

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

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## High Court strikes contraceptive coverage mandate for closely held, for-profit employers with religious objections

Earlier today, in a 5-4 decision, the Supreme Court decided in favor of closely held, for-profit employers with religious objections to providing coverage for certain contraceptive services through their group health plans. Specifically, the Court held that the Religious Freedom Restoration Act gives these companies the right to refuse to offer coverage for specific contraceptive methods that conflict with the sincerely held religious beliefs of the companies' owners. While this decision will not directly affect the majority of employers subject to the ACA, it is a victory for certain employers with religious objections to providing coverage for contraceptive services and may open the door for other ACA-related challenges based on religious beliefs.

### Background

The Affordable Care Act (ACA) requires all non-grandfathered group health plans to provide in-network coverage, without cost sharing, for FDA-approved contraceptive services — a requirement referred to as the “contraceptive coverage mandate.” In final regulations, the Departments of Labor, Treasury, and Health & Human Services (Departments) provided some exemptions from this requirement for qualifying nonprofit religious organizations as well as an accommodation for certain other nonprofit entities. (See our [October 18, 2013 For Your Information.](#))

#### What is RFRA?

The Religious Freedom Restoration Act (RFRA), passed by Congress in 1993, generally prohibits the government from burdening the free exercise of religion.

The Departments, however, did not offer any relief to for-profit secular employers or for-profit corporations with objections to providing contraceptive services. A number of these entities have challenged the contraceptive coverage mandate as applied to them, and the success of these challenges has been mixed in the lower courts.

On November 26, 2013, the Supreme Court agreed to hear two of these cases — *Conestoga Wood Specialties Corp. v. Burwell* and *Burwell v. Hobby Lobby Stores, Inc.* (See our [November 27, 2013 FYI Alert.](#)) In *Conestoga Wood Specialties Corp. v. Burwell*, the Third Circuit Court of Appeals denied

a for-profit employer's request to block enforcement of certain aspects of contraceptive coverage mandate against it, finding that the employer was unlikely to be able to show that the mandate violates its First Amendment right to freedom of religion and the Religious Freedom Restoration Act (RFRA), which generally prohibits the government from burdening the free exercise of religion. The Third Circuit found that the First Amendment's free exercise of religion clause does not apply to secular, for-profit corporations. In *Burwell v. Hobby Lobby Stores, Inc.*, the Tenth Circuit Court of Appeals held that the First Amendment and RFRA most likely protect a for-profit employer, and, therefore a for-profit employer with religious objections need not comply with the portions of contraceptive coverage mandate to which it objected. The Supreme Court heard oral arguments on March 25, 2014. (See our [March 26, 2014 FYI Alert](#).)

### RFRA protects the religious beliefs of closely held, for-profit corporations

In a [lengthy decision](#), the majority opinion (written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas) held that RFRA governs the contraceptive coverage mandate as it applies to the activities of closely held, for-profit corporations like the businesses involved in these cases. In deciding this issue, the Court found that, for purposes of RFRA protection, a closely held, for-profit corporation is a "person" capable of having a religious belief.

**Buck comment.** The Court limited its ruling to the rights of closely held corporations, leaving open the question of whether publicly traded companies also enjoy RFRA protection. The Court expressed doubt, however, about the likelihood of RFRA claims on the part of public companies. In contrast to many family-owned companies, publicly traded corporations typically have unrelated shareholders (which can include institutional investors) who do not share uniform religious beliefs.

After deciding that RFRA applies, the Court then held that the contraceptive coverage mandate "substantially burdens" the corporations' exercise of religion by requiring them either to violate their sincere religious beliefs or face "severe economic consequences" in the form of ACA penalties for failing to comply with the contraceptive coverage mandate. For more information about consequences of ACA noncompliance, please see our [February 28, 2014 FYI In-depth](#). The Court rejected the government's position that the corporations could avoid these penalties simply by paying employer shared responsibility assessments, noting that those assessments would still be costly and that the companies "have religious reasons for providing health-insurance coverage to their employees." For more information about the employer shared responsibility requirements, please see our [April 17, 2014 FYI In-depth](#).

The Court did not determine one way or the other whether the government has a "compelling interest" in providing cost-free access to the challenged contraceptive methods. It found instead that, even assuming there is a compelling interest, the government failed to show that the contraceptive coverage mandate is the least restrictive means of furthering that interest. The government could, for example, assume the cost of providing the coverage. Alternatively, the government could extend to closely held, for-profit corporations the accommodation it has already devised for objecting religious nonprofit organizations.

**Buck comment.** This accommodation allows nonprofit employers to self-certify their opposition to providing coverage for particular contraceptive services. If a nonprofit employer does so, the organization's insurance insurer (insured plan) or third-party administrator (self-funded plan) must provide separate payments — at its own and not the employer's cost — for contraceptive services. (For more information about the

accommodation for religious non-profit organizations, and challenges to that accommodation, please see our [October 18, 2013](#) and [January 28, 2014](#) editions of For Your Information.) While not blessing this arrangement as RFRA-compliant for purposes of all religious claims, the Court appeared to look upon it favorably, stating that it would not impinge on the religious beliefs of the closely held, for-profit employers involved in this case.

The Court limited its decision to the contraceptive coverage mandate, cautioning that the ruling should not be understood to mean that other aspects of the ACA's coverage requirements — for example, coverage for immunizations — must fail if they conflict with an employer's religious beliefs. The Court also stated that the decision should not be read broadly to provide a shield for discrimination in hiring (e.g., discrimination on the basis of race) to be disguised as a religious practice in an effort to avoid legal sanctions.

The dissent (written by Justice Ginsburg and joined by Justices Sotomayor, Breyer, and Kagan) warns that this decision opens the door to many types of businesses, including corporations as well as partnerships and sole proprietorships, opting out of other laws that they find incompatible with their sincerely held religious beliefs.

### In closing

This case, which has garnered significant media attention, will not directly affect most employers subject to the ACA, such as employers that are publicly traded companies or closely held corporations without religious objections to providing contraceptive coverage services. Nevertheless, it may pave the way for other religious belief-based challenges to different aspects of the ACA's coverage mandates.

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