

COMMENT

PRESCRIPTION CONTRACEPTIVE COVERAGE: PROSPECTIVE BUSINESS OPPORTUNITIES FOR EMPLOYERS IN THE AFTERMATH OF *ERICKSON V. BARTELL*^{*}

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I. INTRODUCTION

The life altering experience of bearing and raising a child affects every aspect of a woman's life and is one of the most important decisions she encounters. Consequently, contraceptives were developed to provide women with the ability to control this event. Contraceptives furnish women with the prerogative to avoid pregnancy for an extended period.

Commentators realized the importance of the "relationship between career and motherhood" as women entered male dominated professions.¹ This ever-important relationship between motherhood and career will be expanded in this article to include the lack of motherhood. Strategic planning allows a woman to arm herself with two choices: 1) to delay motherhood until a time when she believes the career/motherhood relationship would be less encumbering, or 2) to bypass motherhood altogether, choosing not to encounter the difficulties of the career/motherhood relationship. Contraception enables women to select one of these options, as it is a "means to prevent, and to control the timing of, the medical condition of pregnancy."²

Title VII of the Civil Rights Act of 1964 and an amendment, the Pregnancy Discrimination Act, have focused employment litigation on the removal of obstacles to meet the goal of equal employment opportunity.³ However, the social ramifications of pregnancy, such as the perception that it is a female responsibility, impedes equal employment opportunity.⁴

1. Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2155 (1994).

2. Equal Employment Opportunity Commission, Enforcement Guidance: Commission Decision on Coverage of Contraception 1 (2000), at 2000 WL 33407187.

3. Nancy E. Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699, 699 (1986).

4. *Id.*

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Consequently, employers should take the opportunity to consider, from a business standpoint, the positive impact prescription contraceptive coverage would have on their employees.

This comment will discuss the factors a federal district court considered in determining a woman with insurance coverage has a claim of discrimination under Title VII, as amended by the Pregnancy Discrimination Act, against employers who choose to omit prescription contraceptives from their employees' insurance plans. From the employer's perspective, multiple economic benefits exist for prescription contraceptives. The inclusion of prescription drug coverage in an employee's benefit health plan reduces costs incurred for unintended pregnancies, costs for medical care due to illness, and business expenses due to employees taking maternity leave.⁵ Additionally, prescription contraceptive coverage would likely provide societal benefits,⁶ fewer unintended pregnancies, fewer abortions, and a decreased health care cost on society.⁷ Furthermore, these benefits may assist gender equality as well as increase the number of individuals in the workplace.⁸ This comment will illustrate indirect effects on the employer, and the direct benefits on the employees and society at large.⁹

II. *ERICKSON V. BARTELL DRUG COMPANY*

In 2001, a Washington federal district court held an employer's prescription drug plan violated Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, for excluding coverage of prescription contraceptives¹⁰ for its female employees.¹¹

5. See Part IV.

6. See Part IV.B.

7. See Part IV.B.1.

8. See Part IV.B.4.

9. See Part IV.A.

10. The five types of prescription contraceptives approved by the Food and Drug Administration ("FDA") were at issue in this case. *Erickson v. Bartell Complaint* at ¶ 23, available at <http://www.covermypills.org/facts/AmendedComplaint.htm> (n.d.). The five types of reversible prescription contraceptives approved by the Food and Drug Administration include the following: oral contraception, Norplant, Depo-Provera, intra-uterine device, and the diaphragm. *Id.*

11. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1276–77 (W.D. Wash. 2001); see also Susan Richter & James Hattori, *Judge Says Health Plan Must Cover Birth Control*, June 13, 2001, at <http://www9.cnn.com/2001/LAW/06/13/contraceptive.lawsuit/index.html> (explaining that *Erickson* "was the first federal challenge against a [sic] employer over the issue of birth control").

A. *Background*

Jennifer Erickson, a pharmacist for Bartell Drug Company,¹² was dismayed at the fact she had to personally purchase her prescription contraceptives and witnessed the frustration of others similarly placed.¹³ Erickson obtained her own birth control pills¹⁴ at Planned Parenthood¹⁵ and they offered assistance to combat this frustration.¹⁶ With Planned Parenthood's support, Erickson filed a complaint against her employer in July of 2000.¹⁷ The basis of the complaint was sexual discrimination as a result of Bartell's exclusion of prescription contraceptives.¹⁸ By the beginning of 2001, Erickson was the named plaintiff of a certified class action suit¹⁹ against employer Bartell, on behalf of all female Bartell employees who used prescriptive contraceptives after December 29, 1997, while enrolled in Bartell's Prescription Benefit Plan for non-union employees.²⁰

12. Bartell Drug Company was founded in 1890 and is described as the nation's oldest continuously held, family-owned drugstore chain. Associated Press, *Judge: Insurance Plan Must Cover Contraceptives*, HoustonChronicle.com, June 12, 2001, at <http://www.chron.com/cs/CDA/printstory.htm?nation/939142> (last visited Oct. 13, 2002).

13. Jennifer Erickson, *You Shouldn't Shell Out for the Pill*, COSMOPOLITAN, Nov. 2001, at 64. A study from the Women's Research & Education Institute concluded women pay 68% more in out-of-pocket health-care expenses than men do. Alyssa Hersh, *Is There a Gender Bias in Coverage of Contraceptives?*, DrugTopics.com (July 3, 2000), at http://www.drugtopics.com/be_core/d/index.jsp.

14. Oral contraceptives, commonly known as birth control pills, are pills with synthetic female hormones that are taken on a monthly schedule. GREG JUHN, UNDERSTANDING THE PILL: A CONSUMER'S GUIDE TO ORAL CONTRACEPTIVES 25, 31 (Pharmaceutical Products Press 1994). The synthetic hormones suppress a woman's natural hormones that regulate the onset of ovulation and menstruation, thereby tricking the body into believing that it is pregnant. *Id.* at 11, 14–15. As a result of this faux pregnancy, ovulation and menstruation cycles are blocked. *Id.* at 11.

15. Planned Parenthood Federation of America, Inc., is a volunteer, non-profit reproductive health care organization that operates 875 clinics throughout the United States. The organization provides complimentary services related to reproduction methods of contraception, fertility control and parenthood. See Planned Parenthood Federation of America, Inc., *Planned Parenthood Services, 2000*, at <http://www.Plannedparenthood.org/library/BIRTHCONTROL/Services.html> (last visited Nov. 5, 2002).

16. Erickson, *supra* note 13, at 64.

17. Erickson, 141 F. Supp. 2d at 1266; see also Julie L. Hatcher, Erickson v. Bartell Drug Co.: *Prescription for Equality in Insurance Coverage*, 25 AM. J. TRIAL ADVOC. 213, 213 (2001).

18. Erickson, 141 F. Supp. 2d at 1268.

19. *Id.*

20. Erickson, 141 F. Supp. 2d at 1268 n.2. Prior to the Erickson lawsuit, statistics indicate that only thirty-nine percent of HMO plans included coverage for reversible contraception. Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, THE GUTTMACHER REPORT ON PUBLIC POLICY, August 1998, available at <http://www.agi-usa.org/pubs/journals/gr010405.html>. Newer types of managed care plan, such as PPOs and Indemnity plans, provide even less coverage. *Id.*

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Plaintiff-employees asserted a claim for disparate treatment and a claim for disparate impact against Defendant-employer.²¹ Both parties moved for summary judgment.²² The federal court had to decide whether the “selective exclusion of prescription contraceptives from defendant’s generally comprehensive prescription plan constitutes discrimination on the basis of sex,” an issue of first impression for the court.²³ Furthermore, the *Erickson* case represented the first involving birth-control coverage.²⁴

B. *Title VII Implications*

An employer violates Title VII when he “fail[s] or refuse[s] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁵ In 1978, Congress amended Title VII with the Pregnancy Discrimination Act to clarify the meaning of discrimination based on sex.²⁶

1. Pregnancy Discrimination Act

The Pregnancy Discrimination Act (“PDA”) governs discrimination resulting from “pregnancy, childbirth, or related medical conditions”²⁷ and categorizes it as sexual discrimination.²⁸

21. *Erickson*, 141 F. Supp. 2d at 1268 n.2. The court granted Plaintiffs’ Motion for Summary Judgment on the disparate treatment claim, thus never having to consider the plaintiffs’ disparate impact claim. *Id.* at 1277.

