Beyond mandates

In this issue of the Journal, Koniares et al. (1) address the reach of the Massachusetts Infertility Insurance Mandate. I share the investigators' dismay that the direct effects of the Massachusetts infertility mandate fall far short of the ideal of comprehensive infertility coverage for all. As a lawyer and longtime infertility patient advocate, I am moved both to defend the strategy of passing state mandates—and to decry the larger system that limits their impact.

First, the effect of mandates nationwide is hardly de minimis. During the 2019–2022 Collaboration with the American Society for Reproductive Medicine (ASRM), RESOLVE: the National Infertility Association and partners succeeded in extending new or improved infertility coverage to >28 million people across the country. This is a huge number that will only grow and grow as new generations of individuals reach childbearing age.

Mandates spur other growth, too. As the investigators note, there is evidence that when a state mandates infertility coverage, self-insured employers there come under pressure to provide similar benefits to remain competitive.

How much pressure?

According to the Massachusetts Division of Insurance, in 2018, one of the years studied in the article, *almost all self-insured employers voluntarily offered full or partial infertility benefits!* The percentage is reported as ">90%" (2). In 2018, approximately 516,000 women worked for these employers, representing 44% of reproductive-age women. The precise number of covered women might not be calculable from these figures, and the comprehensiveness of coverage is not known—but they indicate that far >30% of reproductive-age women in Massachusetts are receiving fertility coverage.

This result confirms the power of the strategy pursued by RESOLVE, and by RESOLVE New England in the northeastern states, to advocate for state infertility mandates while also encouraging self-insured employers to add the benefit voluntarily—the express aim of the RESOLVE's "Coverage at Work" program.

However, the study is entirely correct that if our goal is to make fertility treatment affordable for all, we are falling far short. Why?

I believe our fractured health care system ensures there are only a few and limited ways for citizens to make improvements. The fact that there is *any* avenue through which citizens can exert pressure to override the preferences of powerful insurance companies—which is how mandates operate—is actually fairly surprising. But the investigators are right that statutory exemptions (i.e., exemptions established by other laws) prevent the application of the mandate to more people. We need to remember that statutory exemptions like the Employee Retirement Income Security Act of 1974 were not handed down from on high but are policy decisions made by politicians. Thus, the results of this study should be seen as a failure not of the mandate strategy but rather of a system that permits only small gains for one or another "pocket" of insureds.

Even when advocates do pass mandates, the payoff—getting to use insurance coverage—is not necessarily a bed of roses. Patients report hidden costs and caps, illogical prerequisites before in vitro fertilization, and baseless coverage denials, which leave them paying many thousands of dollars out of pocket. Some reproductive endocrinology and infertility practices do not accept insurance, despite the entreaty of the ASRM Ethics Committee (3). Although having mandated coverage seems like a win, using the coverage can be difficult. (e.g., https://resolvenewengland.org/infertility-and-insurance-coverage-what-ive-learned/)

The investigators and I are in full agreement: it is time to look at the full population of people who need infertility services. Solutions that apply only to people who are employed are inadequate. Solutions that do not reach middle- and low-income people are inadequate. (To that point: when the late Dr. Paul Farmer of Partners In Health established his first clinics in Haiti in the 1980s, he made sure to stock clomiphene citrate so he could help people in that impoverished country overcome infertility.)

There have been commendable inroads. In Delaware, Maryland, Massachusetts, New Jersey, and New York, the mandated infertility coverage includes state employees. In 2016, RESOLVE, ASRM, and partners succeeded in securing some limited coverage for certain military veterans; new bills would expand that coverage and include active duty military, too (4). After advocates raised the issue at the RESOLVE-ASRM Advocacy Day in May 2022, the federal Office of Personnel Management agreed to add fertility preservation for iatrogenic infertility to all plans and Assisted Reproductive Technology coverage to several plans within the Federal Employee Health Benefits Plans beginning in January 2023. A longshot bill in the Congress would extend benefits for fertility treatment and preservation not only to private health care plans nationally, but also to the Medicaid enrollees, active duty military and veterans, and federal employees (5).

Until we fix our fractured health care system, however, the investigators are correct that advocates must continue to target successive pockets of insured, like those who receive coverage from Affordable Care Act policies and Medicaid. I have heard no consideration of amending The Employee Retirement Income Security Act of 1974; the formidable wall of case law exempting self-insured employers from state insurance regulation probably makes such an effort futile. When it comes to these self-insured employers, there are tales of fertility carve-out benefit managers approaching employers that offer comprehensive benefits and persuading them to save money by making the benefits less generous; this, needless to say, is wrong.

As caregivers and advocates, we are moral agents in an amoral system, and we should not be satisfied until everyone can readily have the medical treatment they deserve simply by virtue of being human.

The opinions expressed are the author's own and do not necessarily reflect those of the organizations she is affiliated with.

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