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Crafting Corporate Religious Exemptions: What *Hobby Lobby* Means for Health Care Employers

On the final day of its 2013-2014 term, the U.S. Supreme Court handed down one of the most anticipated decisions of the year – *Burwell v. Hobby Lobby Stores, Inc.*[1] Just a year after its landmark decision upholding the Affordable Care Act's individual mandate, the Court tackled a different ACA mandate – the requirement that nonexempt employers provide insurance coverage for 20 FDA-approved contraceptive methods, including 4 purportedly abortifacient drugs. The owners of two closely-held, family-owned corporations – Hobby Lobby and Conestoga Wood Specialties – challenged that requirement on the basis that compliance (specifically with regard to the 4 abortifacient drugs) would violate their sincerely-held religious beliefs. Although the politically contentious facts of the case generated considerable media attention, the primary legal takeaway is that owners of closely-held corporations with religious objections to generally applicable federal laws now have the ability to seek religious exemptions under the Religious Freedom Restoration Act (RFRA).

Overview of the Religious Freedom Restoration Act

In 1993 Congress passed the RFRA, which prohibits the government from imposing a "substantial burden" on a person's ability to exercise his religion. The law allows individuals to seek exemptions from laws or regulations that burden their exercise of religion; these exemptions are not automatic. Even if those who challenge a law under the RFRA can establish that it imposes a substantial burden on their religious practices, they may still be forced to comply if the government can show that the requirement: 1) advances a compelling government interest, *and* 2) does so in the least restrictive way possible.

Hobby Lobby and Conestoga prevailed under this analysis because the Court found that: 1) the government's mandate imposed a substantial burden on the companies' religious practices; and 2) the government was unable to show its mandate was the least restrictive means of achieving its interest in providing access to free contraception, even if that interest was compelling.[2] The decision not only has the obvious impact of weakening the ACA's contraception mandate, but it will have lasting effects on the scope and interpretation of the RFRA.

Closely-Held Corporations Can Now Bring RFRA Claims

Although this is not the first RFRA case to come before the Court, it is the first time the plaintiff in such a case was a business rather than an individual person. That raised the question whether a business could have religious convictions capable of being protected by federal law. After *Hobby Lobby*, the answer is yes. Because corporations are legal fictions composed of real people, laws targeting corporate entities may nevertheless implicate the rights of their human members. Additionally, the federal Dictionary Act includes corporations in its definition of "persons," so when the RFRA grants rights to persons without qualification, corporations automatically enjoy those rights as well.[3]

The holding is not quite as broad as it may seem at first glance. The Court restricted its opinion to cases of closely-held, family-owned corporations, making the opinion's precedential value somewhat limited. Nonexempt, publicly-traded companies are still subject to the contraception mandate and may not bring RFRA claims. But where a family-owned business with religious convictions has a good-faith objection to a federal law, this decision gives it powerful legal recourse.

[1] 2014 U.S. LEXIS 4505.
[2] The Court assumed, but did not decide, that the government met the "compelling interest" test in this case.
[3] Dictionary Act, 1 U.S.C. § 1 (2012).

"Substantial Burden" Evaluated from the Burdened Party's Perspective

Closely-held corporations considering whether to use their newfound right to bring RFRA challenges can also thank *Hobby Lobby* for effectively easing their burden of proof. Although the RFRA still requires them to prove that the challenged law substantially burdens their religious practice, the Court's analysis of that question is to be evaluated from the perspective of the party alleging the burden. In this case the Supreme Court found a substantial burden based solely on plaintiffs' contention that non-compliance would be costly and alternative approaches (such as not offering employee insurance at all) would leave them at a competitive disadvantage. Although the government questioned how genuinely burdensome the requirement was, the Court summarily dismissed those arguments, stating that it is not the Court's job to determine whether the religious beliefs at issue are "mistaken or insubstantial" – only whether they are sincere.

In RFRA cases going forward, courts are likely to find a substantial burden almost any time the allegedly burdened party can demonstrate suffering of some harm or misfortune as a result of that party's adherence to a religious belief. As long as there is good evidence that the burden was not fabricated to facilitate litigation, the merits of the religious position itself cannot be questioned.

Looking Ahead

After *Hobby Lobby*, lower courts are likely to be somewhat more favorable to claims for religious exemptions. This case gives them license to engage in a rigorous search for any less restrictive means that may be available. Where the government can both adequately serve its compelling interest and provide exemption to religious objectors, it will be required to do so. Although closely-held corporations are now categorically eligible to seek religious exemptions under the RFRA, it does not mean that these challenges will always (or even usually) be upheld. Because the government in this case had already developed less restrictive means to advance its interest with respect to exempt employers, the *Hobby Lobby* analysis was, in one sense, easier than future cases may turn out to be. Additionally, the Court already has indicated that it will not permit exemptions for some activities – covering immunizations or forbidding racial discrimination, for example – since they are compelling objectives for which the least restrictive means are already employed.

For most companies, this case will not significantly alter the employment law landscape. On the ACA front, although 90% of U.S. companies are closely-held and thus now able to bring RFRA claims, most of these employ fewer than 50 individuals and are not subject to the ACA's mandates anyway. The vast majority of employers offered full contraception coverage before the ACA mandate took effect and are likely to continue to do so after *Hobby Lobby*. Even outside the ACA context, most companies will not be eligible to bring claims because their owners have not made religious convictions an integral aspect of corporate governance. The opinion does, however, have great potential to aid ongoing legal challenges by nonexempt religious non-profits, which have received only partial accommodation from the federal government to date.

If you have questions or need assistance regarding the *Hobby Lobby* decision, the RFRA, or other employment laws, please contact Kimberly Daniel or Jonathan Sumrell at (866) 967-9604, kdaniel@hdjn.com, or jsumrell@hdjn.com. Ms. Daniel and Mr. Sumrell thank Tim Patterson for his invaluable assistance with this client advisory. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website, www.hdjn.com .

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