

Supreme Court Decision

on Contraceptive Mandate

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The Supreme Court, in a 5-4 ruling, decided the contraceptives mandate under the Affordable Care Act (ACA) violated rights of certain closely held for-profit corporations under the Religious Freedom Restoration Act of 1993 (RFRA). It is unclear what the immediate impact to employers will be as we await new regulations in response to the Court's ruling.

■ Background

Under the ACA, non-grandfathered group health plans are required to cover certain women's contraceptive services, including twenty FDA-approved contraceptive methods, without cost-sharing in-network. There is an exception for religious employers (such as churches), and certain non-profit organizations with religious objections can utilize a self-certification process where their carriers or TPAs provide the coverage at no cost to the employer.

■ The Case

Two separate cases were brought in two Circuits challenging the contraceptives mandate based on religious grounds – one in the 10th Circuit and one in the 3rd Circuit. The 10th Circuit found in favor of a for-profit employer and barred the government from enforcing the mandate to provide contraceptive services for their employees. The 3rd Circuit found that a for-profit business cannot challenge the contraceptives mandate based on religious grounds.

Since there was a split in the Circuit, the Supreme Court agreed to hear the matter and consolidated the two cases in *Burwell v. Hobby Lobby Stores*. The Court upheld the 10th Circuit's decision and held that the contraceptives mandate conflicted with RFRA. Under RFRA, the Government is prohibited from substantially burdening a person's exercise of religion unless the Government demonstrates that the application of the burden to the person is in furtherance of a compelling government interest, and is the least restrictive means of furthering that compelling government interest.

After finding that the Dictionary Act definition of a "person" included a corporation, the Court turned to the two-prong analysis under RFRA to determine whether a corporation's religious beliefs were violated by the ACA's contraceptive mandate requirement. According to the Court's majority, it was the second prong that ultimately caused the ACA to violate the RFRA. The majority held that the Government failed to use the least restrictive means by requiring contraceptive coverage through an employer-based group health plan. The Court noted that an accommodation is available for certain non-profit organizations to exclude such coverage and for employees to access such coverage for free through the carrier or TPA at no cost to the employer.

It is important to note that the holding in this case is narrow:

- It applies only to closely held corporations, owned and controlled by members of a single family with religious beliefs that oppose some or all contraceptives. It is not applicable to publically traded companies.
- It does not apply to other insurance coverage mandates where the employer may object based on religious belief (e.g., vaccinations, blood transfusions).
- It does not shield the employer from illegal discrimination based on religious belief.
- It does not overturn or otherwise repeal health care reform.

■ Employer Action

At this time, it is unknown what the administration may do in response to the Court's decision and we must await further guidance. We can speculate that the administration may consider extending the self-certification process available to non-profit organizations to certain closely held businesses. Under this accommodation, an eligible for-profit employer would not be required to provide contraceptive coverage under the group health plan. However, participants may access free contraceptives through the carrier (if insured) or the TPA (if self-funded) at no cost to the employee or the employer. Additionally, the Court suggested, but did not require, that the government itself could provide the contraceptives to women whose employers object to the ACA mandate under this ruling.

Until guidance is issued, employers interested in this relief should review their status as a closely held corporation with religious basis for not providing the contraceptives and consult with counsel.

For a copy of the ruling, visit:

http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf

