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Hobby Lobby: The Supreme Court's View and Its Impact

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For the second time in two years the **United States Supreme Court (the "Court")** has **ruled against the Obama Administration** with respect to elements of the **Affordable Care Act (the "ACA").** In a 5-4 decision announced today in ***Burwell v. Hobby Lobby Stores, Inc.*** ("*Hobby Lobby*") (f/k/a *Sebelius v. Hobby Lobby Stores, Inc.),* the Court ruled that the federal government, acting through Health and Human Services ("HHS"), overstepped its bounds by requiring faith-based private, for-profit employers to pay for certain forms of birth control that those employers argued contradicted their religious beliefs, in violation of the **Religious Freedom Restoration Act of 1993** ("RFRA").

In *Hobby Lobby*, the Court found that for-profit employers are "persons" for purposes of the RFRA. The Court, assuming that the government could show a compelling interest in its desire to provide women with access to birth control, ultimately held that the government could have met this interest in a less burdensome way.

Background

Among its many insurance mandates, the ACA requires non-grandfathered health insurance plans to cover "preventive services" at no cost to participants.

As part of its implementation of the ACA, HHS added 20 contraceptives that were required to be included as preventive services, including four that may have the effect of preventing a fertilized egg from developing.

Hobby Lobby argued that requiring the company to pay for or provide pills and procedures that they believe terminate life—so-called abortifacients—intrudes intrudes on their religious beliefs. Hobby Lobby sued HHS, asserting that requiring them to pay for or provide abortifacients violated their First Amendment rights to freedom of religion and also violated the RFRA.

The RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. The Administration argued, however, that neither Hobby Lobby nor Conestoga or any other

for-profit, faith-based employer was a *person* for purposes of the RFRA or the First Amendment.

The Decision

Writing for the majority, **Justice Samuel Alito** held that private—as opposed to publicly traded—employers could be considered "persons" for the RFRA. The Court noted that the law imposed a substantial burden on religious beliefs, requiring the owners of Hobby Lobby to engage in conduct that "seriously violates their sincere religious beliefs."

The Court noted that for the government to prevail it needed to demonstrate a compelling state interest and that its application was the least restrictive means to achieve its goals. The Court assumed (with Justice Kennedy providing the swing vote in his concurrence) that the government does, in fact, have a compelling interest to, among other things, promote "public health" and "gender equality" by providing contraceptive coverage for women. However, the Court found that even assuming a compelling interest there were less restrictive alternatives for the government. The government could, the four-person majority noted, simply provide these benefits to all, without charge to the individuals; in his concurrence, Justice Kennedy questioned this, and noted the Court's opinion does not decide this issue. But Kennedy and the four-person majority agreed the government could extend the accommodation it made religiously affiliated employers: they do not have to provide the benefit but their insurers or third-party administrators would without charge to either the employers or the employees.

Because there are less restrictive alternatives, the Court found that HHS had violated the RFRA as applied to these faith-based, for profit, private employers.

The Impact

The *Hobby Lobby* ruling has a direct impact on a relatively small number of employers—as a percentage of total employers across the country there are very few that can be considered faith-based employers.

However, the ruling is significant in that it signals an ongoing willingness by the Court to exercise its checks-and-balances power. The Court indicated it may not provide the Administration much leeway in its implementation of the ACA, when implementation impacts and is limited by other federal rights.

The ruling may also be significant for certain religious-affiliated non-profit employers who are operating under the accommodation discussed above. By identifying the accommodation as a less restrictive alternative, the Court may be signaling it believes that the exception HHS provided them suffices to meet any concerns they may have. The Court, however, noted it was not deciding this issue, and the "government-pay" approach tendered by four justices may provide a possible opening for relief for the religious-affiliated non-profit employers.

Finally, the *Hobby Lobby* decision should stand as a reminder that while there may be differences of opinion about specific rules and requirements under the ACA, and some of those differences may be decided against the government, the law itself is not going away. Employers need to continue to monitor new developments and implement strategies for complying with the ACA.

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