22. *Id.* at 1268.

23. *Id.*

24. Hatcher, *supra* note 17, at 213.

25. 42 U.S.C. § 2000e-2(a)(1)(2000) (emphasis added). Prescription benefit plans, characterized as a fringe benefit, are part of an employee’s “compensation, terms, conditions, or privileges of employment.” *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

26. *Erickson*, 141 F. Supp. 2d, at 1269.

27. 42 U.S.C. § 2000e(k). PDA provides the following:

The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, That

Thus, the status of an employee as pregnant or potentially becoming pregnant triggers the statutory prohibition.²⁹ As a result, the PDA prevents the consideration of pregnancy as a criterion when distributing business tasks and rewards.³⁰ The rationale underlying the PDA is “[o]nly women can become pregnant; stereotypes based on pregnancy and related medical conditions have been a barrier to women’s economic advancement; and classifications based on pregnancy and related medical conditions are never gender-neutral.”³¹

Although the *Erickson* court analyzed Title VII’s legislative history, it concluded the history could not aid courts desiring to both interpret the laws and make consistent decisions.³² On the other hand, the legislative history of PDA sheds extensive light on the intentions of Congress.³³ Congress acknowledged the stereo-typical role of the woman who works only until she bears children.³⁴ Additionally, Congress recognized the fact that in today’s society, many women work because of economic necessity.³⁵ They realized, as Representative Tsongas expressed,

nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

42 U.S.C. § 2000e(k) (1994).

28. *Erickson*, 141 F. Supp. 2d. at 1269, 1274 (explaining the PDA was a legislative response to a case where pregnant employees were discriminated against. For information on the interrelation of the PDA and the American with Disabilities Act (“ADA”), see Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 27 (1995) (concluding “[i]f a pregnant woman is an ‘individual with a disability,’ then she is entitled to reasonable accommodations under the ADA”).

29. Issacharoff & Rosenblum, *supra* note 1, at 2157.

30. *Id.*

31. Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 380 (1998). Title VII specifically exempts from its reach “religious corporation[s], association[s], educational institution[s], or societ[ies].” 42 U.S.C. § 2000e-1(a) (1994). However, the Ninth Circuit held the religious-based exemptions from Title VII’s prohibition against discrimination does not apply to all possibly discriminatory employment actions. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366–67 (9th Cir. 1986) (holding that the bona fide occupational qualification (“BFOQ”) exception uses the terms “hire and employ” and “discharge” and “does not apply to the discriminatory provision of benefits”).

32. *Erickson*, 141 F. Supp. 2d at 1268–71. The *Erickson* court stated “[t]he truth of the matter is, Congress’ intent regarding the evolution of law is rarely apparent from fragments of legislative history.” *Id.* at 1269.

33. See generally 124 CONG. REC. H21,435 (daily ed. July 18, 1978) (statement of Rep. Hawkins).

34. See 123 CONG. REC. S7538, 7539 (Mar. 15, 1977) (statement of Sen. Williams) (mentioning “the outdated notion that women are . . . temporary workers . . . waiting to return home to raise children full-time”).

35. See 123 CONG. REC. S8,133, 8,145 (daily ed. Mar. 18, 1977) (statement of Sen. Bayh) (setting forth “statistics on working women”). In fact, many women’s earnings today supply the household as the only or a substantial portion of the income used to provide the essentials. 124 CONG. REC. H21,434, 21,436 (daily ed. July 18, 1978)

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women who work should “not be penalized for having a family” due to the “unrealistic and unfair system that forces women to choose between family and career”³⁶

Thus, after examination of Title VII and the PDA, as well as their corresponding legislative histories, the *Erickson* court concluded the goal of Title VII was “to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce.”³⁷

Congress understood how expansive the PDA’s wording would have to be to avert discriminatory practices in the workplace against women on account of their ability to bear children.³⁸ Thus, the definition of sex discrimination was created to include the *entire* childbearing process.³⁹ In fact, the “House Report on the [Pregnancy Discrimination Act] stated, ‘[I]n using the broad phrase ‘women affected by pregnancy, childbirth and related medical conditions,’ the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process.’”⁴⁰ Additionally, PDA provided women protection before, during, and after their pregnancies.⁴¹

According to the *Erickson* court, the PDA was not intended to “alter the contours of Title VII” but instead to correct a Title VII interpretation the United States Supreme Court made in *General Electric Company v. Gilbert*.⁴² The *Erickson* court used the *Gilbert* case and Congress’ subsequent legislative action to

(statement of Rep. Sarasin).

36. 124 CONG. REC. H21,442 (daily ed. July 18, 1978) (statement of Rep. Tsongas).

37. *Erickson*, 141 F. Supp. 2d at 1269.

38. See 124 CONG. REC. H38,374 (daily ed. Oct. 14, 1978) (statement of Rep. Jeffords) (expressing “[i]t is a pro-life, pro-family bill designed to take discriminatory pressure off the millions of families in this country who want to have children, but need two incomes to survive”); see also 123 CONG. REC. S29,385 (daily ed. Sept. 15, 1977) (statement of Sen. Williams) (explaining the amendment to Title VII clarifies “prohibitions against sex discrimination in the act include discrimination in employment on the basis of pregnancy . . .”).

39. See H.R. REP. NO. 95-948, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753 (explaining the legislation protects the whole child-bearing process as a result of the broader phrasing).

40. H.R. REP. NO. 95-948, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4753.

41. See 124 Cong. Rec. H38,574 (daily ed. Oct. 1978) (statement of Rep. Sarasin) (stating “[t]his legislation gives [women] the right to choose both, to be financially and legally protected before, during, and after her pregnancy”); see also Equal Employment Opportunity Commission, Enforcement Guidance: Commission Decision on Coverage of Contraception 1 (2000), *at* 2000 WL 33407187.

42. *Erickson*, 141 F. Supp. 2d at 1269 (referring to *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976)). In the process of enacting the Act, Senator Bayh declared the PDA “was made necessary by an unfortunate decision rendered by the Supreme Court in the case of *Gilbert v. General Electric*.” Issacharoff & Rosenblum, *supra* note 1, at 2180.

guide its decision because of the similarity in issues regarding the exclusion of coverage for female reproductive matters.⁴³ However, the *Gilbert* court did not interpret the definition of sex discrimination to include the entire childbearing process, thereby leaving a “gaping hole” in Title VII’s protection of working women.⁴⁴

2. *General Electric Company v. Gilbert*

The *Gilbert* court held the “exclusion of pregnancy and related conditions from otherwise comprehensive disability insurance plans did not constitute sex discrimination in violation of Title VII.”⁴⁵ This holding was based on the fact that “pregnancy is not a condition that affects all women, [thus] the exclusion of pregnancy from the insurance plan did not constitute gender discrimination.”⁴⁶

The *Gilbert* court’s decision resulted from “tracking its analysis in *Geduldig v. Aiello*.”⁴⁷ The Supreme Court in *Geduldig* held a “state disability statute excluding pregnancy as a covered condition did not violate the equal protection clause.”⁴⁸ This conclusion was derived from the Court’s determination that “pregnancy classifications are not per se sex-based classifications.”⁴⁹ Furthermore, the Court stated pregnancy classifications “merely differentiate between those who are pregnant (women) and those who are not pregnant (men and women).”⁵⁰ This view regarding pregnancy classifications demonstrates the similar foundations used in *Gilbert* and *Geduldig*.

43. *Erickson*, 141 F. Supp. 2d at 1270. In *General Electric Company*, the respondents, employees of General Electric, presented a “claim to the company for disability benefits under the Plan to cover the period while absent from work as a result of [their] pregnancy.” *Gilbert*, 429 U.S. at 128–29. Their claims were denied because “the Plan did not provide disability-benefit payments for any absence due to pregnancy.” *Id.*

44. 123 CONG. REC. S29,385 (daily ed. Sept. 15, 1977) (statement of Sen. Williams).

45. Issacharoff & Rosenblum, *supra* note 1, at 2180; *see also Gilbert*, 429 U.S. at 145–46.

46. Dowd, *supra* note 3, at 737; *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974). In its determination that pregnancy does not affect all women, the *Gilbert* court easily concluded “an otherwise comprehensive short-term disability policy that excluded pregnancy-related disabilities from coverage did not discriminate on the basis of sex”. *Erickson*, 141 F. Supp. 2d at 1269–70.

