

## Bishops reject Obama's compromise on contraception services

Joshua J. McElwee | Brian Roewe | Feb. 28, 2012



On Capitol Hill in Washington Feb. 16, Bishop William E. Lori of Bridgeport, Conn., the Rev. Matthew Harrison, Ben Mitchell, Rabbi Meir Soloveichik and Craig Mitchell are sworn in before testifying at a hearing on religious liberty, prompted by debate over a federal mandate on contraceptive coverage. (CNS/Bob Roller)

In a series of forceful public statements, speeches and congressional testimony, the U.S. bishops in mid-February rejected outright a compromise offered by President Barack Obama on a controversial federal mandate requiring coverage of contraceptive services in health care plans.

But other groups, including several prominent Catholic organizations, welcomed the president's accommodations and said they would like to continue to work with the administration on remaining concerns. Legal experts have questioned the bishops' push for rescinding the mandate as politically impractical and legally problematic.

The mandate, announced as final by the Department of Health and Human Services in late January, required health insurance programs paid for by employers to provide preventive medical services for women, including contraception, without copays or deductibles. The mandate exempted religious institutions if they primarily served or employed religious believers, an exemption that many said was too narrow.

After two weeks of fervor from religious groups -- including a wide coalition of Catholic leaders -- Obama announced a compromise on the measure Feb. 10.

Under the revised plan, Obama said that when an employer affiliated with a religious group declines to provide contraceptive coverage to employees, insurance companies will be required to offer the coverage free of charge to individuals who want it.

Obama said the new version of the mandate would ensure religious institutions will not have to pay for contraceptive services or refer employees to organizations that provide such services.

The Catholic Health Association, whose president is Daughter of Charity Sr. Carol Keehan, said in a press statement following the announcement that the group was "very pleased" that "an early resolution of this issue was accomplished."

The national Catholic social justice lobby NETWORK also applauded the accommodation and remains positive that continuing negotiations can address concerns groups still have.

Daughter of Charity Sr. Mary Ellen Lacy, a NETWORK lobbyist on health care, told *NCR* that Obama's willingness to listen to the initial concerns of religious groups shows his openness toward further discussions.

"He could have just pushed back as hard as he's being pushed," she said. "He's shown an openness; I think it's hard to criticize that.

"When you make a complaint to your boss, somebody you're in a relationship [with], or anybody, and they accommodate, amend their behavior or their stance based upon your input, that's pretty respectful, and I think you owe it to the other party to come to the table, too."

Following an initial statement Feb. 10 from the U.S. bishops' conference that said the organization was "studying" Obama's revision of the mandate, the conference issued a second statement later that day calling for the mandate's complete rescission.

A key staffer for the bishops' conference said Feb. 16 that the bishops "will not relent" and "have no choice" but to continue to oppose the mandate.

"Foundational principles, religious liberty are at stake," Anthony Picarello, the bishops' conference's general counsel and associate general secretary, said on a conference call with members of the Catholic media.

"And ... we're not going to stop until we get it done," he continued. "We're just not. The bishops have no choice. They just have no choice. They're not going to relent on this. They can't relent."

Several bishops in February directly addressed the revised mandate. Bishop William Lori, the chairman of the bishops' ad hoc committee for religious liberty, called for its rescission before the House of Representatives' Committee on Oversight and Government Reform Feb. 16. The same day, Cardinal Donald Wuerl of Washington wrote an article posted on the website of *The Washington Post*, saying, "What is at stake here is a question of human freedom."

On the conference call, Picarello said the revision is the "coercive power of the state being applied to force us to provide, sponsor, [and] pay for things that violate our most deeply held religious convictions."

Picarello cited three objections:

- "We are still forced by government to pay for these things directly";
- That there are insurers affiliated with religious groups who "may well have objections to writing policies that include this";
- Employers affiliated with religious groups who self-insure "would be the ones to pay the dollars directly out of their own funds."

It is unclear to what extent religious employers who self-insure would be exempt from the mandate. While Health and Human Services Secretary Kathleen Sebelius said Feb. 15 that self-insuring religious employers would be exempt, the official language of the revision as submitted to the Office of the Federal Register only lays out the general process by which the mandate will officially be written into law.

That language does not mention institutions that self-insure, and only states that the appropriate federal departments "will initiate a rulemaking" on the issue along the lines of Obama's Feb. 10 announcement.

One group disturbed by this lack of clarity is Catholic colleges that adopted self-insurance plans when state governments enacted mandates requiring coverage of contraceptive services, the head of the Association of Catholic Colleges and Universities told *NCR*.

Twenty-eight states, including Arizona, California, Connecticut and Illinois, have passed such laws.

"Some schools shifted from the way they did provide insurance to become self-insured," said Michael Galligan-Stierle, president of the association. "But now, they really can't avoid it because if they're the actual insurance provider, according to the [mandate] as it now reads, they would have to pay for the medications."

While Galligan-Stierle said he was aware that there had been some talk from members of the administration that they will address the issue regarding religious institutions that self-insure, he also said he was disappointed that the version of the mandate released following Obama's Feb. 10 announcement of a compromise "is exactly the same," except for the language specifying that certain federal departments will clarify the issue in the future.

