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Tom Enneking, Editor

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Prescription Contraceptive Exclusion and the Pregnancy Discrimination Act

Dinsmore & Shohl, L.L.P.

http://www.dinslaw.com/pubs/legal_alert.asp?ID=1342

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Another federal court, this time in Nebraska, has joined the trio of federal courts following the Equal Employment Opportunity Commission's Decision holding that a health plan's exclusion of prescription contraceptive drug coverage violates Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.

Equal Employment Opportunity Commission Decision on Coverage of Contraception

On December 14, 2000, the Equal Employment Opportunity Commission (EEOC) announced its position on contraceptive prescriptions as follows:

- The Pregnancy Discrimination Act ("PDA") prohibits discrimination against a woman based on her ability to

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Junk Fax Prevention Act of 2005

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On Saturday, July 9, 2005, President Bush signed into law Senate Bill 714, the "Junk Fax Prevention Act of 2005," relating to unsolicited fax advertisements. The Bill amends the Telephone Consumer Protection Act (TCPA) to expressly permit unsolicited advertisements to be sent via facsimile to a person with whom the sender has an established business relationship. Senders can send unsolicited fax advertisements to persons with whom they have an established business relationship as long as:

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- become pregnant and/or to control pregnancy not just pregnancy itself
- The PDA requires employers to provide the same coverage for prescription contraceptives that they do for other drugs, devices, or services that are used to prevent the occurrence of medical conditions other than pregnancy
- The exclusion of prescription contraceptives constitutes sex discrimination, regardless of whether the contraceptives are used for birth control or other medical purposes

The complainants involved in the EEOC's decision were using prescription contraceptives for different purposes. One complainant was being prescribed oral contraceptives to alleviate the symptoms of dysmenorrhea and pre-menstrual syndrome and to prevent the development of ovarian cancer, as well as for birth control purposes. The other complainant was being prescribed oral contraceptives solely for birth control purposes. The employer argued that the exclusion for the prescription contraceptives was justified because the plan covered treatment only if there was something abnormal with the employee's physical or mental health. The EEOC disagreed with the employer stating that the employer misunderstood the very nature of pregnancy, a medical condition that poses risks to, and consequences for, a woman. In addition, the EEOC found that the health plan's coverage of vaccinations and other routine preventative care such as pap smears and mammograms demonstrated that the health plan did not restrict coverage to treatment of "abnormal conditions."

Erickson v. The Bartell Company

The U.S. District Court for the Western District of Washington was the first court to give credence to the EEOC's position that the exclusion of oral contraceptives from health

plans violates the PDA. The Bartell Company argued that its self-insured group health plan was not discriminatory on its face even though it treated contraceptives differently from other prescription drugs. Bartell argued that contraceptives are voluntary, preventative, do not treat or prevent an illness or disease, and that control of one's fertility is not "pregnancy, childbirth, or [a] related medical condition" as defined in the PDA. The court, however, gave deference to the EEOC's decision and held that the fact that the prescription contraceptives are preventive is irrelevant. The federal court in Washington further held that regardless of whether the term "prevention of pregnancy" falls within the phrase "pregnancy, childbirth, or related medical conditions," the PDA evidences an interpretation of Title VII which precludes the exclusion of prescription contraceptives. The Bartell plan covered almost all drugs and devices used by men, and according to the court, "Title VII requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover woman-only expenses."

Cooley v. DaimlerChrysler Corp.

The United States District Court for the Eastern District of Missouri followed *Erickson v. Bartell's* lead when it denied DaimlerChrysler's motion to dismiss holding that the plaintiffs, a class of female employees, set forth facts sufficient to support a claim of disparate treatment and disparate impact under Title VII, as amended by the PDA, where DaimlerChrysler's health plan excluded prescription contraceptives from coverage. Like the Bartell Company, DaimlerChrysler argued that prescription contraceptives are not protected under the PDA. DaimlerChrysler also argued that its policy was facially neutral because the plan denied prescription contraceptive coverage

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to all employees. The federal court in Missouri held to the contrary, however, ruling that "under Title VII, as amended by the PDA, the law recognizes that women have different sex-specific needs for which provisions must be made to the same extent as other health care requirements." The court also found persuasive the plaintiffs' argument that under the DaimlerChrysler plan, men were protected from all categories of risk while women were granted only partial protection. This was enough for the plaintiffs to state a claim for disparate treatment under Title VII. The court also found that even if the exclusion of prescription contraceptives is gender neutral, it has a disparate impact on women, and thus, the plaintiffs established a prima facie case of disparate impact under Title VII as well.