47. Dowd, *supra* note 3, at 739 (referring to *Geduldig v. Aiello*, 417 U.S. 484 (1974)); *see also Gilbert*, 429 U.S. at 132–36.

48. Dowd, *supra*, note 3, at 739 (discussing *Geduldig*).

49. *Id.*

50. *Id.*; *see Geduldig*, 417 U.S. at 497 n.20. This reasoning led the Supreme Court to hold that, without proof of an “invidious discrimination,” legislation may be passed constitutionally based on the classification of pregnancy. *Geduldig*, 417 U.S. at 497 n.20.

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However, the *Erickson* court noted the Congressional record reflected that Congress deemed the *Gilbert* dissents' interpretation of Title VII⁵¹ as the precise interpretation and restated Justice Stevens' distinguishing argument "it is the capacity to become pregnant which primarily distinguished the female from the male."⁵² The dissenting opinion maintained because pregnancy is a condition only women can experience, its exception from disability coverage should activate the safeguards of Title VII.⁵³ Referencing the *Gilbert* decision, the *Erickson* court observed with significance the fact "Congress embraced the dissent's broader interpretation of Title VII which not only recognized that there are sex-based differences between men and women employees, but also required employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."⁵⁴

As a result of Congress's attempt to correct the erroneous interpretation of Title VII in *Gilbert*, the PDA's language is analogous to regarding discrimination against pregnant women as discrimination on the basis of sex.⁵⁵ Consequently, the amendment does not explicitly refer to prescription contraceptives.⁵⁶ However, the language of this amendment has been subject to debate.⁵⁷

The Supreme Court has expanded Title VII to protect women who are not yet pregnant.⁵⁸ Prior to the *Erickson* court decision, it was held that a policy explicitly classifying employees by their potential for pregnancy must be regarded under the PDA in the "same light as explicit sex discrimination."⁵⁹ Therefore, in *International Union, UAW v. Johnson Controls, Inc.*, the Supreme Court found that the "PDA's prohibition on pregnancy discrimination applies both to policies that affect pregnant women and those that affect women's abilities to become pregnant."⁶⁰

51. *Erickson*, 141 F. Supp. 2d at 1270 (dissenting justices included Justice Brennan, Justice Marshall, and Justice Stevens.); see also H.R. REP. NO. 95-948, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4750.

52. *Gilbert*, 429 U.S. at 146-62.

53. *Gilbert*, 429 U.S. at 161-62; see also Issacharoff & Rosenblum, *supra* note 1, at 2180.

54. *Erickson*, 141 F. Supp. 2d at 1270.

55. *Id.* at 1269.

56. *Id.* at 1270.

57. Law, *supra* note 31, at 378-83.

58. Law, *supra* note 31, at 378.

59. *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 187-88 (1991).

60. Law, *supra* note 31, at 378-79.

C. Recent Interpretations of PDA and the Prescription Coverage Movement

In addition to the June 2000 interpretation by the Erickson court, the Equal Employment Opportunity Commission ("EEOC") also interpreted the PDA.⁶¹ Moreover, Congress and various state legislatures have maintained the momentum for prescription contraceptive coverage by requiring employers to cover prescription contraceptives.⁶²

In December of 2000, the EEOC ruled that an employer's "exclusion of prescription contraceptives violates Title VII, as amended by the Pregnancy Discrimination Act, whether the contraceptives are used for birth control or for other medical purposes."⁶³ The EEOC declared the two employers' failure to cover prescription contraceptives in their health plans constituted a violation of the pregnancy discrimination law.⁶⁴

The EEOC recognized that Congress had passed an abortion exemption in the PDA and used this fact to conclude that because Congress did not exempt contraceptives, Congress' did not intend to restrict the PDA relative to contraception.⁶⁵ In its interpretation, the EEOC felt the PDA protected against discrimination of women because of their potential to become pregnant in addition to actually being pregnant.⁶⁶

The EEOC recognized contraception allows women to control the event of impregnation.⁶⁷ This acknowledgement provided the basis for the EEOC's interpretation that the PDA's prohibition on discrimination "necessarily includes a prohibition on discrimination related to a woman's use of contraceptives."⁶⁸ Guidelines were provided in its "Decision on Coverage of Contraception" for the employer, so as to avoid further violations of Title VII.⁶⁹

61. Equal Employment Opportunity Commission, Enforcement Guidance: Commission Decision on Coverage of Contraception 1, 2 (2000), at 2000 WL 33407187.

62. Hatcher, *supra* note 17, at 215; see also Susan A. Cohen, *Federal Law Urged As Culmination of Contraceptive Insurance Coverage Campaign*, 4 THE GUTTMACHER REPORT (2001), at <http://www.guttmacher.org/pubs/journals/gr040510.pdf>.

63. Equal Employment Opportunity Commission, Enforcement Guidance: Commission Decision on Coverage of Contraception 1 (2000), available at 2000 WL 33407187.

64. Wendy Netter, *Insurance: Exclusion of Contraception Found Discriminatory by EEOC*, 29 J.L. MED. & ETHICS 104, 104 (2002).

65. Netter, *supra* note 64, at 105; see *supra* note 27 and accompanying text.

66. Netter, *supra* note 64, at 105.

67. Equal Employment Opportunity Commission, Enforcement Guidance: Commission Decision on Coverage of Contraception 1 (2000), available at 2000 WL 33407187.

68. *Id.*

69. See *id.* The guidelines for the Respondents in the decision are as follows:

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The EEOC ruling on Title VII may be perceived as a step in the direction of requiring employers to cover prescription contraceptives for their female employees.⁷⁰ However, the caveat to this advancement is restrained by the fact Title VII does not apply to organizations with less than fifteen employees.⁷¹ Thus, many states have statutes mandating contraceptive coverage.⁷² As of January 2003, twenty states have laws requiring contraceptive coverage,⁷³ and thirteen states have contraceptive equity bills pending.⁷⁴ These state contraceptive laws require “that insurance plans provide the same level of coverage for all FDA-approved prescription contraceptives and related outpatient

Respondents must cover the expenses of prescription contraceptives to the same extent, and on the same terms, that they cover the expenses of the types of drugs, devices, and preventative care identified [in the EEOC decision]. Respondents must also offer the same coverage for contraception-related outpatient services as are offered for other outpatient services. Where a woman visits her doctor to obtain a prescription for contraceptives, she must be afforded the same coverage that would apply if she, or any other employee, had consulted a doctor for other preventative or health maintenance services. Where, on the other hand, Respondents limit coverage of comparable drugs or services (e.g. by imposing maximum payable benefits), those limits may be applied to contraception as well.

Respondents' coverage must extend to the full range of prescription contraceptive choices. Because the health needs of women may change—and because different women may need different prescription contraceptives at different times in their lives—Respondents must cover each of the available options for prescription contraception. Moreover, Respondents must include such coverage in each of the health plan choices that it offers to its employees.

Id.

70. Because the EEOC determined that “the selective exclusion of health coverage for prescription contraceptives by this employee health plan violates the law since it covers a number of comparable prescription drugs and other services”, this EEOC ruling may be seen as a step towards requiring employers to cover prescription contraceptives for their female employees. *EEOC Issues Decisions on Two Charges Challenging the Denial of Health Insurance Coverage for Prescription Contraceptives*, at <http://www.eeoc.gov/gov/press/12-13-00.html> (December 13, 2000).

71. EEOC COMPLIANCE MANUAL § 605 (Jan. 1998); Cohen, *supra* note 62, at 11 (noting less than one fifth of United States employers have more than 15 employees and are subject to Title VII).

72. Through conscience clauses, nine states exempt religious organizations from the requirement of covering contraceptives if doing so would conflict with the organization's religious beliefs. Hatcher, *supra* note 17, at 216; *see, e.g.*, CAL. HEALTH & SAFETY CODE § 1367.25 (West Supp. 2002); VA. CODE ANN § 38.2-3407.5:1 (Michie 2002).

73. *See Cover My Pills: Fair Access to Contraception*, at http://www.covermypills.com/facts/states_law.asp (listing the states with laws mandating prescription coverage) (last visited Jan. 24, 2003); *see also* Hatcher, *supra* note 17, at 215 n.2.

74. For a list of states with mandatory prescription bills pending, *see Cover My Pills: Fair Access to Contraception*, at http://www.covermypills.com/facts/states_bill.asp (last visited Jan. 24, 2003) (listing states with mandatory contraceptive equity bills pending).