In Lori's Feb. 16 testimony, which came in a hearing titled "Lines Crossed: Separation of Church and State. Has the Obama Administration Trampled on Freedom of Religion and Freedom of Conscience?", he compared the contraception mandate to a law that would require delis run by Orthodox Jews to serve pork.

Making a thinly veiled reference to the number of Catholics who do not follow the church's official teaching on birth control, which some studies put at 98 percent of Catholic women, Lori writes in his official testimony that in his analogy "the fact that some (or even most) Jews eat pork is simply irrelevant."

"The fact remains that some Jews do not -- and they do not out of their most deeply held religious convictions," he writes.

Continuing on with the analogy, Lori writes that the main question in that scenario is: "Can a customer come to a kosher deli, demand to be served a ham sandwich, and if refused, bring down severe government sanction on the deli?"

"In a nation committed to religious liberty and diversity, the answer, of course, is: No," he writes.

Picarello said several times on the conference call that the best chance for rescinding the mandate is the Respect for Rights of Conscience Act, a bill introduced in the House of Representatives by Congressman Jeff Fortenberry (R-Neb.) that the bishops have endorsed.

That bill, which has 209 cosponsors, would amend the health care reform law to allow employers to deny coverage of specific services in health plans, as long as they cite religious beliefs.

Asked whether that bill would set up a "slippery slope," allowing employers to deny services such as blood transfusions as well as contraception, Picarello said the bill would simply keep in place current practices, where employers work with insurers to specify what will be covered in their health care plans.

While the insurer may agree to an accommodation, Picarello said the proposed bill "doesn't insist that the insurer say yes to that accommodation."

Yet two experts in constitutional law expressed concerns that the bill would allow for too wide of an exemption, perhaps allowing employers to deny coverage of routine procedures such as blood transfusions and vaccines.

Robert Hockett of Cornell University Law School in Ithaca, N.Y., said the bill's "moral conviction" exemption was so broadly worded as to potentially allow "all sorts of nonsense," an issue that had been specifically

addressed by the U.S. Supreme Court in 1990.

Citing the court's decision that year in *Employment Division v. Smith* -- which held that although states have the power to accommodate otherwise illegal acts for religious purposes, they are not required to -- Hockett referenced Justice Antonin Scalia's majority opinion in that case, which warned of allowing "every citizen to become a law unto himself."

### **Workable limits**

Hockett said that if the reasoning of the Fortenberry bill were applied to other areas of jurisprudence in which exceptions from the rule of law might be claimed in the name of the rights of "conscience," federal laws might be forced to recognize people who form a "religion of one or two" that holds its members to be "religiously required to drive at 90 miles an hour, to rob banks, to pollute the environment, or engage in identity theft."

"The Fortenberry bill places no principled workable limit on the grounds of such claimed exemptions from the law," Hockett said. "One also wonders how the sponsors of this bill intend to reconcile it with the "anti-Shariah law" bills that so many of them seem likewise to favor.

"There's no way you can have the rule of law if you give this kind of plenary exemption power to everybody who claims a right to special treatment on the basis of conscience to do whatever they want," he said.

Another constitutional law professor said that by extending to all for-profit employers and any objection they may have to any procedure, the Fortenberry bill was "pressing the objection to the mandate the furthest that it can go," allowing the "range of objections to be pretty large."

Thomas Berg of the University of St. Thomas School of Law in Minneapolis suggested that with respect to most for-profit employers, the bishops may need to highlight in their objections to the mandate their concerns that some of the services covered could be considered abortifacients, or substances that induce abortion.

Berg said that while the U.S. legal system has a "less clear tradition" for allowing for-profit employers to object to contraception coverage, "we do have a tradition of allowing even for-profit employers and taxpayers to be protected from supporting abortion."

Examples of that tradition, he said, could be found in laws that prevent government funding of abortions and protect doctors and nurses who object to abortions on grounds of conscience or religious beliefs from having to perform them.

While Berg said he wanted to make clear that such a voicing of concerns "wouldn't solve all of the religious liberty issues" for religious organizations, including some that are for-profit, he did say that for most commercial employers it would allow the conversation to begin to take place in an area "where it does fit within our traditions to accommodate people very broadly because of the seriousness of the question."

News coverage about the mandate has also brought to light that some Catholic colleges and universities already provide contraceptive coverage in their employee health plans.

According to a Feb. 12 report by the National Women's Law Center, 26 Catholic colleges provide such coverage. While the report specifies that the plans differ between each institution, many of them cover oral contraceptives and even tubal ligations and vasectomies.

Galligan-Stierle said the number of Catholic colleges that cover such services may be due to the fact that Catholic teaching allows prescription of any medication that is medically necessary, even those that carry a side

effect that may be contraceptive in nature. ?But if the medication is not prescribed for that purpose, there is no issue,? Galligan-Stierle said.

Mentioning that he?s had several college presidents call him saying that they are looking ?very meticulously? at their health care plans, he said, ?The experience of the last month has all faith-based higher education institutions looking more closely at the health plans which they offer their employees and their students.?

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