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The *Hobby Lobby* Decision: What Does It Mean for Employers?

**By David W. Garland, Adam C. Solander, and
Brandon C. Ge**

Introduction

On the last day of June, the United States Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*,¹ holding in a 5–4 decision that a closely held for-profit corporation may refuse to provide contraceptive coverage to employees if it sincerely objects on religious grounds. The impact of this case has been a topic of much debate. Because the Court rested its decision on the Religious Freedom Restoration Act of 1993 (“RFRA”) and not constitutional grounds, Congress could conceivably overrule the decision by amending the Affordable Care Act (“ACA”) or enacting an exemption to RFRA. It seems unlikely, however, that both the House and Senate would pass such a bill, especially in a Congressional election year, and bills introduced in response to *Hobby Lobby* have already hit snags. Some, including Justice Ginsburg in her dissent, have argued that the decision has far-reaching consequences and opens up the floodgates for corporations to claim exemptions, on religious grounds, to a bevy of laws to which they object. Meanwhile, others have argued that the case’s impact will be much more limited, as the holding itself directly applies only to closely held corporations and enforcement of the contraceptive mandate. The real answer likely lies in the middle.

The Contraceptive Mandate

The Affordable Care Act (“ACA”) has its fair share of controversial provisions, but the contraceptive mandate, along with the individual mandate and employer mandate, has been one of its most controversial. Under the contraceptive mandate, non-grandfathered² group health plans (and health insurers) must cover preventive care and screenings for women without charging a co-pay, co-insurance, or deductible. Small employers with fewer than 50 full-time employees are exempt. This provision has been controversial because certain religious groups consider the use of contraceptives to be sinful. Subsequent HHS rules exempted religious employers, such as churches and other houses of worship, from the requirement, and established accommodations for certain other non-profit religious

¹ 573 U.S. ___, 2014 U.S. LEXIS 4505 (U.S. 2014).

² Although *Hobby Lobby*’s group health plan predated the ACA, *Hobby Lobby* elected not to retain grandfathered status before the contraceptive mandate was proposed. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124 (10th Cir. 2013).

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The *Hobby Lobby* Decision: What Does It Mean for Employers?

By David W. Garland, Adam C. Solander, and
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(text continued from page 321)

organizations, such as non-profit religious institutions of higher education. Under these accommodations, health insurance companies or third-party administrators (instead of objecting non-profit religious organizations) would pay for contraceptive services used by women who otherwise receive health coverage under these organizations' health plans.

In the ACA, Congress did not specify the types of preventive care that must be covered. Instead, the Health Resources and Services Administration ("HRSA") of the Department of Health and Human Services ("HHS") has been authorized to determine what types of preventive care must be covered. Generally, the contraceptive mandate requires coverage of the 20 contraceptive methods approved by the Food and Drug Administration.³

Facts

In *Hobby Lobby*, the owners of three closely held for-profit corporations—Hobby Lobby Stores, Mardel Christian and Educational Supply, and Conestoga Wood Specialties—challenged the ACA's contraceptive mandate based on their Christian beliefs that life begins at conception and that facilitating access to contraceptives that operate after that point would violate their religion. Notably, HRSA's list of preventive services that must be covered without cost sharing include four contraceptive methods that operate post-conception, and it is these four methods to which the plaintiffs in *Hobby Lobby* objected.

Hobby Lobby is owned by David and Barbara Green, as well as their three children. David Green started Hobby Lobby 45 years ago, and it has since grown into a chain of 500 arts-and-crafts stores with more than 13,000 employees. One of David Green's sons started Mardel, an affiliated business that operates 35 Christian bookstores and employs approximately 400 people. Both Hobby Lobby and Mardel are organized as for-profit corporations under Oklahoma law, and both businesses remain closely held, with the Green family retaining exclusive control of the companies.

Conestoga is a wood-working business founded by Norman Hahn about 50 years ago. Today, it has 950 employees. Conestoga is organized as a for-profit corporation under Pennsylvania law, with the Hahns exercising sole ownership of the business. The Hahn family controls the board of directors and holds all voting shares, and one of the Hahn sons serves as the company's president and CEO.