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services as is provided for other prescription drugs and outpatient preventive care.”⁷⁵

A federal version of the state laws that would apply to all health insurance plans nationwide is pending in Congress.⁷⁶ Titled the Equity in Prescription Insurance and Contraceptive Coverage Act (“EPICC”), this federal statute would not allow insurance companies to deny coverage for prescription contraceptives if the health plan covers other prescriptions.⁷⁷ A present need exists for federal legislation because states differ as to the requirements for coverage of women’s contraceptives.⁷⁸ Additionally, EPICC is necessary because self insured employers are not covered by the state laws.⁷⁹ As a result of the EEOC ruling and the state and federal legislatures’ actions, the Prescription Coverage Movement has provided subsequent support for the Erickson ruling.

III. DEFENDANT BARTELL’S CONTENTIONS AND THE FEDERAL DISTRICT COURT’S RESPONSE

Defendant Bartell asserted six counterarguments to refute Plaintiffs’ contention of a Title VII violation.⁸⁰ However, the court discerned flaws within all six arguments.⁸¹

A. *Prescription Contraceptives and their Impact on Women’s Health*

Defendants first argued prescription drugs used to treat diseases and illnesses are easily distinguishable from prescription contraceptives.⁸² They contended prescription contraceptives fall into a different classification because their use prevents fertility and not diseases or illnesses.⁸³ Despite this argument, the Erickson court found in the plaintiff’s favor and

75. Cohen, *supra* note 62 (remarking that the federal government has required contraceptive coverage for its employees since 1999).

76. *Id.* Federal employees, gained prescription contraceptive coverage through the 1998 omnibus spending act. See Hatcher, *supra* note 17, at 215; see also Choice Notes, *A Publication of Physicians for Reproductive Choices and Health, Special Issue on Contraception and Family Planning*, Vol. 4, No. 2 (June 1999) (showing contraceptive coverage provided for federal employees), at http://www.prch.org/publications/choice_notes/News_June99.shtml.

77. Hatcher, *supra* note 17, at 215.

78. Cohen, *supra* note 62, at 11.

79. *Id.*

80. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d. 1266, 1272 (W.D. Wash. 2001).

81. *Id.* at 1272–77.

82. *Id.* at 1272.

83. *Id.*

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recognized “the availability of affordable and effective contraceptives is of great importance to the health of women and children because it can help to prevent a litany of physical, emotional, economic, and social consequences.”⁸⁴ The court reasoned the lack of availability of prescription contraceptives results in a vast number of unintended pregnancies.⁸⁵ In addition, it cited a statistic revealing more than half of pregnancies are unintended.⁸⁶

Bartell’s argument also attempted to differentiate prescription contraceptives from other medications that were covered due to their preventative nature.⁸⁷ This argument is recognizably flawed given that Bartell’s prescription plan covered other preventative drugs.⁸⁸ The court’s response stated that the status of pregnancy is not desirable by all women even if it is not considered a disease or illness.⁸⁹ In fact, it has been recognized prescription contraceptives are of crucial significance to a woman’s health for an extended period of time in her life.⁹⁰ Erickson’s complaint provided a statistic revealing “the typical American woman spends roughly three decades— or about 75% of her reproductive life— trying to avoid unintended pregnancy.”⁹¹ Thus, one can reasonably comprehend the court’s dismissal of Bartell’s contention that contraceptives are not an essential health care need of women.

B. *Title VII and the Pregnancy Discrimination Act*

Additionally, Bartell contended the exclusion of prescription contraceptives in its employees’ health benefit plans did not violate PDA.⁹² In the court’s review of the Act’s legislative history, it determined “[w]hen Congress enacted the PDA, it clearly had in mind the obvious and then-commonplace practice of discriminating against women in all aspects of employment, from hiring to the provision of fringe benefits.”⁹³ Although

84. *Id.* at 1272–73.

85. *Id.* at 1273.

86. *Id.* Surprisingly, more women in the United States face unintended pregnancies than “women in nearly every other developed country.” Law, *supra* note 31, at 363.

87. *Erickson*, 141 F. Supp. 2d. at 1272.

88. *Id.* at 1273.

89. *Id.*

90. *Id.* at 1273–74.

91. Plaintiff’s Amended Complaint at ¶ 22, *Erickson v. Bartell*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (No. C00-1213L), available at http://www.covermypills.org/facts/AmendedComplaint_.htm.

92. *Erickson*, 141 F. Supp. 2d. at 1274.

93. *Id.*

prescription contraceptives are not explicitly mentioned in the Act, the Erickson court found Congress' intentional overruling of *General Electric Co. v. Gilbert* indicated the lack of prescription contraceptive language is not relevant in determining whether the PDA covers prescription contraceptives.⁹⁴ Therefore, the Erickson court concluded the overruling of *Gilbert* supports a prohibition under Title VII of the elections Bartell made.⁹⁵

C. The Exclusion of Certain Drugs as a Business Decision to Manage Costs

Bartell additionally contended employers were allowed to exclude certain drugs from their employees' health benefit plans in order to control costs.⁹⁶ While an accurate contention, Bartell was not allowed to eliminate from its benefit plan certain drugs used only by women as a method to restrain costs.⁹⁷ Other cost-reducing methods the court suggested Bartell could have implemented included cutting benefits, raising deductibles, or changing the benefit plan in a non-discriminatory manner.⁹⁸ The court ultimately refuted Bartell's cost argument when it declared, "[a]lthough Bartell is permitted, under the law, to use non-discriminatory cuts in benefits to control costs, it cannot balance its benefit books at the expense of its female employees."⁹⁹

In reality, Bartell's cost-cutting argument lacked substance. While it has been established that employers have the right to non-discriminatorily alter their benefit plans in compliance with its budget, Bartell altered its benefit plan to the disadvantage of women employees.¹⁰⁰ Statistics indicated Bartell could actually have lowered its total costs by paying the initial cost of prescription contraceptives.¹⁰¹ Complete contraceptive coverage would cost employers, "at most, only \$21.40 per employee per year."¹⁰²

94. *Id.*

95. *Id.*

96. *Id.* In addition to prescription contraceptives, Bartell did not cover the anti-impotence drug Viagra, infertility drugs, or cosmetic surgery. Tamar Lewin, *Company's Insurance Should Pay for Contraceptives, Suit Says*, N.Y. TIMES, July 20, 2000, at A16.

97. *Erickson*, 141 F. Supp. 2d. at 1274.

98. *Id.*

99. *Id.*

100. *Id.*

101. Cohen, *supra* note 62, at 12. An estimation by the Washington Business Group on Health speculated "not providing contraceptive coverage may in fact cost an employer 15-17% more than providing coverage." *Id.*

102. *Cover My Pills: Fair Access to Contraception*, at <http://www.covermypills.org/facts/factsheet.asp> (last visited May 23, 2002).

2003] *PRESCRIPTION CONTRACEPTIVE COVERAGE* 155*D. Exclusion of Prescription Contraceptives is Non-Discriminatory*

Bartell claimed the exclusion of prescription contraceptives from its employees' health benefit plan is "neutral and non-discriminatory" because they choose not to cover any "family planning" drugs.¹⁰³ However, the court recognized Bartell's benefit plan covered prenatal vitamins.¹⁰⁴ Thus, Bartell's "family planning" explanation for the exclusion of prescription contraceptives was rendered weak.¹⁰⁵ This contradiction was furthered when the court recognized Bartell's plan covered abortion.¹⁰⁶ The court stated, "[a]bortion is, after all, the quintessential 'family planning' measure, and yet it is covered in all circumstances."¹⁰⁷

E. Lack of Litigation on the Coverage of Prescription Contraceptives

The court acknowledged that Title VII has not been interpreted to include a "right to prescription contraceptives in certain circumstances" in almost forty years of existence.¹⁰⁸ However, it then noted that until the Bartell case, courts had not been required to evaluate the exclusion of contraceptives from company health plans as a violation of Title VII.¹⁰⁹

F. The Legislative versus the Judiciary Role in Interpreting Federal Statutes

Bartell's final contention the court disagreed with was the legislative body should ultimately determine whether the health plan is discriminating against women employees.¹¹⁰ In fact, the purpose of the judiciary is to "interpret existing laws and determine whether they apply to a particular set of facts."¹¹¹

The Erickson court did not give credit to any of Bartell's six contentions.¹¹² As an employer, Bartell chose to limit its

103. *Erickson*, 141 F. Supp. 2d. at 1274–75.

