



# Women Have Paid the Price for Trump's Regulatory Agenda

By Osub Ahmed, Shilpa Phadke, and Diana Boesch | September 10, 2020

From the first day of Donald Trump's presidency, his administration has used every tool in its arsenal to chip away at women's health, employment, economic security, and rights overall. One of the administration's most effective, and at times less noticed, tools to crafting this harmful agenda against women has been to use the standard agency rule-making process as a political weapon.<sup>1</sup> Frequently ignoring relevant data and research, the Trump administration has used the rule-making process to issue guidance, interpret public policy, and implement statutes in ways that are fundamentally harmful to women, often pushing beyond the limits of its legal authority while consistently underestimating the financial costs and dismissing the human impact of its rules.<sup>2</sup>

The administration's harmful regulatory agenda is part of a larger and unfortunately all-too-familiar agenda to strip women of their fundamental rights to control their own bodies and economic futures, while catering to social and religious conservatives and big-business interests. These efforts often have reflected a narrow worldview—rooted in racism and misogyny—that treats women, and specifically women of color, as objects to be controlled rather than full participants in a society that still has work to do to become more inclusive, fairer, and responsive to women's needs. Women's real-world experiences—as caregivers, as breadwinners, and as health care decision-makers—are dismissed as peripheral and thus are nowhere to be found in the administration's policies. Indeed, these rules negatively affect every facet of women's lives in the United States, including their ability to control their bodies, demand equal pay, and protect themselves against sexual violence. The rules are also consistent with President Trump's own harmful and disrespectful rhetoric about women and women's rights.<sup>3</sup> Only by identifying and understanding these dangerous rules can we begin to dismantle and mitigate their harms.

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## Threatening private abortion coverage

The Trump administration finalized a rule in December 2019 that threatens abortion coverage both on and off the Affordable Care Act (ACA) marketplaces.<sup>4</sup> The rule would force health insurers that offer coverage on the ACA marketplaces to bill consumers separately for the part of insurance premiums that covers abortion services—as little as \$1. This change is likely to result in consumer confusion and additional administrative costs for insurers and states, which could eventually lead to the elimination of abortion coverage from health plans. This rule puts 3.4 million people currently enrolled in ACA marketplace plans that cover abortion at risk of losing their abortion coverage.<sup>5</sup> Furthermore, people enrolled in private insurance plans outside of the marketplace could lose their abortion coverage, as insurers who offer plans both on and off the marketplace usually align both sets of plans.<sup>6</sup> While a federal court temporarily halted the implementation of the rule, the threat is far from over.<sup>7</sup>

The administration claims that insurers, states, state exchanges, and the federal government will face \$546 million in additional billing and payment policy costs in the first year following the rule's implementation. This cost, however, does not account for consumers' confusion over their second bill, which they may miss entirely or choose not to pay out of confusion. Rule estimates also do not fully account for the cost of printing extra bills; the hiring of additional staff to handle consumer inquiries and address payment and billing concerns; and the creation of new administrative processes to handle the new billing procedures. Some insurers estimate these added costs to be up to \$10.8 million annually per issuer, compared with the administration's estimate of up to about \$1 million annually per issuer.<sup>8</sup> Over time, insurers will be forced to either absorb these additional costs or, alternatively, eliminate abortion coverage from their plans due to the unsustainability of such coverage.

Additionally, the rule does not account for the cost to pregnant people who are denied abortion care. If insurers drop abortion coverage, then pregnant people may have to decide between continuing unwanted pregnancies or enduring severe financial stress to themselves and their families in order to obtain abortion care—which can cost them \$1,650 or more out of pocket.<sup>9</sup>

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## Undermining the ACA's birth control benefit

The ACA requires most health plans to cover a range of preventive services, including contraceptives, with no out-of-pocket costs. The birth control benefit has been a particular boon for women: 61.4 million women have coverage of contraceptives without out-of-pocket costs due to the ACA and have saved \$1.4 billion annually on oral contraceptives alone.<sup>10</sup>

However, the Trump administration has been relentless in its efforts to undermine this particular ACA provision. In November 2018, the U.S. Department of Health and Human Services (HHS) finalized rules that expanded religious and moral exemptions for employers, universities, and insurers that are opposed to providing contraceptive coverage. Various district courts quickly halted the rules,<sup>11</sup> and the legal fight eventually landed in front of the U.S. Supreme Court, which in July 2020 decided that the rules can remain in effect.<sup>12</sup> While the Trump administration attempts to use religion as cover for its policy, all major religious groups in the United States support employer-provided health care coverage that includes contraception at no cost.<sup>13</sup> The Trump administration's use of religion as a tool to discriminate has also been part of a larger strategy to prioritize the religious liberty of a select few at the expense of others.<sup>14</sup> For example, in 2019, the administration also finalized a broad religious exemption that expands providers' and other health care workers' ability to deny health care services—including health services for transgender people and abortion care—based on religious or moral objections.<sup>15</sup> A federal district court has preliminarily enjoined this refusal of care rule.<sup>16</sup>