Proceedings Below

In September 2012, the Greens, Hobby Lobby, and Mardel filed a lawsuit in district court against HHS and other federal agencies and officials under RFRA and the Free Exercise Clause of the First Amendment.⁴ The lawsuit sought to enjoin application of the contraceptive mandate insofar as it required Hobby Lobby to provide coverage of the four contraceptive methods that operate post-conception. The district court denied a preliminary injunction, and the plaintiffs appealed. In a split opinion, the Tenth Circuit reversed the lower court, holding that Hobby Lobby and Mardel are "persons" as defined under RFRA and may therefore bring suit under the law. The Tenth Circuit went on to conclude that the contraceptive mandate substantially burdened the two companies' exercise of religion because it required choosing between compromising their religious beliefs and paying a significant penalty. The Tenth Circuit also held that the law was not justified by a compelling interest and that HHS had failed to demonstrate that the contraceptive mandate was the least restrictive means of furthering the government's interests.

The Hahns and Conestoga also sued HHS and other federal agencies and officials under RFRA and the First Amendment's Free Exercise Clause, seeking to enjoin enforcement of the contraceptive mandate with regards to coverage of the four objectionable contraceptives.⁵ The district court denied the Hahns' request for a preliminary injunction, and the Third Circuit affirmed in a divided opinion, concluding that for-profit, secular corporations cannot engage in the exercise of religion within the meaning of RFRA or the First Amendment. The Hahns' claims as individuals were also rejected because the contraceptive mandate does not impose any obligations on the Hahns in their individual capacities.

⁴ *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012). The Greens also based their suit on the Administrative Procedure Act.

⁵ *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013). The Hahns also based their suit on the Fifth Amendment and the Administrative Procedure Act, but these claims were not before the Supreme Court.

³ See U.S. Dep't of Health & Human Servs., *Women's Preventive Services Guidelines*, <http://www.hrsa.gov/womensguidelines/>.

The Supreme Court's Decision

The Supreme Court decided that RFRA does not permit HHS to promulgate regulations requiring certain group health plans to provide contraceptive coverage with no cost sharing. The contraceptive mandate “substantially burdens” the exercise of religion because it requires employers to engage in conduct that violates their religious belief (*i.e.*, that life begins at conception). The alternative is to violate the contraceptive mandate and pay hefty penalties of up to \$100 per day for each affected individual. For Hobby Lobby, the potential penalty was approximately \$1.3 million per day or \$475 million per year. Another alternative would have been to drop coverage altogether and force employees to obtain health insurance on an exchange, but this would have also triggered penalties under the employer mandate (potentially \$26 million for Hobby Lobby).

The following is the statutory text at issue in *Hobby Lobby*:

(a) In general

Government shall not substantially burden a *person's exercise of religion* even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.⁶

One of HHS's arguments was that RFRA should not apply to the plaintiffs since RFRA limits its applicability to persons. Writing for the majority, Justice Alito (joined by Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy) disagreed with the government and the Tenth Circuit. As RFRA itself does not define “person,” the Supreme Court looked to the U.S. Code's Dictionary Act, which is to be consulted in determining the meaning of any Act of Congress unless the context indicates otherwise.⁷ Under the Dictionary Act, the word “person” includes not only individuals, but also corporations, companies, associations, firms, partnerships, societies, and joint stock companies.⁸ The majority saw nothing in RFRA to indicate that Congress intended for

a different definition to apply. HHS itself conceded that *non-profit* corporations are persons within RFRA's definition, to which the majority added:

no conceivable definition of the term includes natural persons and non-profit corporations, but not for-profit corporations.⁹