104. *Id.* at 1275

105. *Id.*

106. *Id.*

107. *Id.* at 1275 n.13.

108. *Erickson*, 141 F. Supp. 2d. at 1275.

109. *Id.* Additionally, a commentator noted, "[g]iven the costs of contraception and the costs of litigation, individuals are unlikely to seek or find a lawyer to raise challenges to discriminatory insurance plans that do not cover contraception." Law, *supra* note 31, at 389.

110. *Erickson*, 141 F. Supp. 2d at 1276.

111. *Id.*

112. *Id.* at 1272–77.

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Prescription Benefit Plan coverage by excluding coverage of prescription contraceptives.¹¹³ While this limitation generally applies to employees, its primary application was at the expense of their female employees.¹¹⁴ The Erickson court noted “the intent of Congress in enacting the PDA, even if not the exact language used in the amendment, shows that mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women.”¹¹⁵

To properly limit the scope of coverage, Bartell should have ensured both their male and female employees received relatively equal comprehensiveness of coverage.¹¹⁶ By excluding prescription contraceptives as an available drug to women from their health plan, the comprehensiveness of women’s plans decreased as their male counterparts’ comprehensiveness remained untouched.¹¹⁷ As the Erickson court noted, “[t]he special or increased healthcare needs associated with a woman’s unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs.”¹¹⁸

IV. BUSINESS IMPACT ON EMPLOYERS AND INSURANCE COMPANIES

The procedure employers utilize to select a health insurance plan for employees is unnecessarily complicated by the insurance companies.¹¹⁹ An employer usually chooses the health insurance plan for its employees or provides employees with an opportunity to choose their own plan at its corresponding cost.¹²⁰ The difficulty with the selection of plans arises when both employees

113. *Erickson*, 141 F. Supp. 2d at 1270. Bartell’s health plan provided coverage for contraceptives prescribed for medical reasons unrelated to birth control; however, this coverage did not relate to the discrimination issue. CNN, *Seattle Pharmacist Sues Employer for Failing to Provide Birth Control Coverage* (July 20, 2000) at <http://www.cnn.com/2000/LAW/07/20/contraceptive.lawsuit/index.html>.

114. *Erickson*, 141 F. Supp. 2d at 1274. Expenses paid personally by women for prescription contraceptives per year is approximately \$360 for oral contraceptives, \$180 for Depo-Provera, \$450 for Norplant, and \$240 for an Intra-Uterine Device. *Cover My Pills: Fair Access to Contraception*, at <http://www.covermypills.org/facts/factsheet.asp> (last visited Jan. 24, 2003).

115. *Erickson*, 141 F. Supp. 2d at 1271.

116. *Id.* at 1272. The employer must also ensure no discrimination against male employees exist. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 669 (1983) (holding male employees were discriminated against by a policy which provided full coverage to female employees’ husbands and incomplete coverage to male employees’ wives).

117. *Erickson*, 141 F. Supp. 2d at 1275.

118. *Id.* at 1271.

119. Law, *supra* note 31, at 386.

120. *Id.*

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and employers are unable to ascertain what is covered under each available plan.”¹²¹ Additionally, in selection of a health insurance plan, employers and employees take into consideration various factors and the coverage of prescription contraceptives may not be a high priority during the selection process.¹²² Bartell provided health coverage for its employees, free of charge.¹²³

Employers, such as Bartell Drug Co., who desire to decrease their scope of coverage, may still do so as long as both men and women have relatively equal comprehensiveness of prescription drug plans.¹²⁴ Jean Bartell Barber, Bartell Drug’s Chief Financial Officer, asserted “no health plan can cover every medical cost.”¹²⁵ While this may be true in the business environment, the Erickson court established excluded medical costs may not be to the detriment of only female employees.¹²⁶

A. *Economic Implications of Contraceptive Coverage*

From a business perspective, it may be in the best interest of the employers and insurance companies to include prescription contraceptives in their health plan coverage.

1. Reduction in Costs for Unintended Pregnancies

Statistics indicate a substantial number of pregnancies in the United States are not planned.¹²⁷ In fact, “[n]early half of American women aged 15 to 44 years have had at least one unintended pregnancy.”¹²⁸ The fact that unintended pregnancy is at such an elevated rate signifies a market exists for

121. *Id.* This inability to obtain information regarding the coverage of various health insurance plans violates the Employee Retirement Income Security Act (ERISA) and several state laws. *Id.* at 387. While these laws are often ignored, individuals and companies rarely pursue litigation due to the lack of financial incentive. *Id.* at 387–88.

122. Law, *supra* note 31, at 388.

123. CNN, *Seattle Pharmacist Sues Employer for Failing to Provide Birth Control Coverage* (July 20, 2000), at <http://www.cnn.com/2000/LAW/07/20/contraceptive.lawsuit/index.html>. Jean Bartell Barber, CFO, claimed the plan “does a good job of covering most costs.” Bernard McGhee, *Pharmacist Sues for Contraception*, APONLINE, July 20, 2000, at 2000 WL 24002395.

124. *Erickson*, 141 F. Supp. 2d at 1272.

125. CNN, *Seattle Pharmacist Sues Employer for Failing to Provide Birth Control Coverage*, CNN (July 20, 2000), at <http://www.cnn.com/2000/LAW/07/20/contraceptive.lawsuit/index.html>.

126. *Erickson*, 141 F. Supp. 2d at 1272.

127. Lisa M. Koonin, et al., *Healthy Pregnancies Start with Planning*, BUSINESS & HEALTH, Jan. 2001, at 55; see also *Contraceptive Use, Facts in Brief*, The Alan Guttmacher Institute, at http://www.agi-usa.org/pubs/fb_contr_use.html (indicating approximately three million unintended pregnancies occur in the United States every year).

128. Koonin, *supra* note 127, at 55.

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contraceptives, the use of which would benefit employers and insurance companies.¹²⁹

It can be reasonably inferred that employers who include coverage of prescription contraceptives in their employee's plan, will decrease the number of employees that are included in this unintended pregnancy statistic.¹³⁰ In 1995, an Institute of Medicine Committee on Unintended Pregnancy concluded "one of the reasons for the high rates of unintended pregnancy in the U.S. was the failure of private health insurance to cover contraceptives."¹³¹ In doing so, the increase in costs of contraceptives may be counterbalanced by the decrease in costs of unintended pregnancies. Statistics indicate the average amount for insurers for one pregnancy is \$10,000, while the average cost to insurers for a year of birth control pills is \$360.¹³² This counterbalancing would lower expenses for the insurance companies, thereby saving employers money, because the costs of prescription contraceptives are dramatically lower than the costs for a pregnancy. In fact, taking into consideration indirect savings, researchers determined employers expend fourteen to seventeen percent more by not providing any contraceptive benefit.¹³³

An additional reason to deter unwanted pregnancies through the coverage of prescription contraceptives is the correlation between unplanned pregnancies and complications in pregnancies.¹³⁴ Complications result in high-risk pregnancies and dramatically add to the total cost businesses expend for an employee's pregnancy.¹³⁵ This total cost accounts for financial consequences of a high-risk pregnancy¹³⁶ as well as the lost

129. See *infra* notes 132–133 and accompanying text.

130. Further inferences lead to the conclusion that the number of unintended pregnancies for employees within a company would decrease as a result of contraceptive coverage. However, additional reasons exist for unintended pregnancies, apart from having no prescription contraceptive coverage, such as the incorrect use of contraceptives or the choice to not use contraceptives. See The Alan Guttmacher Institute, *Contraceptive Use, Facts in Brief*, at http://www.agi-usa.org/pubs/fb_contr_use.html (last visited Sept. 6, 2002). In addition, most prescription contraceptives are not 100% effective, even if used correctly. See AMERICAN COLLEGE HEALTH ASSOCIATION, *CONTRACEPTION: CHOOSING A METHOD* (1997).

131. Planned Parenthood, *Cover My Pills: Fair Access to Contraception*, at <http://www.covermypills.org/facts/unintended.asp> (last visited Oct. 12, 2002).

