Supreme Court Rules Closely Held Companies Not Subject to Contraceptive Coverage Mandate of Health Care Reform Law

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In a highly publicized decision, the Supreme Court, 5-4, has ruled that closely held corporations cannot be required to provide contraceptive coverage as mandated by the Affordable Care Act (ACA). *Burwell v. Hobby Lobby Stores, Inc., et al.*, No. 13-354 (June 30, 2014) (together with *Conestoga Wood Specialties Corp. et al. v. Burwell*, No. 13-356).

Background

At issue in the case were regulations promulgated by the Department of Health and Human Services (HHS) under the ACA generally requiring group health plans to provide preventive care for women without cost-sharing. The HHS regulations specified 20 contraceptive methods approved by the Food and Drug Administration that must be provided, including four methods that may have the effect of preventing a fertilized egg from implanting in the uterus.

Hobby Lobby, a Christian-owned arts-and-crafts chain store, and Conestoga Wood Specialty Store, owned by a Mennonite family (whose case was consolidated for oral argument and decision with the *Hobby Lobby* case), challenged the ACA's contraceptive mandate on the grounds that the mandate violated their religious freedom under the Religious Freedom Restoration Act of 1993 (RFRA) by requiring them to pay for those methods of contraception that they believe are akin to abortion, and morally wrong.

The HHS regulations provide an exemption from the contraceptive mandate for religious employers (churches and other houses of worship). They also provide an accommodation for other non-profit religious organizations (such as schools and hospitals) that object to providing one or more methods of contraceptive coverage on religious grounds. Eligible non-profit religious organizations that self-certify they meet the regulatory requirements for the accommodation do not have to contract for, or pay for, contraceptive coverage. The regulations require the insurer or the third-party administrator of an eligible non-profit employer who provides the certification to provide the coverage at no cost to the employees.

RFRA Violated

The Supreme Court held that, as applied to closely held corporations, the HHS regulations requiring contraceptive coverage violates the Religious Freedom Restoration Act of 1993.

The RFRA prohibits the government from "substantially burdening" a person's exercise of religion, except where the burden is both in "furtherance of a compelling governmental interest" and is the "least restrictive means of furthering that compelling governmental interest." 42 U.S.C. Section 2000bb-1(a).

Both Hobby Lobby and Conestoga claimed the HHS regulations violated their First Amendment rights, but the Court did not rule on that issue, deciding instead that the RFRA provided sufficient basis for the holding.

The Court held as a threshold issue that closely held corporations are "persons" within the meaning of the RFRA and, therefore, the protections of that statute apply.

Additionally, the Court held that the ACA's penalties for failure to comply with the contraceptive mandate (estimated at close to $475 million a year for Hobby Lobby) were a "substantial burden" within the meaning of the RFRA.

The Court further held the government had failed to show the contraceptive mandate was the least restrictive method of advancing its interest in guaranteeing access to contraceptive coverage without cost-sharing. The Court acknowledged, without discussion, that contraceptive coverage was a valid government interest.

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Further, the Court found that HHS, while providing a regulatory accommodation for religious non-profits, had not provided any meaningful rationale for failing to extend a similar accommodation to for-profit, closely held corporations that have religious objections to providing coverage for all or some methods of contraception.

The Court addressed the dissenters' claims that the decision opened the floodgates to discrimination claims or refusals to provide coverage for other mandated medical treatments by qualifying the reach of its opinion.

First, the Court stated the decision is to be applied narrowly to "closely held" corporations — although, unfortunately, no definition of "closely held" is provided in the opinion.

While not referenced by the Court, the Internal Revenue Service definition could be used by regulators. The IRS defines closely held corporations as companies where five or fewer individuals own more than 50 percent of the business's outstanding stock.

Second, the Court states that its decision is limited in scope, concerns only the contraceptive mandate, and does not necessarily mean that all insurance mandates (e.g., for blood transfusions or vaccinations) would fail if they conflict with religious beliefs.

Finally, the majority states the decision does not provide a shield for employers who might cloak racial discrimination as a religious belief. In such a case, the Court stated, the government's interest in equal access to employment opportunity presumably would outweigh the religious belief objections. The Court did not specifically address other forms of discrimination based on religious belief (e.g., gender or sexual orientation).

Dissent

Four justices dissented from the majority opinion. The dissenters sharply criticized the majority for essentially concluding that commercial entities could opt out of almost any law considered incompatible with their owners' religious beliefs. The dissent fundamentally disagreed with the majority, concluding that for-profit corporations were not "persons" protected by the RFRA (given that for-profit corporations exist mainly to make money rather than perpetuate religious values), that there was no logical basis upon which to restrict the majority's reasoning to closely held corporations, and that the ACA's contraceptive coverage requirements did not substantially burden the exercise of religion, because covered employers merely directed money into undifferentiated funds to finance a wide variety of benefits under comprehensive health plans and the decision whether to actually use the objected-to contraceptive methods ultimately rested with covered plan participants and their health care providers.

The dissent further stated that the ACA's contraceptive coverage requirements furthered the compelling interests of public health and the well-being of women, noting the majority opinion would appear to allow employers who object on religious grounds to exclude all forms of contraception from their plans, that the majority's proffered alternative (having the government — i.e., tax payers or a third party — assume the cost of providing contraception to the employees of objecting employers) would create unnecessary logistic and administrative obstacles to access, and that there is no way to distinguish between the majority's holding concerning contraception and further challenges to treatments such as vaccines, blood transfusions, antidepressants and other medications deemed objectionable on religious grounds.

Jackson Lewis will closely track further developments around *Hobby Lobby* and related ACA requirements. If you have any questions about this and other workplace law developments, please contact a member of our Employee Benefits practice.