HHS's principal argument focused on the “exercise of religion” language in RFRA. It argued that corporations cannot exercise religion, and therefore, RFRA does not apply to corporations such as Hobby Lobby, Mardel, and Conestoga. In her dissent, Justice Ginsburg quoted former Justice Stevens, who wrote in a 2010 opinion that corporations “have no consciences, no beliefs, no feelings, no thoughts, no desires.”¹⁰ According to Justice Ginsburg, only a natural person, not an artificial legal entity such as a corporation, is capable of exercising religion. Justice Alito and the majority of the Supreme Court were not persuaded by this argument. RFRA protects non-profit corporations, and the majority saw no reason to differentiate between non-profit corporations and for-profit corporations:

While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.¹¹

The dissent suggested that non-profit corporations should be entitled to special treatment because furthering their religious autonomy often furthers individual religious freedom as well. Justice Alito responded by noting that “[f]urthering [for-profit corporations'] religious freedom also ‘furthers individual religious freedom.’”—applying RFRA to Hobby Lobby, Mardel, and Conestoga protects the religious liberty of their owners, the Greens and the Hahns.¹²

Upon determining that for-profit corporations are entitled to protection under RFRA, the majority next determined whether the contraceptive mandate substantially burdens

⁶ 42 U.S.C. § 2000bb-1 (emphasis added).

⁷ 1 U.S.C. § 1.

⁸ 1 U.S.C. § 1.

⁹ *Hobby Lobby*, 2014 U.S. LEXIS 4505, at *42.

¹⁰ 2014 U.S. LEXIS 4505, at *118 (Ginsburg, J., dissenting, quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 466 (2010)).

¹¹ 2014 U.S. LEXIS 4505, at *46.

¹² 2014 U.S. LEXIS 4505, at *44.

the exercise of religion. This was an issue with which the majority had “little trouble”:

As we have noted, the Hahns and Greens have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that . . . may result in the destruction of an embryo. By requiring the Hahns and Greens and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.

If the Hahns and Greens and their companies do not yield to this demand, the economic consequences will be severe. If the companies continue to offer group health plans that do not cover the contraceptives at issue, they will be taxed \$100 per day for each affected individual. For Hobby Lobby, the bill could amount to \$1.3 million per day or about \$475 million per year; for Conestoga, the assessment could be \$90,000 per day or \$33 million per year; and for Mardel, it could be \$40,000 per day or about \$15 million per year. These sums are surely substantial.¹³

Essentially, the owners and corporations were faced with two choices: engage in conduct that goes against their religious beliefs or pay millions of dollars per year. This, according to the majority, was enough to demonstrate a substantial burden on the exercise of religion. Because the majority found that the contraceptive mandate substantially burdened the exercise of religion, the mandate would have to be (1) justified by a compelling governmental interest, and (2) the least restrictive approach to furthering that interest. The majority assumed that ensuring access to contraceptives was a compelling governmental interest, but found that it was not the least restrictive approach to further that interest. For example, the government itself could pay for contraceptive services, or HHS could expand its accommodations to cover for-profit corporations.

The Impact

At the very least, the decision will likely have an impact on contraceptive access, as some women may go without their preferred contraceptive method, pay out of pocket, or otherwise obtain a government subsidy. It remains to be seen how significant this impact will be, however.¹⁴

¹³ 2014 U.S. LEXIS 4505, at *63.

¹⁴ See, e.g., Kelly Ayotte & Deb Fischer, *The Hobby Lobby Decision and Its Distortions*, Wall St. J., July 15, 2014, available at <http://online.wsj.com/articles/kelly-ayotte-and-deb-fischer-the-hobby-lobby-decision-and-its-distortions-1405469473>.

Although many see the closely held corporation limitation as greatly restricting the scope of the holding’s impact, this may not be the case. The Internal Revenue Service defines a closely held corporation as a corporation that:

1. Has more than 50 percent of the value of its outstanding stock owned (directly or indirectly) by 5 or fewer individuals at any time during the last half of the tax year; and
2. Is not a personal service corporation.¹⁵

In other words, closely held corporations are private corporations with a limited number of shareholders. There is no definitive account of the current number of people employed by closely held corporations. According to a 2000 study by the Copenhagen Business School, closely held corporations account for as much as 90 percent of America’s corporations.¹⁶ What is important, however, is the number of employees, not necessarily the number of employers — because the majority of closely held corporations are small businesses with few employees, and larger companies are typically traded publicly. Closely held corporations still account for a significant proportion of employees — one study indicates that closely held corporations employ 52 percent of the American workforce.¹⁷