132. *Id.*

133. Koonin et al., *supra* note 127, at 55.

134. *Id.* (noting the correlation "between complications and unplanned pregnancy is strong enough for the federal government to have set a Healthy People 2010 goal to increase" intended pregnancies to seventy percent).

135. *Id.*

136. *Id.* (discussing the cost to insurers of one premature baby, which can run \$250,000).

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productivity caused by employees absences due to their pregnancy.¹³⁷ In fact, curtailing the occurrence of unintended pregnancy is considered “the single most effective means of reducing the number of distressed, low birth weight babies.”¹³⁸

2. Reduction in Medical Care Costs

Above and beyond preventing pregnancy, oral contraceptives bestow minor and major benefits. Minor benefits include protecting against pelvic inflammatory disease¹³⁹ and treating acne.¹⁴⁰ A significant benefit to both employers and employees through the coverage and use of oral contraceptives is the fact oral contraceptives have been proven to prevent several illnesses.¹⁴¹

A woman who takes birth control pills for five years will decrease her chances of developing ovarian cancer by about forty percent.¹⁴² As the seventh most common cancer among women,¹⁴³ ovarian cancer “accounts for nearly 4% of all cancers among women.”¹⁴⁴ The correlation between production of eggs and ovarian cancer is established and short of having a woman’s ovaries removed, taking birth control pills is the only known preventative measure to reduce a woman’s risk for developing this cancer.¹⁴⁵ Moreover, one study indicates women who at some

137. *Id.* (describing high risk pregnancy as the largest threat to employee productivity).

138. Law, *supra* note 31, at 367. According to the National Vital Statistics Report for 2000, the percentage of low birth weight babies in 2000 was 7.6 percent. JOYCE A. MARTIN, ET AL., *BIRTHS: FINAL DATA FOR 2000*, 50 NATIONAL VITAL STATISTICS REPORTS 1 (2002).

139. Tamar Nordenberg, *Protecting Against Unintended Pregnancy, A Guide to Contraceptive Choices*, 31 FDA CONSUMER, April 1997, at 20, 22. Pelvic inflammatory disease is “an infection of the fallopian tubes or uterus that is a major cause of infertility in women.” *Id.*

140. Annette Fuentes, *Beyond Birth Control: The Pill Tackles New Duties*, N.Y. TIMES, May 7, 2002, at F6.

141. Nordenberg, *supra* note 139, at 22. A serious caveat to oral contraceptives is they are not beneficial for every woman. Some women may experience negative side effects, including increased risk of high blood pressure and blood clots, which may lead to strokes and heart attacks. *Id.* See also ORTHO-MCNEIL PHARMACEUTICAL INC., ORTHO-TRI-CYCLEN DETAILED PATIENT LABELING (2000).

142. LEON SPEROFF & PHILIP DARNEY, *A CLINICAL GUIDE FOR CONTRACEPTION* 61 (Williams & Wilkins, 2d ed. 1996). The risk of developing ovarian cancer relates to the number of ovulatory cycles a woman has. Joellen M. Schildkraut et al., *Relationship Between Lifetime Ovulatory Cycles and Overexpression of Mutant p53 in Epithelial Ovarian Cancer*, J. NAT’L CANCER INST. 932, 932 (1997). The decreased risk of developing ovarian cancer relates “to ovulation suppression” by the birth control pills. Ann Schrecengost, *Ovarian Mass—Benign or Malignant?*, 76 AORN J. 792, 793 (2002).

143. American Cancer Society, *Cancer Facts and Figures 2002* at 10 (Oct. 24, 2002), available at <http://www.cancer.org>.

144. *Id.* at 13 (reciting ovarian cancer ranks second among gynecologic cancers).

145. S. Edwards, *Reduced Ovarian Cancer Risk Quantified Among Women Who Use*

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point in their life used oral contraceptives were “37% less likely to develop colon cancer and 34% less likely to develop rectal cancer than women who had never used the pill.”¹⁴⁶ Oral contraceptives may also protect against endometrial cancer.¹⁴⁷ In light of the fact contraceptive use decreases a woman’s chance of developing these various cancers,¹⁴⁸ it is reasonable to conclude increased contraceptive use would result in a decrease in costs expended by employers and insurance companies for medical care.

Another noteworthy health benefit for women taking birth control pills is the reduction in a woman’s risk of hip fracture resulting from osteoporosis.¹⁴⁹ One study established “the risk of hip fracture was 25% lower in ever-users of oral contraceptives than in never-users.”¹⁵⁰ More importantly, researchers have suggested for women who took the oral contraceptives in the later years of their reproductive life a thirty percent reduction in hip fracture risk.¹⁵¹

Taking into account these major and minor health benefits for women, birth control pills are a small expenditure for employers in comparison to the expenses that would be incurred for treating all of the illnesses or cancers that birth control pills have been proven to reduce.

3. Reduction in Costs for the Business

By paying a little over seventeen dollars a year for an employee, employers could provide comprehensive health coverage to their female employees, while averting higher costs

the Pill, 26 FAMILY PLANNING PERSPECTIVES 143 (1994) (describing a study that found of the two factors to decrease the risk of ovarian cancer (increased parity and use of birth control), the use of oral contraceptives was easier to modify). It has been determined that the higher the potency of progestin in an oral contraceptive, the greater the decrease in risk for developing ovarian cancer. Joellen M. Schildkraut et al., *Impact of Progestin and Estrogen Potency in Oral Contraceptives on Ovarian Cancer Risk*, 94 J. NAT’L CANCER INST. 32, 32 (2002).

146. Amy Slugg Moore, *More Evidence that OCS Protect Against Colorectal CA*, 61 RN 20 (1998); see also Mary Jane Minkin & Tony Hanlon, *Birth Control Pills: Not Just for Contraception Anymore*, 51 PREVENTION 86 (1999) (providing additional studies reporting reduction in colon cancer risk to be between thirty and forty percent).

147. SPEROFF & DARNEY, *supra* note 142, at 61; see also JUHN, *supra* note 14, at 54.

148. JUHN, *supra* note 14, at 54.

149. Karl Michaelsson, et al., *Oral Contraceptives Use and Risk of Hip Fracture: A Case-control Study*, 353 LANCET 1481–84 (1999) (suggesting the effect of oral contraceptive use on hip fracture depends on the age of use; specifically “use at older ages was associated with lower relative risks than use at earlier periods of life”).

150. See Michaelsson, *supra* note 149, at 1481.

151. Ali Kubba et al., *Contraception*, 356 THE LANCET 1913–14 (2000) (recounting results from studies by Michaelsson and colleagues and from a World Health Organization study).

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that would result from pregnant employees.¹⁵² It would only take a “15% increase in the number of women using oral contraceptives to produce enough savings in pregnancy costs to provide full contraceptive coverage to all health plan members.”¹⁵³ This inference is not meant to suggest employers should encourage their employees not to have children. Instead, it simply provides the basis for reasoning it behooves businesses economically to provide prescription contraceptives to those who have already chosen to avoid pregnancy.

The additional twenty dollars a year for each female employee is a nominal expense for employers in order to avert the higher costs that would result from pregnant employees.¹⁵⁴ One study indicated “for an average employer, the total indirect cost of pregnancy-related absences per year per 1,000 covered female employees would be \$542,000.”¹⁵⁵ The study further “estimated that the average[] cost to replace female employees who quit each year due to pregnancy is an additional \$14,000 per employee.”¹⁵⁶

Financially, employers may have a lot to lose by having their female employees not present at work. An additional consideration is that employers with over fifty employees are required to comply with the Family Medical Leave Act (“FMLA”).¹⁵⁷ Despite the fact women are statutorily provided unpaid maternity leaves, employers still bear the expense of having an employee absent for an extended period of time.¹⁵⁸ For a variety of reasons, including the birth of a child, these employers are obligated to provide their eligible employees a maximum of “twelve weeks of unpaid leave.”¹⁵⁹ While the twelve

152. Cheryl A. Danner, *Prescription Contraceptives: Educate Yourself on the Discrimination You May be Suffering Because You Work for a Private Educational Institution*, 31 J.L. & EDUC. 513, 520 (2002).

153. *Id.* at 521

154. *Cover My Pills: Fair Access to Contraception*, at <http://www.covermypills.Org/facts/factsheet.asp> (last visited Oct. 12, 2002).

