Supreme Court Rules in Favor of Hobby Lobby in Contraception Mandate Case

July 10, 2014

The decision of the U.S. Supreme Court (the “Court”) in Burwell v. Hobby Lobby, 573 U.S. __ (2014) may offer additional relief to employers who object to providing and paying for contraceptive coverage under their group health plans on grounds of their religious beliefs.

Background
The Patient Protection and Affordable Care Act and The Health Care and Education Reconciliation Act of 2010 (collectively “ACA”) require that non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage provide, at no cost to the covered individual, recommended preventative services, including preventive care and screenings for women. The Department of Health and Human Services (“HHS”) promulgated regulations which establish the parameters for women preventive care and screenings, including a mandate to cover 20 methods of contraception approved by the Food and Drug Administration (the “contraceptive mandate”). Four of these methods may prevent an already fertilized egg from developing any further (the “objectionable contraceptives”). The Plan sponsors of group health plans and health insurance issuers face significant penalties if they fail to comply with these ACA requirements.

HHS also promulgated regulations that exempt group health plans (and group health insurance coverage provided in connection with such plans) established or maintained by religious employers with respect to any requirement to cover contraceptive services (the “religious employer exemption”). The term “religious employer” as revised in the final HHS regulations issued on July 2, 2013, means an organization that is organized and operates as a nonprofit entity and is referred to in IRC Section 6033(a)(3)(A)(i) or (iii) (generally referring to churches).

In 2013, HHS created another accommodation for eligible organizations. An eligible organization is one that (1) opposes providing coverage for some or all of the contraceptive services on account of religious objections; (2) is organized and operates as a nonprofit entity; (3) holds itself out as a religious organization; and (4) self-certifies that it satisfies the first three criteria (using the Form EBSA 700). Upon self-certifying that it is an eligible organization, such organization is exempt from contracting, arranging, paying or referring contraceptive coverage for plan participants and beneficiaries (the “religious accommodation”). When a group health insurance issuer receives notice that one of its employer-clients has invoked the religious accommodation, that issuer must exclude contraceptive coverage from the employer's plan and assume sole responsibility for providing separate payments (e.g. through a separate individual contraceptive coverage policy) for contraceptive services for plan participants and beneficiaries without cost-sharing, premium, fee or other charge to plan participants or beneficiaries or to the eligible organization or its group health plan. The issuer also must notify plan participants and beneficiaries about the availability of this no-cost, separate individual contraceptive coverage policy. HHS claims this system imposes no net economic burden on the health insurance issuers impacted by this religious accommodation as the costs associated with the issuer's provision of such contraceptive coverage is balanced by the cost savings from lower pregnancy-related costs and improved women health for these participants and beneficiaries who are covered under the eligible organization’s group health plan.

Hobby Lobby Decision
In Hobby Lobby, the owners of three closely held, for-profit companies purported to have religious beliefs that would be violated if their companies were required to facilitate access to and pay for the four objectionable contraceptives through the company-provided group health plans. The companies and their owners sued HHS arguing that the mandate to cover the objectionable contraceptives violated their rights under the Religious Freedom Restoration Act of 1993 (“RFRA”). RFRA prohibits the government from substantially burdening a “person’s” exercise of religion unless the government demonstrates, under a stringent test, that the burden to the person furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.
While RFRA refers to the religious rights of “persons,” it does not specifically define the term. The Court in its *Hobby Lobby* decision issued on June 30, 2014, found that the term “person” as used under RFRA included corporations (both for profit and nonprofit), partnerships, individuals and other entities. The Court rejected the government’s argument that corporations were separate from their owners and that corporations do not “exercise religion.”

The Court concluded that when a federal regulation, such as the contraceptive mandate, restricted the religious activities of a closely held for-profit corporation, such restriction must comply with RFRA. The Court declined to rule on whether the government’s interest was compelling but found that, even assuming the government had a compelling interest in guaranteeing cost-free access to contraceptives to women, the government failed to show that the contraceptive mandate was the least restrictive means of furthering that interest. Accordingly, the Court held that “the contraceptive mandate, as applied to these closely held corporations, violate[d] RFRA.”

**Key Takeaways from the *Hobby Lobby* Decision**

- Although the scope of the *Hobby Lobby* decision is limited to closely held for-profit corporations, the decision arguably extends to nonprofit corporations, but is not likely to apply to publicly-traded corporations. The Court specifically held that closely held for-profit corporations are entitled to RFRA protections, and, in dicta, it also recognized that nonprofit corporations were similarly afforded RFRA protections. The Court, however, noted that it has had no occasion to consider RFRA’s application to publicly traded corporations and doubted that such claim would arise given the practical restraints and nature of such corporations. “For example [the Court stated], the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable.”

- The *Hobby Lobby* decision does not signal a blanket prohibition on HHS’ enforcement of the contraceptive mandate. A closely held corporation or nonprofit corporation would still need to demonstrate that complying with the contraceptive mandate violates its sincere and honest religious convictions. It is not clear at this point how an employer would assert such RFRA protections and curtail HHS enforcement action or penalty assessments. An employer could seek a declaratory judgment on the issue at its own expense, and perhaps HHS will create guidelines and accommodations for closely held and nonprofit corporations similar to the religious accommodation it created for religiously-affiliated nonprofit organizations.[1]

- Moreover, the *Hobby Lobby* decision did not specifically address the impact of its decision on insurance issuers offering health policies in group markets. Until more certainty evolves, health insurance issuers likely will continue to offer group health insurance products that automatically include no-cost contraceptives for plan participants and beneficiaries with no carve-out ability by the employer to exclude such contraceptive services, even where the employer has religious objections to maintaining a plan that covers such services. This point further illustrates the complexity and the uncertainty of how employers, especially those with fully-insured group health plans, who have religious objections to the contraceptive mandate will actually avail themselves of the *Hobby Lobby* decision.

- The *Hobby Lobby* decision finding that the contraceptive mandate violates RFRA appears to apply to all 20 methods of contraception, not just the objectionable contraceptives. However, the Court admonished that its ruling should not be read to apply to other ACA recommended preventive services, such as vaccinations or blood transfusions, and the ruling does not “provide a shield for employers who might cloak illegal discrimination as a religious practice.”

- Democrats in Congress have already developed legislation to override the Supreme Court decision in *Hobby Lobby*, which could be on the Senate floor as early as next week, but such legislation faces long odds in the Republican-controlled House.

Employers who are interested in more information about the *Hobby Lobby* case or potentially ending mandated contraception coverage under their group health plans in the exercise of their religious beliefs, should contact the authors of this alert (Amy Christen at 248-203-0760, or Kathrin Kudner at 734-214-7697) or your Dykema relationship lawyer.

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[1] In over 51 active cases, religiously-affiliated nonprofit companies are challenging HHS’ requirement that such organizations must file Form EBSA 700 with HHS to take advantage of the religious accommodation. On July 3, 2014, just three days after its *Hobby Lobby* decision, the Court issued an injunction in *Wheaton College v. Burwell*, 573 U.S. ___(2014), providing that HHS was enjoined from requiring Wheaton College to file the Form EBSA 700 with HHS while its lower court case is being resolved. This ruling compounds the uncertainty of how employers ultimately may avail themselves of their RFRA protections of not complying with the contraceptive mandate.
Supreme Court Rules in Favor of Hobby Lobby in Contraception Mandate Case (Cont.)

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