But the holding of *Hobby Lobby* is limited to closely held corporations that meet other criteria: The decision’s direct impact is limited to employers that (1) provide a non-grandfathered group health plan, (2) have over 50 full-time employees, (3) are closely held, and (4) have a sincere religious objection to the contraceptive mandate. Closely held corporations may employ over half the workforce, but it is unclear how many individuals work for employers that meet all four criteria.

The majority opinion in *Hobby Lobby* did not specify precisely how many shareholders a corporation must have to assert a claim under RFRA, nor did it specify a definition of “closely held.” Instead, Justice Alito merely noted that the corporations involved in the litigation were

¹⁵ Internal Revenue Serv., *Frequently Asked Questions*, <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5>.

¹⁶ Morten Bennedsen & Daniel Wolfenzon, *The Balance of Power in Closely Held Corporations*, Working Paper 10-99 (2000), available at <http://openarchive.cbs.dk/bitstream/handle/10398/7622/wpec1099.pdf?sequence=1>.

¹⁷ Venky Nagar et al., *Governance Problems in Closely-Held Corporations* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1291612.

owned and controlled by members of the same family.¹⁸ Ultimately, despite the case's focus on closely held corporations, corporations that are not closely held could ostensibly attempt to exempt themselves from mandates based on religious objections. Neither RFRA nor the decision provides a logical basis for confining the holding to closely held corporations, at least if a non-closely held corporation can demonstrate that it runs under one set of religious beliefs (or at least different religious beliefs that object to the same law).

On the other side of the spectrum, there are those who fear that *Hobby Lobby* has far-reaching consequences and virtually gives corporations *carte blanche* to refuse to comply with any law to which they object on religious grounds. In her dissenting opinion, Justice Ginsburg wrote:

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.¹⁹

Such a parade of horrors, however, is not likely to ensue. A corporation that wishes to exempt itself from a law based on religious beliefs would have to demonstrate that there exists a less restrictive alternative to further the governmental interest at issue. In fact, the *Hobby Lobby* decision notes that employers would not, for example, be able to exempt themselves from anti-discrimination laws based on religious beliefs since there is no less restrictive way to prevent discrimination than to ban discrimination. The majority stressed the narrow applicability of the decision and recognized that RFRA claims will be assessed on a case-by-case basis.

The decision is important in that it indicates the Supreme Court's willingness to strike down provisions of the ACA, or at least application of ACA provisions to certain

entities. This may be a cause of worry for fervent ACA supporters as more ACA-related litigation makes its way to the Supreme Court, including the *Halbig* line of cases addressing the availability of cost-sharing subsidies and premium tax credits on federally-facilitated exchanges.

The most significant consequence of *Hobby Lobby* could be the Supreme Court's continuing expansion of corporate rights. Certainly, many areas of the law grant corporations the same rights as individuals. Corporations can enter into contracts, sue in court, and hold property, just as individuals can. And just a few years ago, the Supreme Court controversially ruled that corporations had the right to spend money on political advertising.²⁰ But never before has the Supreme Court squarely addressed the issue of whether for-profit corporations are entitled to religious freedom protections under RFRA. While the holding will directly impact a limited number of employers, it seems likely that *Hobby Lobby* will set a precedent for future cases involving the potential expansion of corporate rights.

Regardless of the ultimate impact, employers that are considering taking action in response to *Hobby Lobby* might want to consider waiting for the regulatory dust to settle. HHS will likely issue new guidance soon in response to the decision, possibly extending the accommodation currently in place for non-profit religious organizations to for-profit corporations with religious objections.

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¹⁸ *Hobby Lobby*, 2014 U.S. LEXIS 4505, at *58.

¹⁹ 2014 U.S. LEXIS 4505, at *97 (Ginsburg, J., dissenting).

²⁰ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 50 (2010).