CITY OF BALTIMORE

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October 9, 2020

The Honorable President and Members
of the Baltimore City Council
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: Mayor and City Council Bill 20-0613 – Employee Health Care Services Providers – Contraceptive Coverage

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20 – 0613 Employee Health Care Service Providers – Contraceptive Coverage. The bill would require that certain carriers wishing to do business with the City in order to provide health insurance to City employees certify in advance of any bid submissions that they will provide certain contraceptive coverage. The bill also requires certain standards from carriers providing health services to City employees.

The Affordable Care Act

Under the Affordable Care Act (ACA), health plan providers must offer coverage of at least one form of contraception for women in each FDA approved category without cost sharing. 42 U.S.C.A. § 300 gg-13 (and accompanying regulations). Insurance plans are also required to cover over-the-counter contraceptive methods, but are permitted to impose certain requirements on the coverage. Methods for male contraception are not covered by the act. While the ACA requires coverage of sterilization for women without cost-sharing, it does not require the same for sterilization procedures for men. The ACA also prohibits step therapy requirements and preauthorization requirements for contraception.

The validity and enforceability of the ACA contraceptive coverage mandate has been legally challenged in many states and its enforceability against employers with religious objections has been called into question, despite the addition of a religious exemption. The fate of the ACA is unknown at this point due to the many pending lawsuits, some of which were brought by the current federal administration.

Assuming the ACA benefits mandate will remain legally viable, it contains a savings clause that would save a state law from preemption. *See* the Public Health Services Act (84 Stat. 1506 (1970)), which the ACA amends in part, "nothing in this title shall be construed to preempt any state law that does not prevent the application of the provisions of this title."). 42 U.S.C.A. § 300gg-23 also contains presumption against preemption of state laws. This presumption against

preemption of state laws presumably leaves the door open for local legislation, although it is not clear.

The Maryland Contraceptive Equity Act

In 2016, Maryland passed the Contraceptive Equity Act (MCEA), a comprehensive state law requiring greater access to contraception than afforded by the ACA. Maryland Code, Insurance § 15-826.1. The MCEA goes further than the ACA contraceptive mandate by requiring coverage for male sterilization procedures, broadens the range of contraceptive products covered without cost sharing, requires coverage for a one-year dispensing of oral contraceptives, and expands the no cost sharing requirement for prescription contraceptives to over-the-counter products.

The preemptive effect of the MCEA is unclear. There is no express preemption clause, but certainly the pervasiveness with which the state regulates health insurance suggests that the bill could be preempted by field preemption. Field preemption is found where the General Assembly "'acted with such force that an intent by the State to occupy the entire field must be implied[.]'" *Md. Reclamation Assocs. v. Harford County*, 414 Md. 1, 36 (2010) (quoting *Talbot County v. Skipper*, 329 Md. 481, 487–88 (1993)). "[T]he primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated in the field." *Skipper*, 329 Md. at 488.

The Law Department is still investigating whether this bill would be preempted by Maryland insurance laws and has consulted with outside counsel.

The fact that the City is purchasing the insurance in this bill does not necessarily save it from preemption. *See, e.g. Council of the City of New York v. Bloomberg*, 6 N.Y. 3d 380, 395 (2006) (market participant exception to preemption did not apply to benefits mandate law where the City was not only purchasing but also "setting social policy.").

ERISA

The federal Employee Retirement Income Security Act (ERISA) establishes standards for employee benefit plans and has a broad preemptive scope. 29 U.S.C. § 1144 (a) ("the provisions of [ERISA] shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan"). Similar contraceptive mandate laws have avoided ERISA preemption due to the exemption for laws that "regulate insurance." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (citing 29 U.S.C. § 1144(b)(2)(A)). In addition to this exemption from preemption, however, is a section which provides that "no employee-benefit plan …shall be deemed to be an insurance company …for purposes of any law of any state purporting to regulate insurance companies, insurance contracts." § 1144(b)(2)(B) (known as the "deemer clause"). The interplay of these two sections, as recognized by the Supreme Court, is elusive and "not a model of legislative drafting." *Metro. Life*, 471 U.S. at 739-40. The deemer clause's modification of the savings clause which saves traditional insurance laws from preemption creates a distinction between insured and uninsured plans that is beyond the scope of this bill report. Generally speaking, if an employer self-insures, federal law governs, but if the employer instead

purchases an insurance plan from an insurance company, those benefits are regulated by state law. 94 Md. Op. Atty. Gen. 3 (2009).

If the City is deemed to self-insure, it is likely that ERISA preempts the bill.

As with respect to state law preemption, the bill would not be saved from ERISA preemption because the City is the purchaser of the insurance. See, e.g., *Bloomberg*, 6 N.Y. 3d at 9 (city's equal benefits law, prescribing terms of benefit plans of firms contracting with the city, preempted by ERISA because city law was an attempt to induce firms contracting with city to follow certain social policies).

NLRA

Although the bill potentially impacts terms that were negotiated in collective bargaining agreements, the Supreme Court has found that similar laws to not violate the National Labor Relations Act. *Metro. Life*, 471 U.S. at 758.

Scope of Application

Clarification of the scope of the bill's application is needed with regard to the definition of "covered individual." The bill defines "covered individual" as "an individual receiving health benefits from a carrier that has contracted with the Mayor and City Council to provide those benefits to city employees." CCB 20-0613 p.2, line 15. The certification requirement applies to coverage of products used by the "covered individual." p. 3, line 26. If the bill's intent is to require certification that city employees will receive these benefits pursuant to the contract that is being bid on, the definition of "covered individual" must be narrowed to only encompass those city employees. Otherwise, the bill could be read to require certification that all people receiving benefits from those insurers or plans receive the extra benefits, merely because that insurer has a contract to insure city employees.

Adding "employed by the City" after "individual" in the definition of "covered individual" would address this issue.

Similarly, section 30-3 must be narrowed. That section provides "any carrier contracting with the city to provide health care services to Baltimore city employees *or persons receiving health care through any entity funded by the city* shall:" CCB 20-0613 p. 4, line 25. The italicized language should be deleted, as many entities funded by the City have employees that are not insured through the City.

Finally, the bill should be amended to clarify that certain carriers, like dental plans, that do not provide contraceptive coverage, are excluded from the bill.

In conclusion, due to the complexity of the legal issues raised by the bill, the Law Department cannot render a final opinion at this time. More time is needed to research both the federal and state preemption issue and consult with experts in the field.

Very truly yours,

Ashlea Brown, Assistant Solicitor

cc: Dana P. Moore, Acting City Solicitor
Matthew Stegman, Mayor's Office of Government Relations
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