The administration claims that its birth control rules will cumulatively cost women just around \$67.3 million, but it uses flawed assumptions and unclear calculations to arrive at this figure.<sup>17</sup> Remarkably, the administration claims that just 15 women—out of the 61.4 million women who currently have contraceptive coverage without out-of-pocket costs—will bear out-of-pocket costs due to expanded moral exemptions.<sup>18</sup> The administration also claims that only 6 percent of women with contraceptive coverage did not have this coverage prior to the ACA and are at risk of losing it once the rules go into effect. At the same time, the administration admits that it is unsure whether an additional 31 percent of women also lacked this coverage pre-ACA and would be similarly affected. If the administration had taken the upper bound of women possibly without access to contraceptives pre-ACA, the rules' final costs would have been much greater—and still would not encompass the rules' other significant methodological issues or flawed assumptions that, if corrected, would yield even greater costs to women. Illustratively, between 2012 and 2014—with the birth control benefit going into effect in August 2012—the number of privately insured women who paid out of pocket for oral contraceptives dropped from 85 percent to 33 percent.<sup>19</sup>

The Trump administration also limits the number of entities it counts in its estimate that may claim religious or moral exemptions to those that have already filed religious accommodation claims in the past or are involved in litigation. This does not account for the number of entities that newly qualify and may seek to take advantage of the exemptions.

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## Eroding equal pay by halting pay data collection on the EEO-1 form

In August 2017, the Trump administration directed the Equal Employment Opportunity Commission (EEOC) to halt the implementation of the pay data collection rule, citing unfounded concerns about burden and utility.<sup>20</sup> The Trump action was challenged in federal court and found to be arbitrary and improper, and the EEOC was directed to complete the pay data collection for 2017 and 2018.<sup>21</sup> But the EEOC remained undeterred in its effort to derail the pay data rule, announcing in September 2019 that it had decided to discontinue pay data collection for future years.<sup>22</sup> Despite the lack of a sufficient rationale to justify weakening a key enforcement tool, this rollback was approved by the Office of Management and Budget in June 2020.<sup>23</sup> The rule, first revised in September 2016 by the Obama administration, required employers with 100 or more employees—more than 73,000 employers, representing 56.1 million workers in 2018<sup>24</sup>—to submit pay data to the EEOC via a form called the Employer Information Report, or EEO-1 form.<sup>25</sup> Access to pay data—disaggregated by factors such as sex, race, and ethnicity—is a vital tool to help identify where pay disparities are occurring and isolate factors that could be fueling such disparities, including discrimination.<sup>26</sup> These data can help enforcement agencies pinpoint problems and trends and can even help employers themselves uncover and rectify workplace pay inequality.

Before 2016, employers were already required to file the EEO-1 form annually to provide workforce demographic data broken down by race, gender, and ethnicity across 10 occupational categories. The Obama administration rule added a new component, requiring employers to provide pay data breakdowns across the same demographic and occupational categories. This revision to the EEO-1 form aimed to provide enforcement officials with much-needed pay information to strengthen investigations and help combat pay discrimination, while balancing employer concerns about maintaining confidentiality and minimizing burden.

The Trump administration's move to eliminate pay data collection—and undermine efforts to combat pay discrimination in the process—ignores the economic burden of persistent pay disparities experienced by working women, and particularly women of color, who experience the largest pay gaps. Compared with a white man working full time in 2017 and 2018, a Black woman earned almost \$35,000 less; a Latina earned almost \$40,000 less; a white woman earned nearly \$19,000 less; and an Asian woman earned nearly \$7,000 less.<sup>27</sup> Collectively, women working full time earned more than \$1 trillion less than their male counterparts during that same two-year period. These disparities call for increased enforcement—rather than weakening areas of progress—to secure equal pay for women.

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## Weakening Title IX and putting students at greater risk of sexual harassment and assault

In May 2020, the U.S. Department of Education finalized a rule that dramatically changes the way Title IX of the Education Amendments of 1972—the watershed civil rights law that prohibits sex discrimination in federally funded education programs and activities—is enforced and implemented. It does so by, among other things, narrowing the definition of sexual harassment and allowing educational institutions to require a greater burden of proof when investigating cases.<sup>28</sup>

The Trump administration claims that the rule will result in a net cost of only \$48.6 million to \$62.2 million over 10 years due to a reduction in the number of Title IX investigations, among other things. However, considering the rule's extensive changes to Title IX, the administration's projections underestimate the true scope and magnitude of the rule's costs. Specifically, the rule will result in increased costs to survivors, whose safety, health, and education will be threatened in an increasingly hostile educational environment, and to schools, which will shoulder greater technological, record-keeping, staff, and supportive-measure costs. The rule also does not account for the downstream social and economic effects of the rule such as long-term physical and emotional effects on survivors, reduced job earnings, and lost productivity.