In re Union Pacific Railroad Employment Practices Litigation

In holding that Union Pacific's policy of excluding prescription contraceptives and related outpatient services violates Title VII, as amended by the PDA, the Nebraska court went one step further than the EEOC's decision, or the Erickson and Cooley decisions. Specifically, Judge Laurie Smith Camp opined that while she concurred with the EEOC and District Courts' reasoning and logic in deciding that the exclusion of prescription contraceptives violates Title VII and the PDA, she found the fact that prescription contraceptives are used only by women to be inconsequential to the resolution of the issue before the court.

Judge Camp found Union Pacific's arguments regarding the social and financial impact of including prescription contraceptive coverage unpersuasive holding that the social ramifications should be left to the legislature and that the increased costs of insurance cannot justify discrimination under Title VII or the PDA.

Like DaimlerChrysler in Cooley, Union Pacific also argued that its denial of contraceptive

coverage was on its face neutral and applied equally to men and women. To further its argument, Union Pacific argued that with the imminent arrival of male contraceptives, a gender-neutral exclusion of all prescription contraceptives would not be discriminatory. Judge Camp, however, did not buy this argument opining that a male contraceptive would have no beneficial impact on the health of men and even if a male contraceptive were available, the exclusion of coverage for prescription contraceptives for both sexes would still only affect the health of women.

Like in both Erickson and Cooley, the court did not find Union Pacific's arguments persuasive that prescription contraceptives are not related to pregnancy and childbirth. Union Pacific argued that contraception affects fertility which occurs in both sexes and that fertility is not related to pregnancy and childbirth under the PDA. In discrediting this argument, Judge Camp acknowledged that some forms of contraception affect fertility but that others prevent conception or the implantation of fertilized ova.

Finally, in a rather graphic hypothetical example, Judge Camp exemplified why the court disagreed with Union Pacific's argument that fertility is normal, and thus contraception is not medically necessary. Following the hypothetical described in gender-neutral terms, Judge Camp posed the question of whether Union Pacific's plans covered medicines or medical services to prevent employees from developing diseases or conditions that pose an equal or lesser threat to employees' health than does pregnancy. The court noted that the plans covered prescription medications for male-pattern baldness, male erectile dysfunction, lowering blood pressure, reducing cholesterol, replenishing hormones, reducing nicotine dependence, preventing allergic reactions, and immunizations against flu, tetanus, rubella, and childhood diseases.

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The Law Library Announces the Return of Lexis.com and Training Sessions

Beginning in September, the Law Library began offering access to Lexis.com. Lexis is a tool that allows you to research state and federal case law, codes and statutes, and other court documents. It also offers Shepard's, which permits you to cite check and ensure you are working with "good law."

On October 20, 2005, the Law Library will be hosting the following Lexis training sessions:

Lexis I

This class provides a basic working knowledge of the LexisNexis services. Skills included are how to develop a search request, find cases and other documents by topic and find cases by cite or by party names. In addition, you learn to use SHEPARD'S® Citation Service.

Lexis II

Building on the techniques learned in the introductory class, this session emphasizes time efficient and cost-effective searching tips. Skills include how to bypass menu screens using short cuts, narrow searching with segments, focus on a specific word(s) within an original search and refine searches with advanced connectors.

To reserve your spot, call Madonna at 946-5301 or register online at: <http://www.hamilton-co.org/cinlawlib/cle/signup.html>.