155. *Id.*

156. *Id.*

157. 29 U.S.C. § 2611(4)(A)(i) (2000) (defining “employer” to whom FMLA would apply). While women employees were the “intended primary beneficiaries” of this legislation, the Act provides a broader range of benefits affecting both men and women. Issacharoff & Rosenblum, *supra* note 1, at 2190.

158. Calloway, *supra* note 28, at 48 (describing the requirements for employers under the FMLA).

159. Calloway, *supra* note 28, at 48. Also included in the FMLA is the ability of an employee to take unpaid leave because of placing a child in either foster care or up for adoption, to care for a seriously ill family member, or for employees that develop a serious health condition that disables the employee’s ability to work. 29 U.S.C. § 2612(a)(1) (2000).

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weeks are unpaid, the employer is still incurring costs for the absent employee's benefits.¹⁶⁰

In addition, the employer will likely expend its time and money in an effort to replace the employee while she is on leave.¹⁶¹ For highly skilled positions or employees with a high degree of knowledge, employers may find it difficult to find adequate temporary employees to fill the positions, because temporary employees usually have only general skills.¹⁶² Furthermore, placing a temporary employee in a position which entails constant client connections and contact will result in less efficient and potentially less productive business results.¹⁶³ Thus, a female employee who prevents pregnancy by taking prescription contraceptives saves her employer the opportunity costs and/or replacement costs that would result from her absence if she was pregnant.

The replacement cost of a female employee who leaves on maternity leave is a foreseeable expense for a business. However, by taking certain actions, employers can avoid not only the cost of an employee's maternity leave, but the pregnancy. Employers have overlooked this opportunity as a business plan to save on costs already foreseen and accounted. These savings provide employers and insurance companies financial incentives to cover preventative fertility drugs to those employees who either choose not to have children or prefer to wait for a more opportune time to have children. Therefore, decreasing unplanned pregnancies for women who would rather not have a child or wait to have a child will likely result in fewer expenses for the employer and insurance company.

4. Cost/Benefit Analyses for Businesses

The reduction in costs of unintended pregnancy, medical care and costs to the business justify why employers should cover prescription contraceptives for their employees. Researchers have established it is "14 to 17 percent more expensive for employers not to provide any contraceptive benefit."¹⁶⁴ Simply put, the employers would save more by paying for prescription

160. Issacharoff & Rosenblum, *supra* note 1, at 2191 (explaining FMLA requires the employer to continue to pay benefits during the leave). Troubles thus arise for smaller companies with over fifty employees, especially if they employ a disproportionate amount of women. *Id.* at 2190.

161. *Id.* at 2191.

162. *Id.* at 2191–92.

163. *Id.* at 2191.

164. Koonin, *supra* note 127, at 55.

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contraceptives and preventing pregnancy than they would expend paying for the actual pregnancy and any medical problems arising with the mother or child. Additionally, employers would likely save money by paying for prescription contraceptives and preventing the various illness and cancers that oral contraceptives have been proven to protect against than by paying the medical bills resulting from the illnesses and cancers.¹⁶⁵ Lastly, the minor expense for prescription contraceptives result in less employee pregnancies which would lead to the elimination of the major expense of an absent employee for up to twelve weeks.¹⁶⁶ When balancing costs versus benefits for the business, prescription contraceptive coverage statistics clearly evidence that it is not only in the best interest of the female employees, but their employers as well.

B. *Social Implications of Contraceptive Coverage*

Social implications result from a lack of prescription contraceptive coverage. Unintended pregnancies affect a woman and her child's life in numerous ways, including: (1) increased infant mortality and morbidity; (2) increased financial costs on account of childbirth and distressed newborns; (3) higher rates of abortion; and (4) increased limitations placed on "women's abilities to perform and contribute to society and undermines national economic stability."¹⁶⁷ Society will likely bear the cost of unintended pregnancies in one or more ways.

1. Less Unwanted Pregnancies

Coverage of prescription contraceptives would likely lessen the number of unintended pregnancies, which would logically lead to a decrease in the number of unwanted pregnancies within society. The average family in the United States has two children.¹⁶⁸ It has been determined two decades of contraceptive use is required in order to have only two children.¹⁶⁹

2. Less Abortions

Less unintended pregnancies will likely result in less abortions due to the fact that "[a]most half (forty-four percent) of

165. See *supra* Part IV.A.2.

166. See *supra* Part IV.A.3.

167. Law, *supra* note 31, at 364–65.

168. Planned Parenthood, *Cover My Pills: Fair Access to Contraception*, at <http://www.covermypills.org/facts/factsheet.asp> (last visited Oct. 12, 2002).

169. *Id.*

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all unintended pregnancies in the United States end in abortion.”¹⁷⁰ This statistic supports the prospect to reduce the number of women affected by the psychological repercussions likely to exist in women who have an abortion.¹⁷¹

3. Less Health Care Issues for Society

By simply covering oral contraceptives in their employees' health benefit plans, employers would be furnishing their female employees with the capability to decrease their chances of falling victim to various types of cancers, illnesses and conditions.¹⁷² Society as a whole is likely to benefit from a decrease in these health problems.

4. Equality in the Workplace

Moreover, prescription contraceptives, which provide women with the capability to influence their ability to get pregnant, may assist in maintaining equality of sexes in the workplace. The addition of the PDA essentially “guarantees women the same opportunity that has always existed for men: the opportunity to participate in the workforce while having a family without the fear of losing job security or seniority.”¹⁷³ Similarly, employees may prefer not to have children or to wait until the optimal time in their career to have children so they can achieve their personal business goals.¹⁷⁴ Women's ability to “participate fully and equally in the ‘marketplace and the world of ideas’” is severely impacted by unintended pregnancies.¹⁷⁵ Thus, an employee who would prefer to time her pregnancy pursuant to her career plan should be given this option.

170. Law, *supra* note 31, at 367.

171. *Id.*

172. See Part IV.A.2.

173. Cintra D. Bentley, Comment, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment to Achieve Pregnancy within the Scope of Title VII's Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391, 403 (1998) (emphasis added); see also 123 CONG. REC. S29, 384, 29, 387 (daily ed. Sept. 15, 1977) (statements of Sen. Javits).

174. See 124 CONG. REC. H21,434, H21,331 (daily ed. July 18, 1978) (statement of Rep. Garcia) (suggesting a substantial number of women have decided to forgo motherhood in order to continue working). For example, a female attorney may desire to work to make partner before having children.

175. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d. 1266, 1273 (W.D. Wash. 2001) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)). The *Erickson* court further noted “[t]he ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.” *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992)).

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5. Increased Number in the Workforce

Employers could make an additional impact on society by ameliorating the financial cost to those who desire to avoid pregnancy and remain in the workplace. An increase in contraceptive use by working women, thus resulting in more individuals in the workforce, may create an enhanced economic outlook for the United States.¹⁷⁶

Although published articles regarding the effect of contraceptives on the economy and the U.S. work force are scarce, one author described a study which discovered “the [birth control] pill has had more to do with women’s ascent in corporate America than such issues as affirmative action or abortion reform.”¹⁷⁷ According to Rob Norton, this study, performed by two Harvard economists,¹⁷⁸ shows “the pill has indeed transformed the face of the American labor force during the past three decades, so powerfully that it will surely be regarded as one of the signal innovations of the Twentieth century.”¹⁷⁹ The study indicated two types of economic effects result from increased access to the birth control pill.¹⁸⁰ The first effect, referred to as the “direct effect,” was that “[t]he pill enabled women to invest in expensive, long-duration training” and not “have to pay the penalty of abstinence or cope with considerable uncertainty regarding pregnancy.”¹⁸¹ The second effect, named the “indirect (or social multiplier) effect,” is derived from the fact birth control pills have had an impact on “all women, not just career women, and [have also] affected men.”¹⁸² As a result of the social multiplier effect, the economists claim the pill could propagate “a new equilibrium in which marriages are later, careers more

176. Law, *supra* note 31, at 368 (observing access to family planning was one of six factors that the President’s Council on Sustainable Development recognized as significant in sustaining domestic economic growth).

177. Rob Norton, *Not So Fast: Sex, Drugs, and Career Choices*, FORTUNE, Apr. 3, 2000, at 68. A probable explanation for the lack of commentary on this issue is because this subject was “shrouded in societal taboos.” *Id.*

178. See generally Claudia Goldin & Lawrence Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER NO. 7527 (2000), available at <http://www.nber.org/papers/w7527>.