To arrive at its relatively low net cost estimates, the Trump administration claims its rule will lead to a reduction in the number of Title IX investigations and will therefore yield large cost savings. To calculate this reduction in investigations, however, the administration relies almost exclusively on inherently flawed data sets—such as the Clery Act and the Civil Rights Data Collection—which severely undercount the prevalence of sexual assault in schools due to schools' under-reporting.<sup>29</sup> The administration also claims its rule will not lead to an increase in the underlying rate of sexual harassment; however, the rule will raise reporting and investigation thresholds, alter grievance procedures, and ultimately lead to a reduction in the rate of Title IX investigations, making it less likely that survivors will pursue formal investigations. If fewer incidents of sexual harassment are investigated, the likelihood that this harassment will be detected and punished will also be reduced, thereby weakening the system's general deterrent effect and increasing the underlying rate of sexual harassment.<sup>30</sup>

In addition, the rule encourages schools to offer extensive supportive measures, in the form of counseling, campus security escorts, and other school accommodations, in lieu of pursuing formal investigations. It does not, however, provide adequate funding for schools to offer such services. Likewise, the rule requires harmful live hearings, during which survivors and accused students can be cross-examined through a third party, but does not offer the requisite funding to schools to purchase equipment and software to conduct these hearings.

Numerous studies have outlined the incredibly high cost of sexual violence. For example, one study has placed the marginal lifetime costs of rape at \$122,461 per survivor and \$3.1 trillion for all survivors.<sup>31</sup> Women experiencing ongoing abuse also have annual health expenditures that are 42 percent higher than those of women who have never been abused and have lost a total of \$110 billion in short-term productivity.<sup>32</sup> It is also important that these costs are couched in an understanding that some effects of sexual assault cannot be quantified but are no less harmful.

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## Dismantling the nation's Title X family planning network

The Trump administration finalized regulations in March 2019 that have undermined the integrity of Title X, the United States' only family planning program that provides critical health care—including birth control services, wellness exams, and breast and cervical cancer screenings.<sup>33</sup> This rule—known as the domestic gag rule<sup>34</sup>—prohibits providers that receive Title X funding from referring patients for abortion services or providing information or counseling related to abortion. It also requires the physical separation between abortion services and other health services.<sup>35</sup> Since the rule's implementation, dozens of Title X grantees have left the program's network, and more than 1.6 million women have been unable to access vital family planning services.<sup>36</sup>

The Trump administration once again underestimates the magnitude of the rule's effect on women's health. The HHS claims that the rule will cost \$69.2 million in 2019 and \$14.8 million in each subsequent year, based on calculations regarding training, documentation, and physical separation costs.

For example, the rule's physical separation requirement seeks to force Title X providers to construct separate facilities for non-Title X abortion-related activities, which the rule estimates will cost between \$20,000 and \$40,000 per clinic in the first year. However, this estimate is completely unrealistic—the costs of either reconfiguring an existing health care facility or locating and opening a new facility, securing the appropriate staff, and purchasing separate workstations and equipment, among other things, would far exceed this suggested cost range. In addition, the administration underestimates the cost of its new documentation requirements, as Title X providers are now responsible for creating new electronic health record systems and purchasing additional server capacity to capture and store provider and patient information.<sup>37</sup>

The rule also does not consider the consequences of patients not having access to affordable, high-quality providers. When patients do not receive timely family planning care, the public health outcomes and related costs are significant. Indeed, investments in family planning help to prevent unplanned pregnancies, sexually transmitted infections, cervical and breast cancer, and other critical health outcomes. Every public dollar spent on family planning services results in taxpayer savings of \$7.09.<sup>38</sup>

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## Eliminating key nondiscrimination protections in health care

In June 2020, the Trump administration issued its final rule regarding Section 1557 of the ACA, a critical civil rights provision that prohibits discrimination on the basis of race, color, national origin, sex, age, and disability status in health programs and activities.<sup>39</sup> During the Obama administration, this provision was interpreted to protect against, among other things, discrimination based on gender identity, sex stereotyping, and pregnancy status, including the termination of pregnancy.<sup>40</sup> The Trump administration has sought to remove these specific protections to the detriment of LGBTQ individuals and people seeking abortion services.

