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# High Court to Hear Nonprofit Employers' Objections to ACA Contraceptive Coverage Mandate, Again

Once again, the Supreme Court will consider the ACA's contraceptive coverage mandate — this time, as it applies to nonprofit organizations with religious objections to providing such coverage to their employees. While this case will not affect the majority of employer plans subject to the mandate, it is of interest to certain employers with religious objections to providing coverage for contraceptive services and has generated significant media attention. Oral argument will take place in March 2016, with a decision expected by the end of the Court's term in June 2016.

## Background

The Affordable Care Act (ACA) requires non-grandfathered group health plans to provide in-network coverage, without cost sharing, for FDA-approved contraceptive services — a requirement known as the "contraceptive coverage mandate." In July 2013, the Departments of Labor, the Treasury, and Health & Human Services (HHS) (together, departments) exempted from this mandate certain nonprofit religious entities considered churches or conventions of churches under the Internal Revenue Code (Code).

The departments also created an accommodation — rather than an exemption — for certain other nonprofits that do not meet the Code definition of church or convention of churches, but (1) hold themselves out as religious organizations, and (2) object on religious grounds to providing contraceptive services to their employees. Under this accommodation, an organization can self-certify via EBSA Form 700 that, on account of religious objections, it opposes providing contraceptive coverage to its employees, is a nonprofit entity, and holds itself out as a religious organization. The insurer, in the case of an insured plan, and the third-party administrator (TPA), in the case of a self-funded plan, must then provide for separate payments for contraceptive services without any charge or cost-sharing. (See our October 18, 2013 *For Your Information*.)

> **Comment.** The types of nonprofit entities to which the accommodation could apply include religiously affiliated charitable, educational and social services groups.

## Non-Profit Religious Entities' Objections

In the wake of this guidance, a number of nonprofit religious entities filed lawsuits objecting to the requirement that they sign EBSA Form 700 in order to avoid the mandate. They argued that doing so starts the chain of events that ultimately leads to providing contraceptive services to their employees — and thereby violates their principles of faith. (See our January 28, 2014 *For Your Information*.) On August 22, 2014, following the Supreme Court's directive in *Wheaton College v. Burwell*, the departments set forth an alternative process whereby, instead of signing EBSA Form 700, an nonprofit organization can inform HHS in writing of its religious objections. For an insured plan, HHS then notifies the insurer of the objection, and the insurer provides the contraceptive coverage. For a self-funded plan, DOL designates the relevant TPA as plan administrator for contraceptive services. (See our September 9, 2014 *For Your Information.*)

The departments' alternative process did not satisfy the objections of many religious nonprofit groups with pending claims. Several of these cases rose to the federal appellate level, with every court except the Eight Circuit Court of Appeals (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota) siding with the government in upholding the application of the contraceptive coverage mandate to these entities. Seven of the nonprofit groups petitioned the Supreme Court for review.

## As Expected, Supreme Court to Hear Nonprofits' Objections

On November 6, 2015, the Supreme Court agreed to rule on the religious nonprofits' challenges — as many court watchers expected it to do. Accepting and consolidating all seven cases, the Court will determine whether the application of the contraceptive coverage mandate, including the availability of the departments' accommodations, violates the nonprofits' rights under RFRA.

> **Comment.** The Court refused to hear claims that the government discriminated against the nonprofits by exempting from the mandate only entities considered churches or conventions of churches under the Code, in violation of RFRA or the First Amendment of the U.S. Constitution.

Oral argument is scheduled for March 2016, with a decision expected by the end of the Court's term in June 2016.

**Déjà Vu: Didn't the Supreme Court rule on the contraceptive coverage mandate in its 2014 *Hobby Lobby* decision?**

Yes, but on a different aspect of the mandate's application. In the *Hobby Lobby* case, the Court held that the Religious Freedom Restoration Act (RFRA) gives *closely held, for-profit employers* the right to refuse to offer coverage for specific contraceptive methods that conflict with the sincerely held religious beliefs of their owners. (See our **June 30 2014** *FYI Alert*.) That decision did not involve *nonprofit* entities, whose claims the Court has now agreed to consider.

## In Closing

After years of litigation, the Supreme Court will finally determine nonprofit religious employers' obligations concerning the provision of contraceptive coverage to their employees. However, while this and other cases involving similar objections have garnered significant media attention, they do not affect most employer plans subject to the ACA's contraceptive coverage mandate.

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