



PROFESSIONAL COMMENTARY

Don't Believe the Hype: The Real Effect of Hobby Lobby on Employers & Employees

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JURIST Guest Columnists Renee Mattei Myers and Redeate Dessaegn of Eckert, Seamans, Cherin & Mellott, LLC discuss the effect of the recent US Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.* on employers and employees...

In a 5-4 decision, the US Supreme Court held the Department of Health and Human Services' (HHS) mandate to provide contraception that conflicted with an employers' religious beliefs was unlawful under the Religious Freedom Restoration Act of 1993 (RFRA). The aftermath of the ruling has led to numerous debates, many based on broad, and in some instances, inaccurate interpretations of the court's opinion. So what is the truth behind the *Burwell v. Hobby Lobby Stores, Inc.* decision and how will it actually affect employers and their employees?



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Background

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA) mandating certain employers provide "preventative care and screenings" for female employees at no cost. This included mandating the coverage of certain contraceptives that have the effect of preventing a fertilized egg from developing.

Following the passage of this mandate, three closely held, family operated, for-profit companies (Hobby Lobby, Conestoga and Mardel) filed suit, alleging that the requirement to provide such contraception violated their religious rights under the RFRA. The RFRA prohibits the government from substantially burdening a person's exercise of religion unless: 1) it furthers a compelling governmental interest and 2) it is done in a manner that is least restrictive.

The Decision

In its opinion, the court focused on four main issues in determining whether the ACA mandate violated the RFRA as applied to Hobby Lobby.

First, because the statutory provisions of the RFRA apply only to "persons," the court needed to address whether a corporation could be considered a "person" under the RFRA. In doing so, the court looked to the dictionary definition of "person" (which includes "corporation"), the legislative history of the RFRA (which suggested no congressional intent to deviate from the dictionary definition) and the court's prior application of the RFRA to non-profit corporations (noting it would be irrational to differentiate between non-profit and for-profit corporations in its application).

Furthermore, the court reasoned that ruling businesses like Hobby Lobby are not "persons" within the RFRA would force merchants to make a difficult decision between judicial protection of their religious liberty and the benefits of operating as corporations. Thus, the court ultimately concluded that closely held for-profit corporations are "persons" under the RFRA.

The next issue the court addressed was whether a corporation can "exercise religion." Ultimately, the court concluded that there is no credible explanation to find that closely held corporations couldn't exercise religion. In reaching this conclusion, the court relied mainly on statutes from the states where the three corporations at issue were incorporated. Specifically, the statutes allow for-profit corporations to pursue "any lawful purpose" including exercise of religion. In addition, the court relied on the fact that non-profit corporations were found to "exercise religion" under the RFRA. Thus closely held corporations should not be excluded from being able to "exercise religion" under the RFRA simply because they are for-profit.

Once the court determined that for-profit corporations were entitled to the protections

afforded by the RFRA, it turned to the issue of whether the ACA mandate substantially burdened the corporations' free exercise of religion, and if so, whether there was a compelling governmental interest to impose such a burden.

Under the terms of the ACA, the corporations were subject to fines up to \$475 million per year, for refusing to provide coverage for the four contraceptive devices at issue. In addition, if the corporations made the business decision to stop offering health insurance benefits completely, they would be subjected to approximately \$26 million in penalties.

Based on these numbers, the court found that the ACA mandate did in fact place a substantial burden on the companies' right to exercise free religion. The court dismissed the argument that the cost of the fines for discontinuing insurance coverage was actually less than the overall cost of providing health coverage to their employees. The court reasoned that in order to retain and attract skilled employees, corporations would be forced to provide additional compensation to make up for the lack of health coverage, which in the long run, would cost the company more than a group health plan. In any event, the court reasoned that Congress could not have enacted the RFRA or the ACA to encourage employers to eliminate health care coverage completely.

Finally, after assuming providing cost-free access to the four contraceptives at issue is a compelling governmental interest, the court addressed whether the mandate in the ACA was the least restrictive alternative. In finding whether alternatives existed, the court looked no further than the exemptions to the mandate offered to non-profit corporations that are permitted to exclude contraceptive coverage from group health insurance plans. In this situation, the insurance companies are required to offer the coverage directly to the employees, thus permitting female employees to continue to receive coverage for all FDA-approved contraceptives. A second option the court noted was to have the government assume the cost of providing the mandated contraceptives.

Dissent

Justice Ginsburg wrote the dissent to the court's opinion, which was joined by three other Justices. The dissent argued that the decision in Hobby Lobby will allow all corporations to opt out of any laws that they deem to be against their religion, despite the majority explicitly stating otherwise. Ginsburg goes on to state that for-profit corporations should not be afforded religious freedom simply because their main goal is

to earn profit rather than religious worship. She stated that the majority ruling imposes the beliefs of the employers on the employees and denies "a legion" of female employees access to affordable contraceptive care. In total, the dissent warned that the court "has ventured into a minefield," in which female employees will be its victim.

The Real Effect on Employers and Employees

It appears as if most of the misunderstandings over the Hobby Lobby decision stem from the perceived effect it will have on employers and employees in the future. The court, foreseeing such confusion, explicitly states in the majority opinion that the decision is "concerned solely with the contraceptive mandate ... it should not be understood to hold that an insurance coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs." Thus, employers may still be required to provide coverage for health services such as immunizations and blood transfusions despite their religious beliefs.

Additionally, the court further clarifies that the decision does not apply to all for-profit corporations, but only to closely held corporations with owners that operate their businesses according to their shared religious beliefs. So conglomerates, such as Wal-Mart, are not exempt from providing contraceptive coverage, given it is run by shareholders who have different religious values. Thus, most female employees will not be affected by the court's decision in Hobby Lobby, and those who are will have access to the four contraceptives through a system that will be less restrictive on a company's free exercise of religion.

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