New Titles at the Law Library

- Mark Landes. *Police Liability in Ohio*. Eau Claire, WI: Lorman Educational Services, 2005.
- Christian A. Fisanick. *Vehicle Law Search Deskbook*. St. Paul, MN: Thomson/West, 2005.
- Thomas J. Sherman. *Ohio Residential Real Estate Manual*. Newark, NJ: LexisNexis, 2005.
- Jennifer J. Rose. *How to Capture and Keep Clients: Marketing Strategies for Lawyers*. Chicago, IL: General Practice, Solo and Small Firm Section, American Bar Association, 2005.
- Stephen A. Fishman. *Working with Independent Contractors*. Berkeley, CA: Nolo, 2005.



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After describing in detail the perceived flaws in Union Pacific's arguments, the court held that the exclusion of prescription contraceptives violated Title VII, as amended by the PDA, because it treated medical care needed to prevent pregnancy less favorably than it treated medical care needed to prevent other medical conditions that are no greater threat to health than is pregnancy.

Do these rulings affect my health plan and how do I find out more?

It is clearly the EEOC's position that health plans may not exclude prescription contraceptives from coverage. However, for now, exclusion of prescription contraceptives violates Title VII and the PDA solely within the jurisdictions of the U.S. District Courts for the Western District of Washington, the Eastern District of Missouri, and the District of Nevada. Of important note, however, is that Judge Camp's ruling that contraception in and of itself is a "medical necessity" to prevent pregnancy may have set the stage for other courts to determine that plans may not exclude prescription contraceptives for use solely to prevent pregnancy, even if they have adopted a test of medical necessity.

If your company and/or subsidiaries have operations and employees within these jurisdictions that participate in your employer-sponsored health plan, these rulings may mandate that prescription contraceptives be included in your health plan coverage for such employees. For more information about your health plans and the court decisions regarding the exclusion of prescription contraceptive drug coverage, please contact any member of Dinsmore & Shohl's Compensation and Benefits Group.

NOTE: This article is intended to inform and should not be construed as legal advice.

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(1) the number was acquired in a manner authorized by the recipient; and

(2) the facsimile provides notice of the opportunity to opt-out of receiving future unsolicited advertisements. The Act became effective immediately.

Established Business Relationship Exception

The primary purpose of the new law is to permit unsolicited fax advertisements to be sent in certain instances. The move was in reaction to a recent change in position by the Federal Communications Commission (FCC), interpreting the former statute to prohibit reliance on an established business relationship to send a fax advertisement unless the recipient expressly consented in writing to the receipt of faxed advertisements from the sender. The law makes clear that express consent is not required if there is an established business relationship between the recipient and sender as long as certain other conditions are met.

The law adopts the definition of "established business relationship" set forth in recent regulations under the TCPA which provides there is an established business relationship if the relationship is based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the 18 months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller within the three months immediately preceding the date of a telemarketing call.

The law also requires that the sender has obtained the fax number of the recipient by some sort of voluntary communication or through a directory, advertisement, or website to which the recipient voluntarily agreed to make available its fax number for public distribution. This requirement is intended to ensure that faxes are directed towards the number which a business wants to receive faxes from the general public and not at a private fax machine used for other purposes.

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Requirement of Opt Out Notice

To take advantage of the new exemption, the unsolicited fax advertisement is required to contain a notice that states that the recipient may make a request to the sender not to send any future unsolicited fax advertisements. The notice is required to be "clear and conspicuous" and appear on the first page of the unsolicited advertisement. In addition, the notice is required to provide:

- (1) a domestic contact telephone and fax machine number for the recipient to transmit such a request to a sender; and
- (2) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender.

An example of an appropriate notice is set forth below in bold. These telephone and fax numbers must permit a recipient to make such a request at any time on any day of the week. Additional direction on the notice requirement is likely to come from the FCC soon. It appears likely that an exemption will be provided from some of the notice requirements for small business. What sort of exemptions will be provided and to whom the exemption will apply is unclear.

Although the notice is only required to be included on unsolicited fax advertisements sent based on the established business relationship exception, some businesses may find it advisable to include the notice on all faxed advertisements. Inclusion of the notice on all fax advertisements may provide an additional defense to a claim based on a violation of the TCPA and promote consistency among employee practices. Finally, since businesses are now required by law to honor "do-not-fax" requests, a special effort should be made to make employees who might receive a do not fax request in the manner provided in the notice aware of the method of ensuring future fax advertisements are not sent to a person who has made a do not fax request.

