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## **The Vermont Legislative Research Shop**

### **Distribution of Birth Control by Pharmacists**

A recent trend has emerged across the United States, where pharmacists have been refusing to fill regular birth control and morning-after pill prescriptions on moral and religious grounds. This has sparked a wide debate over a woman's reproductive rights versus a pharmacist's religious rights. As a result of this largely heated issue, many state legislatures have responded by seeking to pass laws either protecting pharmacists or forcing them to fulfill their roles as pharmacists. Legislators have also proposed some compromise solutions of laws allowing pharmacists to refuse to fill a prescription so long as another pharmacist was on site to fill it, or there was another pharmacy within close proximity. If the FDA approves the morning after pill for over-the-counter sale by pharmacists, then state legislatures might not even have to address this issue. If this went into effect, then pharmacists that did not want to fill the prescriptions on moral and religious grounds would not have to do so or even carry it within their pharmacies (Belluck and Davey 2005). At this time, it is unclear if the morning-after pill will be sold over-the-counter. The Bush administration is currently under pressure from the religious right to prevent this from occurring.

### **Current Legislation**

There is currently no federal law requiring pharmacists to fill prescriptions. Senators John Kerry (D-MA) and Rick Santorum (R-PA), however, recently introduced The Workplace Religious Freedom Act, legislation that would allow pharmacists to refuse to fill a prescription as long as there was another employee available to help the customer. There is also 'must fill' legislation working its way through the House of Representatives and the Senate, though it is not expected to make it very far (Belluck and Davey 2005).

'Conscience clause' and 'must fill' legislation may be an even hotter issue on the state level. At least 23 states have either passed legislation or are considering legislation on this issue. Forty-six different states have conscience clause legislation; however, only the conscience clause bills of Arkansas, Georgia, Mississippi, and South Dakota specifically allow pharmacists to refuse to fill a prescription. Four states, meanwhile, have 'must fill' legislation currently pending. Two of those states, West Virginia and California, are also considering conscience clause bills (Belluck and Davey 2005).

In response to a Chicago pharmacist refusing to fill a morning-after pill prescription, the Governor of Illinois, Rod Blagojevich, passed an emergency rule on April 1, 2005 requiring

pharmacies to fill such prescriptions. The rule is in place for 150 days. A hotline was also created to allow people to report noncompliance by pharmacists.

The following chart shows existing states' laws regarding the rights of Individual Health Care Providers and Health Care Institutions (including the possibility of private or religious institutions) to decline to provide health care services involving abortion, contraception, and sterilization.

<b>EXEMPTIONS FROM PROVIDING HEALTH SERVICES</b>						
<b>STATE</b>	<b>ABORTION</b>		<b>CONTRACEPTION</b>		<b>STERILIZATION</b>	
	<b>Individual Providers</b>	<b>Institutions</b>	<b>Individual Providers</b>	<b>Institutions</b>	<b>Individual Providers</b>	<b>Institutions</b>
Alaska	X	Private				
Arizona	X	X				
Arkansas	X	X	X*	Private	X	X
California	X	Religious				
Colorado	X	X	X	Private		
Connecticut	X					
Delaware	X	X				
Florida	X	X	X			
Georgia	X	X	X†		X	X
Hawaii	X	X				
Idaho	X	X			X	X
Illinois	X	Private	X‡	X	X	X
Indiana	X	Private				
Iowa	X	Private				
Kansas	X	X			X	X
Kentucky	X	X			X	
Louisiana	X	X				
Maine	X	X	X	Private		
Maryland	X	X			X	X
Massachusetts	X	X		Private	X	Private
Michigan	X	X				
Minnesota	X	Private				
Mississippi	X*	X*	X*	X*	X*	X*
Missouri	X	X				
Montana	X	Private			X	Private
Nebraska	X	X				
Nevada	X	Private				
New Jersey	X	Private		Private	X	Private
New Mexico	X	X				X
New York	X					
North Carolina	X	X				
North Dakota	X	X				
Ohio	X	X				
Oklahoma	X	Private				
Oregon	X	Private				
Pennsylvania	X	Private			X	Private
Rhode Island	X				X	
South Carolina	X	Private				
South Dakota	X	X	X†			
Tennessee	X	X	X	Private		
Texas	X	Private				
Utah	X	Private				
Virginia	X	X		Religious		
Washington	X	X	X	X	X	X
West Virginia					X	X
Wisconsin	X	X			X	X
Wyoming	X	Private				
<b>TOTAL</b>	<b>46</b>	<b>43</b>	<b>10</b>	<b>10</b>	<b>16</b>	<b>15</b>

Note: Unless indicated, the right to refuse applies to all institutions— private, religious and public.

