waxman, vice president for health and reproductive rights at the National Women's Law Center, denied the very idea that the Affordable Care Act gave the administration the authority to include a religious exemption. ?We don?t think there?s any authority in the law to have a conscience clause,? Waxman said. ?It?s unfortunate that the administration is considering this proposal to allow some employers to deny this coverage to women.? Again, the authority to provide a religious exemption may, or may not, be in the ACA but it is certainly in the First Amendment. President Obama, who once taught Constitutional Law, surely knows this.

?Although this new rule gives the agency the discretion to authorize a ?religious? exemption, it is so narrow as to exclude most Catholic social service agencies and healthcare providers,? said Cardinal Daniel N. DiNardo, Archbishop of Galveston-Houston and chairman of the USCCB Committee on Pro-Life Activities in a press release from the USCCB [1].

The problem is with the conjunction ?and.? If that conjunction were switched to ?or? the new rule would be fine. The four items listed as defining a ?religious employer? include ?primarily employs person who share its religious tenets.? But, Catholic schools and hospitals employ lots of non-Catholics. The language also requires a religious employer be one that ?primarily serves persons who share its religious tenets? but, again, Catholic hospitals and schools take care of all people. Under this rule, we would have to kick out poor Protestant kids from our schools, and refuse to treat Jews in our hospitals. Is that what the administration intends? As Sister

Mary Ann Walsh said in a blog post at the USCCB media blog [2], ?HHS?s reg conveniently ignores the underlying principle of Catholic charitable actions: we help people because we are Catholic, not because our clients are. There?s no need to show your baptismal certificate in the hospital emergency room, the parish food pantry, or the diocesan drug rehab program. Or any place else the church offers help, either.?

Sister Carol Keehan, head of the Catholic Health Association, acknowledged that parts of the new rule are laudable. ?There are many aspects of this new rule that are vital in protecting life,? Keehan told me yesterday. ?Eliminating deductibles and co-pays for screening services is wonderful for protecting the health of all women but especially those who are poor.? But, Keehan also noted that the conscience exemptions need to be air-tight. ?We have a comment period in which to study and recommend any changes necessary to assure the conscience protection language is adequate,? Keehan said. ?Adequate conscience protection will be essential and we will study what has been released, dialogue and submit comments to assure we have adequate conscience protection.? She also praised the administration for removing abortifacients from the list of mandated coverage, although there is some debate about the effects of one of the FDA-approved drugs. The administration may not listen to me. They may not listen to the USCCB. But, they surely should listen to Sr. Carol without whom there would be no Affordable Care Act in the first place.

The White House should be aware that this is a really, really big issue for us Catholics. And, to be clear, the issue is not contraception. There is no effort to force our views on contraception on the whole society, only an insistence that society?s views not be foisted on us. Many Catholics disagree with the Church?s teaching on contraception to be sure, but if the government can dictate to us on this point, it can dictate to us on any point. And, then, the First Amendment becomes meaningless.

This is also a test case for the White House Faith-Based Office which serves as a liaison to the religious community. They have much improved their outreach to Catholics this year, as I noted in an article last month. But, there remains an outstanding question: How much juice do they have within the administration? The Faith-Based Office knows how important this is to Catholics. Can they persuade others within the White House and HHS to act on that knowledge? To be clear. Keeping the rule as is would give me great pause in casting my ballot for Barack Obama next year, not because he failed to do right by my Church, but because anyone who fails to grasp the constitutional issue here probably should not be entrusted with the post of Chief Magistrate under that same Constitution.

Sixty days is not a long time. But, it is long enough for those who consider ourselves liberals to call on the administration to be true to the best in the liberal tradition, the idea that consciences should not be violated by the government. And, it is long enough for those of us who are Catholics to voice our concern that we do not want to restrict our hospitals and our schools to ourselves, but wish to continue to offer them as a service to the nation and all its citizens. Let's hope the administration will listen.

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- Religious groups irked by contraception mandate [3]
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- Conscience Regs Are Totally Inadequate [5]
- Respecting, protecting differences of conscience strengthens health care [6]

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