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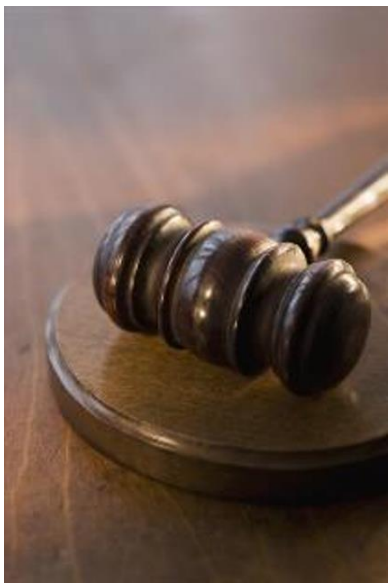
High Court Kicks Contraceptive Coverage Mandate Accommodation Back to the Circuits

Highlighting the potential for compromise, the Supreme Court directed lower courts to consider nonprofit religious employers' objections to the procedures required to avoid the ACA mandate to provide coverage for contraceptive services. If the lower courts cannot facilitate an accommodation that both the government and the nonprofit religious entities will accept, the issue may ultimately wind its way back up to the Supreme Court. This case will not affect the majority of employer plans subject to the mandate, but it is of interest to certain employers with religious objections to providing coverage for contraceptive services and has generated significant media attention.

Background



The Affordable Care Act (ACA) requires non-grandfathered group health plans to provide in-network coverage, without cost sharing, such as co-pays, co-insurance, or deductibles, for FDA-approved contraceptive services — a requirement known as the "contraceptive coverage mandate." Entities considered churches or conventions of churches under the Internal Revenue Code (Code) are exempt from this mandate.

Accommodations are available for certain other nonprofits that do not meet the Code definition, but hold themselves out as religious organizations and object on religious grounds to providing coverage for contraceptive services. A nonprofit can self-certify via EBSA Form 700, and either the insurer or the third-party administrator (TPA) will arrange separate payments for contraceptive services without any charge. (See our September 9, 2014 *For Your Information*.) Alternatively, a nonprofit can inform HHS in writing of its religious objections. For an insured plan, HHS then notifies the insurer and the insurer provides the coverage. For a self-funded plan, DOL designates the relevant TPA as plan administrator for contraceptive services. (See our November 16, 2015 *For Your Information*.)

Religious Nonprofit Employers' Objections

Many religious nonprofits objected to the accommodation process on the grounds that the act of self-certifying or providing notice triggers the chain of events that ultimately leads to providing contraceptive services to their employees — and thereby violates their principles of faith. All but one federal appeals court that considered the issue sided with the government and determined that the accommodations do not infringe on such religions rights. On November 6, 2015, in *Zubik v. Burwell,* the U.S. Supreme Court agreed to consider the nonprofits' challenges. (See our November 16, 2015 *For Your Information*).

Following oral argument, the Court solicited additional briefs on whether and how the nonprofits' employees can obtain the coverage through their employers' insurance companies in a way that does not require their employers' involvement "beyond [the] decision to provide health insurance without contraceptive coverage to their employees." Both the government and the nonprofits confirmed in those briefs the general feasibility of a modified accommodations process, with the nonprofits specifically confirming their agreement to a process where they "need to do nothing more than contract for a plan that does not include coverage for some or all forms of contraception" — but their employees receive cost-free contraceptive coverage from the same insurance company.

Supreme Court Directs Lower Courts to Facilitate Palatable Compromise

On May 16, 2016, in light of the parties' clarified positions, the Supreme Court sent the case back to the lower courts for the "opportunity to arrive at an approach going forward that accommodates [the nonprofits'] religious exercise" while at the same time ensures that women covered by those employers' plans "receive full and equal health coverage, including contraceptive coverage." In other words, the Court directed the lower courts to work out a mutually acceptable solution to this dispute. In doing so, the Court took care not to rule on the merits of the issue. The ruling expressly allows the government to rely on this lawsuit as notice of the nonprofits' objection, and prohibits the government from imposing taxes or penalties on these nonprofits because they did not provide notice or otherwise failed to satisfy the current accommodation requirements.

> **Comment.** Some Court watchers speculate that, following Justice Antonin Scalia's death earlier this year, the eight-member Court's inability to reach a majority decision on the merits of this dispute motivated the justices to push the case back to the lower courts to fashion a compromise.

In Closing

The lower courts must now try to devise an accommodation that satisfies both the government and the nonprofit religious employers. If they cannot do so, the Supreme Court may ultimately decide the issue. While this and other cases involving similar objections have garnered significant media attention, they do not affect most employer plans subject to the ACA contraceptive coverage mandate.

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