\* Exemption expressly applies to pharmacists along with health providers.

† Exemption applies only to pharmacists.

‡ Pharmacies are required to dispense contraception.

**Figure 1: Exemptions from Providing Health Care Services**  
Source: The Alan Guttmacher Institute

## **Judicial Issues Pertaining to Pharmacists' Refusal**

### **Actual Court Cases**

With the increasing trend of pharmacists' refusal to fill contraceptive and "emergency" contraceptive prescriptions, as well as the move of state legislatures to pass this legislation, this issue has also begun to make its way to the legal battlefield as well. Although both pharmacists against their employers and women against pharmacies have filed several suits, almost all cases are still in current litigation. Some examples of court cases where there have been decisions made regarding a pharmacist's refusal to fill a birth control prescription include one in Ohio and in Wisconsin. In the Wisconsin case, pharmacist Neil T. Noesen refused to fill a University of Wisconsin birth control prescription at a Kmart. The pharmacist also refused to transfer the prescription to another pharmacy. In this case, an administrative judge of the state pharmacy board required Noesen to take ethics classes, alert future employers to his beliefs, and pay up to \$20,000 to cover the legal proceeding costs. It would then be left up to the state pharmacy board for future penalties (Stein, 2005). Another court case in Ohio, had a different result. In this case, a pharmacist was fired for refusing to fill a prescription for Micronor, an "emergency contraceptive pill." The judge in this case refused to dismiss the case, allowing it to continue being litigated, on the grounds that "an Ohio law, designed to protect people who refuse to perform or participate in medical procedures resulting in an abortion, applies to pharmacists (CNS News)."

### **Title VII of the Civil Rights Act of 1964**

Another way that courts have approached similar issues is by turning to Title VII of the Civil Rights Act of 1964. Title VII "requires employers to make reasonable accommodations for their employees' religious beliefs and practices, unless doing so would result in "undue hardship" to the employer" (*Shelton v. University of Medicine & Dentistry of New Jersey*). In order for this rule to apply, the employee must have a sincere religious belief that prevents him/her from completing a job requirement. Furthermore, the employee must inform their employer of the religious belief. According to Title VII, no employer can "discharge...or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of...religion" (*Shelton v. University of Medicine & Dentistry of New Jersey*). With that said, no pharmacist can be required to fill a prescription, nor can they be fired for not filling a prescription unless their employer could prove that by them refraining from filling a prescription it is causing "undue hardship" on the employer. One remedy available to employers is to either have a second pharmacist on staff that can fill prescriptions that another may refuse to fill. Also, a pharmacy can provide "reasonable accommodation" to the employee by offering them a different position that may not conflict with their religious beliefs. In such a small business, this may be a difficult task to fulfill (*Shelton v. University of Medicine & Dentistry of New Jersey*).

### **Legal Reasoning**

Courts may continue to see further litigation on this issue because two fundamental, constitutional issues continue to come up between the two opposing groups, the women's rights

activists and the religious right. Those two issues are the First Amendment's Free Exercise Clause protecting "an absolute freedom of belief and an individual right to practice religion," and the Fifth Amendment's protection of property and prohibition on deprivation of personal liberty without due process (Annenberg Center 2005). Therefore, the issue of the pharmacist's religious and moral right to refuse filling birth control prescriptions has become a difficult issue to grapple with due to those roots. For instance, legally, it can be argued that requiring pharmacists to fill prescriptions that conflict with their religious beliefs violates the Free Exercise Clause of the First Amendment because "people whose religion prohibits birth control or abortion cannot freely exercise their religion if they are forced to dispense these medications (Annenberg Center 2005)." On the other hand, it has also been argued that requiring a pharmacist to fill a prescription against its religious beliefs, does not violate the Free Exercise Clause because the pharmacist doesn't actually have to take the medication. Finally, even if there is a possibility of a free exercise violation, it doesn't matter because the patients' need to have their medication outweighs the pharmacist's religious rights and beliefs. This issue continues to be complicated because it can involve the Fifth Amendment as well as the first. For instance, under the fifth, an individual is guaranteed both the protection of property and no deprivation of personal liberty without due process (Annenberg Center 2005). In this case, the prescription is not only the patient's property, but "passing laws to allow individual pharmacists to refuse to refill prescriptions that offend their personal moral s would deprive patients of their liberty without due process (Annenberg Center 2005)."

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Compiled by Bethany Dufresne, Nick Managan, and Ryan Mullady on April 26, 2005 under the supervision of Professor Anthony Gierzynski.

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