179. Norton, *supra* note 177, at 68.

180. Goldin & Katz, *supra* note 178, at 1–2.

181. *Id.* at 1–2. Norton described the direct effect as the fundamental change in the “educational and career tradeoffs for young women graduating from college.” Norton, *supra* note 160, at 68. An effect is exemplified in the situation women face if they chose to pursue post-graduate degrees. See *id.* In this instance, the woman “either had to pay the penalty of sexual abstinence or take the chance that her investment might be wasted if she became pregnant and abandoned her career.” *Id.*

182. Goldin & Katz, *supra* note 178, at 2.

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numerous, and matches are ‘better.’”¹⁸³ Accordingly, employers should provide those employees who either do not desire to have children or desire to have children at a later point in time with every financial opportunity to prevent pregnancy.

V. PLAN FOR EMPLOYERS

Because Erickson was a case of first impression in federal court,¹⁸⁴ employers will likely look to decisions of various other tribunals before enacting health benefit plans.¹⁸⁵ The Erickson decision may have clarified the purpose and intentions of PDA for employers;¹⁸⁶ however, in the wake of the Erickson decision, employers may remain uncertain on what items they can and cannot cover legally in their employee’s health benefit plan.¹⁸⁷ Due to the ingenuity of researchers in the pharmaceutical industry, new drugs are continuously developed. Therefore, questions may continue to arise regarding when and where employers may draw the line of coverage.

By providing coverage of prescription contraceptives, employers are likely to reduce the number of unintended pregnancies for its employees. Yet, even when a woman is receiving coverage for her prescription contraceptives, unintended pregnancies may still occur.¹⁸⁸ Employers should comprehend that “[n]o contraceptive method is completely effective” and take additional measures to promote and obtain the greatest utilization from the contraceptives it provides.¹⁸⁹ Thus, in addition to employers providing their employees

183. *Id.* at 17. This conclusion by the authors was based on the fact a greater market for marriage would exist for those career-oriented women, on account of the fact birth control pills allow women to postpone marriage. *Id.* at 2.

184. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d. 1266, 1268 (W.D. Wash. 2001).

185. *See id.* at 1275 (indicating other tribunals have considered this issue).

186. *See id.* at 1271.

187. *See supra* note 69 and accompanying text for the EEOC’s plan of action for employers to avoid Title VII violations. A recommendation from Planned Parenthood, the organization that supported Erickson in her suit against Bartell, is a prescription benefit plan should include the following:

1. The coverage if all Food and Drug Administration approved prescription methods, including the “morning after pill;”
2. The coverage of annual doctor visits with the designated obstetrician/gynecologist;
3. Similar co-payments/deductibles as other covered services; and
4. Confidentiality.

Planned Parenthood, *Cover My Pills: Fair Access to Contraception*, at <http://covermypills.org/facts/goodplan.asp> (last visited Sept. 4, 2002).

188. A large amount of unintended pregnancies result from “either lack of use or ineffective use of contraceptives.” Koonin, *supra* note 127, at 55.

189. *Id.*

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prescription coverage, employers should offer contraceptive counseling in their corporate health plan.¹⁹⁰

Informing employees of the advantages and disadvantages of various contraceptive methods is vital to preventing unintended pregnancies.¹⁹¹ Accordingly, counseling should be provided to a woman seeking to avoid pregnancy to ensure she is using a form of birth control appropriate for her lifestyle.¹⁹² However, “[w]omen selecting contraception need to consider not only the convenience and effectiveness of a given method, but other important noncontraceptive risks and benefits as well.”¹⁹³ Thus, it should be recognized in choosing to follow a particular contraceptive method, a woman “may regard other considerations—costs, effectiveness, convenience, and protection against STDs—as more important than long-term effects on gynecologic cancers.”¹⁹⁴ Due to these multiple factors a woman should deliberate upon, counseling would likely prove helpful in assisting women in making the proper contraceptive selection.

Discerning the most effective type of contraceptive is essential because many pregnancies occur due to inconsistent or incorrect usage of prescription contraceptives.¹⁹⁵ While businesses spend money to provide prescription contraceptives, it is wise to ensure the ultimate effectiveness of these prescriptions by providing employees with information regarding their usage.

VI. CONCLUSION

Many considerations exist for employers in determining whether to provide employees coverage for prescription

190. *Id.*

191. Nordenberg, *supra* note 139, at 20. Before choosing a particular contraceptive method, a woman must consider various factors including the effectiveness rate of the contraceptive, the woman's health, the frequency of sexual activity and whether the woman desires to have children in the future. *Id.* at 20–21.

192. It is important to consider the differences between prescription contraceptives when determining which contraception is appropriate for a particular woman's lifestyle. For instance, oral contraceptives must be taken every day around the same time, while Depro-provera is a shot taken only four times a year. JUHN, *supra* note 14, at 9, 33. Thus, birth control pill is an appropriate contraceptive only for those women who are capable of remembering to take her pills daily. An additional example of a woman's lifestyle affecting the proper choice of a contraceptive is that women who smoke are recommended not to use oral contraceptives. Nordenberg, *supra* note 139, at 22.

193. *Counseling to Prevent Gynecologic Cancers, Guide to Clinical Preventative, WebMd*, at <http://my.webmd.com/content/article/1680.50762> (last visited Oct. 12, 2002).

194. *Id.*

195. Koonin, *supra* note 127, at 55. The rate of pregnancy based on typical use of the birth control pill in one year may be as high as 3-5%. Sheldon Segal, *Contraceptive Update*, 23 N.Y.U. REV. L. & SOC. CHANGE 457, 458 (1997). This is 4.9% higher than the “lowest expected rate of pregnancy.” *Id.*

contraceptives. The Erickson case provided an interpretation of the PDA favorable to those female employees desiring to have their prescription contraceptives covered.¹⁹⁶ Although contraception is not included specifically in the PDA, the purpose of the act appears to ensure women are not subject to discrimination on account of ability to reproduce.¹⁹⁷ The Erickson court noted “[m]ale and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception.”¹⁹⁸

An additional decision favorable to employees is the recent EEOC ruling finding health plans excluding coverage of prescription contraceptives constituted sexual discrimination under Title VII.¹⁹⁹ These two rulings, as well as the state contraceptive laws and the proposed federal contraceptive law, demonstrate the advancements employees are achieving toward prescription contraceptive coverage. Consequently, employers should utilize the present circumstances to recognize the benefits they will accrue if they provide extended coverage for their employees.

From the employer’s perspective, covering prescription contraceptives appears to be a straightforward solution to reducing costs. Expenses that may be reduced include those costs for unintended pregnancies, other covered medical conditions, and costs to the business due to an employee’s absence during an unintended pregnancy. Thus, a cost/benefit analysis should demonstrate a positive result for employers who choose to cover prescription contraceptives for their employees.

Further, employers have the opportunity to influence society by providing employees with a chance to decrease the number of unintended pregnancies, the number of abortions, and health care costs. Employers should thus take advantage of their ability to increase profits, all the while assisting society.²⁰⁰ Positive impacts ensuing from employer coverage of prescription contraceptives may also be observed through increased equality

196. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d. 1266, 1268 (W.D. Wash. 2001).

197. 42 U.S.C. § 2000e(k) (2000).

198. *Erickson*, 141 F. Supp. 2d at 1271.

199. *EEOC Issues Decision on Two Charges Challenging the Denial of Health Insurance Coverage for Prescription Contraceptives*, at <http://www.eeoc.gov/press/12-13-00.html>.

200. Law, *supra* note 31, at 367 (noting “[i]n addition to its emotional, financial, and human costs, unintended pregnancy damages the national and world economies and communities”).

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in the workplace and an increased number in the workforce.²⁰¹

It has been noted “[t]he reconciliation of employment responsibilities with the demands of childbirth and child-rearing remains a critical issue in the achievement of true equal employment opportunity for women.”²⁰² If this is a true proposition, then female employees would be better able to manage (or avoid) this reconciliation by planning their pregnancies or fulfilling their desire not to get pregnant. Accordingly, employers have an opportunity to play a crucial role by assisting their employees in achieving the highest potential while increasing their own equity.

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201. Issacharoff & Rosenblum, *supra* note 1, at 2179. “[A]ny attempt to equalize the career prospects of working men and women must provide a mechanism for women to overcome the hurdle of expected fertility.” *Id.*

202. Dowd, *supra* note 3, at 699.