Penalties for Violation of TCPA

The new law should serve businesses as a reminder of the legal restrictions on unsolicited fax advertisements. The FCC has taken numerous enforcement actions, including citations and fines against companies for violations and suspected violations of the TCPA's prohibition against unsolicited faxes. Most notable was the FCC's proposal to fine Fax.com, Inc. \$5,379,000 for violating the prohibition. The Act also provides a private right of action through which a consumer can

recover the actual monetary loss that resulted from the TCPA violation or receive up to \$500 in damages for each violation, whichever is greater. The court, in its discretion, can triple the damages for each violation if it finds that the defendant willingly or knowingly committed the violation. As a result, each unsolicited fax sent willingly could result in a minimum judgment of \$1,500. Private litigants can bring class actions under the TCPA and collect \$1,500 for each facsimile sent in a mass fax. Judgments in such class actions have exceeded \$11 million. Some states may provide additional penalties including criminal penalties.

OPTING OUT FROM RECEIVING FUTURE UNSOLICITED FAX SOLICITATIONS:

We at ABC COMPANY believe fax advertisements provide a valuable resource for our business partners. We recognize, however, that for a variety of reasons some business partners prefer not to receive fax advertisements. If you no longer want to receive fax advertisements like this one, you may make such a request by contacting us via fax at (XXX) XXX-XXXX or via telephone at 1-800-XXX-XXXX and identifying the fax number or numbers at which you no longer wish to receive unsolicited fax advertisements. It is a violation of federal law to continue to send you unsolicited fax advertisements after receiving such a request and we will respect your request in the quickest manner we reasonably can. If at any time after making such a request you would like to begin receiving such advertisements again, you can do so by contacting us at any of the above listed numbers.

NOTE: This article is intended to inform and should not be construed as legal advice. It is anticipated that the Federal Trade Commission will provide an interpretation of the new statute or regulations implementing it in the near future.

Law Library Introduces News Service via Email

The Law Library subscribes to a number of newsletters, electronic journals and other titles that provide legal news. We monitor these resources and select certain articles as being of specific interest to our members.

We select articles on number of topics, including: Labor; Pension and Benefits; Intellectual Property; Estates and Trusts; and Workers' Compensation.

If you would like to receive emails on substantive legal topics, please visit: <http://www.hamilton-co.org/cinlawlib/interact/list.html> to activate your subscriptions.

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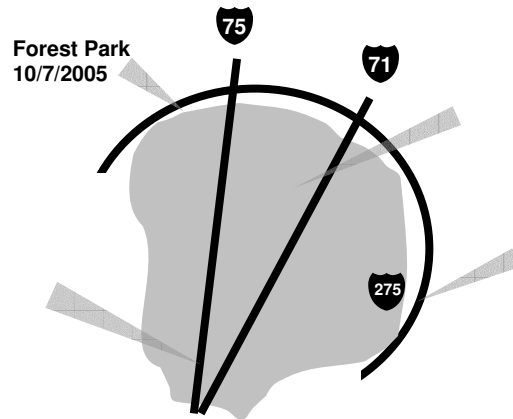
Don't miss out on your last chance to enroll in the **High Octane Internet Legal Research CLE**, a 3.5 hour seminar, given by David Whelan, our Law Librarian. The CLE will walk you through Internet search techniques, free primary law resources and services, and other practice-oriented sites and databases.

The seminar is \$35 for members and \$90 for non-members. This location is approved by the Ohio Supreme Court Commission on CLE for 3.5 general credit hours.

To reserve your spot, call Madonna @ 946-5301 or register online at:
<http://www.hamilton-co.org/cinlawlib/cle/signup.html>.

Mark your calendar:

- Fri., **October 7, 2005**, 7:45 – noon, Lee's Inn & Suites, **Forest Park**.



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ADDRESS CORRECTION REQUESTED

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