

HHS mandate ‘unprecedented,’ must be rescinded, USCCB attorneys say

WASHINGTON – The federal government’s mandate that all health insurance plans cover contraceptives and sterilization free of charge “represents an unprecedented attack on religious liberty” and creates “serious moral problems” that require its rescission, attorneys for the U.S. bishops said in comments submitted to the Department of Health and Human Services.

In a 35-page comment submitted Aug. 31, Anthony R. Picarello Jr. and Michael F. Moses, general counsel and associate general counsel, respectively, for the U.S. Conference of Catholic Bishops, called the HHS mandate “unprecedented in federal law and more radical than any state contraceptive mandate enacted to date.”

“Only rescission will eliminate all of the serious moral problems the mandate creates,” they said. “Only rescission will correct HHS’ legally flawed interpretation of the term ‘preventive services.’”

The mandate and a proposed religious exemption to it were announced Aug. 1 by HHS Secretary Kathleen Sebelius and are subject to a 60-day comment period.

The USCCB attorneys also took issue with the religious exemption proposed by HHS, saying it “represents an unprecedented intrusion by the federal government into the precincts of religion that, if unchecked here, will support ever more expansive and corrosive intrusions in the future.”

HHS has proposed that only religious employers meeting four criteria would be exempt from providing contraceptives and female sterilization through their health plans. Those requirements are that the organization “(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization” under specific sections of the Internal Revenue Code.

"Under such inexplicably narrow criteria - criteria bearing no reasonable relation to any legitimate (let alone compelling) government purpose - even the ministry of Jesus and the early Christian church would not qualify as 'religious,' because they did not confine their ministry to their co-religionists or engage only in a preaching ministry," the USCCB comments said.

"The government has no business engaging in religious gerrymanders, whereby some churches are 'in' and others are 'out' for regulatory purposes based on who their teaching calls them to serve, how they constitute their workforce or whether they engage in 'hard-nosed proselytizing,'" the attorneys added.

They said it is "blatantly unconstitutional" to treat religious denominations or organizations differently because some are "so to speak, insular in their workplace and ministry" and others "have a missionary outlook."

"Church agencies with the temerity (in the government's view) to hire and serve persons other than their own members are penalized by the HHS exemption or, alternatively, forced to fire nonmembers and withdraw from or limit public service," they said. "Such a forced choice is offensive, discriminatory and unconstitutional."

The USCCB also said in its comments that the HHS contraceptive mandate violates the Weldon amendment, certain provisions of the Patient Protection and Affordable Care Act and the Obama administration's public statements about coverage of abortion, because the contraceptives that must be covered include ella, which can cause abortions.

It also "targets Catholics for special disfavor 'sub silentio' and therefore violates both the Free Exercise and Establishment Clauses of the First Amendment," the comments said.

"Moral opposition to all artificial contraception and sterilization is a minority and unpopular belief, and its virtually exclusive association with the Catholic Church is no secret," Picarello and Moses said. "Thus, although the mandate does not expressly target Catholicism, it does so implicitly by imposing burdens on conscience that are well known to fall almost entirely on observant Catholics - whether employees, employers or insurers."

The mandate also interferes with church governance by “forcing churches as employers (save those few excepted) to purchase for, and then provide without charge to, their employees services that violate the religion’s own moral rules,” the attorneys said.

“If the state forces church institutions to violate their own moral rules, then their governance structure is damaged not only by the immediate compulsion, but also by severely compromising that church’s ability to enforce those same rules internally in the future,” they added.

In composing a religious exemption, the USCCB urged HHS to look to the “church plan” exemption found in section 414(e) of the Internal Revenue Code, which defines a “church plan” to include any pension or welfare plan to covers employees or a church or tax-exempt organization associated with a church.”

In a separate letter to Sebelius that was to be submitted to HHS during the comments period, a group of prominent Catholics suggested defining a religious organization as a “nonprofit religious, educational or charitable organization” that “engages its religious, charitable or educational activities for bona fide religious purposes or reasons” and “holds itself out to the public as a religious organization.”

Such language “would extend conscience protections to religious organizations on the front lines of the Catholic Church’s ancient mission to the poor and the sick,” said the letter.

Signers included Jesuit Father Thomas Reese of Georgetown’s Woodstock Theological Center; Stephen Schneck of the Institute for Policy Research & Catholic Studies at The Catholic University of America in Washington; Kristen Day of Democrats for Life; and Sister Simone Campbell of the Catholic social justice lobbying group Network.

Among the other organizations expected to submit comments on the HHS mandate and religious exemption by the end of September were the Catholic Health Association, Catholic Medical Association and Catholic Charities USA.