Surprisingly, the administration claims that these large-scale changes across the health care system will result in only \$585 million per year over the first five years—primarily stemming from the revision of policies and procedures as well as retraining of employees—but fails to consider the consumers who will be disproportionately affected. The rule also claims that removing these protections will result in cost savings for covered entities because patients who have experienced discrimination will no longer have recourse to file grievances. However, the administration does not adequately consider the physical, mental, and direct monetary costs the rule will have on LGBTQ people and those who have had or will have an abortion. The literature clearly shows the effect that legalized discrimination in health care poses to people's health such as avoiding or postponing health services as well as experiencing negative health outcomes.<sup>41</sup> The administration has admitted that it does not have the data to fully assess the current benefits consumers accrue from existing protections and cannot quantify the number of people who would no longer receive those protections as a result of this rule. Meanwhile, the Trump administration is in the midst of finalizing another rule,<sup>42</sup> which would eliminate explicit nondiscrimination protections for sex, sexual orientation, and gender identity in HHS grants—something that Section 1557 would have prevented—and thereby put access to critical services at risk.<sup>43</sup>

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## Limiting an increase in the overtime threshold

The U.S. Department of Labor (DOL) under the Trump administration finalized a rule in September 2019 that marginally raised the overtime threshold to \$679 per week—or an annual salary of \$35,308 for a person working a full year<sup>44</sup>—after rolling back a higher threshold of \$47,476 per year set by a 2016 Obama administration rule.<sup>45</sup> The Trump rule leaves behind an estimated 4.2 million women who would have received new or strengthened protections under the 2016 rule.<sup>46</sup> This loss of overtime protections and earnings is particularly devastating for the 64.2 percent of mothers overall, especially 84.4 percent of Black mothers, who are the primary or co-breadwinners in their families.<sup>47</sup>

The overtime rule sets the new salary threshold that determines which white-collar employees or those who perform executive, administrative, or professional duties are covered by overtime protections. Under the Fair Labor Standards Act, white-collar employees who earn less than the salary threshold are eligible for overtime pay—at a rate of 1.5 times their regular rate of pay—when they work more than 40 hours a week. The DOL under the Obama administration worked to significantly expand and modernize the previous overtime threshold, set in 2004 at \$23,660 per year, by issuing a final rule in May 2016 which would have raised the overtime salary threshold to \$51,053 per year for full-year workers by 2020. This would have covered millions more people, and the threshold would have been automatically updated every three years.<sup>48</sup> Unfortunately, however, the Trump administration worked to block this 2016 rule, and the rule never took effect after a lawsuit from business groups and states led a federal court to strike it down in September 2017.

The new rule from the DOL under the Trump administration sets a dramatically lower threshold of \$35,308 and fails to include automatic updates for inflation. And, while the Trump administration touts the rule as part of its deregulatory agenda—claiming that it will result in annualized cost savings of \$534.8 million compared with the 2016 rule<sup>49</sup>—this callously ignores the lost overtime wages of more than 8 million workers, including 4.2 million women, who are not eligible under the Trump rule.<sup>50</sup> An analysis from the Economic Policy Institute estimates that workers will lose between \$1.2 billion and \$1.6 billion, in inflation-adjusted terms, each year, or \$12.6 billion total, during the first 10 years of the Trump administration rule, compared with wages employees would have received under the 2016 rule.<sup>51</sup>

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## Conclusion

Each of these rules comes with a price tag for women—on top of other unquantifiable and harmful costs to women’s lives. Worst yet, this list of regulations is not even exhaustive. The Trump administration has taken numerous actions that harm women in the workplace and roll back their rights, including its rescission of the Fair Pay and Safe Workplaces executive order, which would have ensured that federal contractors do not violate workers’ rights and labor laws, and its tipped wage proposal, which allowed employers to pocket their workers’ tips.<sup>52</sup> Even during the pandemic, the Trump administration has worked to undermine working women with caregiving responsibilities through its regulations for emergency paid leave laws.<sup>53</sup> The DOL broadly interpreted the exemption of health care providers from emergency paid leave, leading to the exclusion of thousands of front-line workers<sup>54</sup> and narrowly limited uses for child care leave for working parents of school-aged children.<sup>55</sup>

This is on top of the administration's attempts to take away access to health care through the issuance of junk plans, which provide woefully inadequate coverage and do not cover preexisting conditions; work requirements, which require beneficiaries to participate in certain activities, including employment, for a specified number of hours per month in order to receive Medicaid benefits; and public charge regulations, which deny visas or green cards to certain immigrants who may qualify for public assistance. While these rules are seemingly gender neutral, women will be among those most affected. The administration has supported efforts to eliminate abortion care, which is essential health care, as well as any references to sexual and reproductive health out of its response plan to the pandemic in the United States and abroad.<sup>56</sup>

This administration and its misguided actions have taken women's progress backward. Identifying and undoing these harmful rules must be a top priority in a progressive policy agenda in order to preserve women's health, rights, and economic security.

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