

July 9, 2014



Michael Mishlove,  
Esq.

Questions  
on this topic?  
**CLICK HERE**

## As a Practical Matter, What Does the Supreme Court's Decision in the *Hobby Lobby* Case Mean to You? More Likely Than Not, Not Much.

By Michael Mishlove

If national media attention is one's yardstick, the Supreme Court's decision in [\*Burwell et al. v. Hobby Lobby Stores, Inc. et al.\*](#), (No. 13-354, slip op. June 30, 2014) - holding that, as applied to closely held corporations, the Patient Protection and Affordable Care Act's ("ACA") "contraceptive mandate" violates the Religious Freedom Restoration Act ("RFRA") - is surely the Court's most important employment-related decision this term. Without question, the Court's determination that closely held for-profit corporations qualify as "persons" capable of exercising religion (at least under the RFRA) and are therefore afforded rights under the RFRA has far reaching legal implications and ramifications for a wide spectrum of legal questions, employment-related and -unrelated alike. That said, the fact of the matter is that the reach of the *Burwell* holding is relatively limited and, as a practical matter, the decision will not impact the vast majority of employers and employees.

Because much of the commentary in the media by talking heads as well as social media posts by both supporters and critics of the decision contain wide-sweeping and unjustified statements that go far beyond anything the Court considered or decided, this 60 Second

Memo sets out the Court's holding and the limits on the reach of that holding for employers.

By way of brief background: Generally, unless an exception applies, the ACA requires employers with 50 or more full-time employees to offer group health insurance coverage that provides "minimum essential coverage," including, as is relevant here, "preventive care and screenings" for women. Regulations promulgated under the ACA by the Department of Health and Human Services provide that such preventative care includes all contraceptive methods approved by the Food and Drug Administration (the "contraceptive mandate") - four of which may operate by inhibiting attachment of an already fertilized egg to the uterus.

The plaintiffs in *Burwell* - three closely held corporations and their owners who held sincerely religious beliefs that life begins at conception and that it would violate their religion to facilitate access to contraceptives that operate after the fertilization of an egg (as opposed to preventing fertilization in the first instance) - sued the Department of Health and Human Services and other federal officials and agencies (collectively "HHS") seeking to enjoin application of the ACA's contraceptive mandate insofar as it requires them to include coverage for the four objectionable contraceptives under their group health insurance plans. Specifically, the plaintiffs claimed that the contraceptive mandate violated their rights under RFRA and the Free Exercise Clause of the First Amendment.

RFRA prohibits the government from taking any action that substantially burdens the exercise of religion unless that action is the least restrictive means of serving a compelling government interest.

As noted above, the Court sided with the plaintiffs and held that "[t]he contraceptive mandate, as applied to closely held corporations, violates RFRA." Slip op. at 49.

As an initial matter, for purposes of understanding the limited scope and sweep of the decision, it is important to take note of the sentence immediately following the Court's above-quoted statement of its holding: "Our decision on that statutory question makes it unnecessary to reach the First Amendment claim raised by [plaintiffs]." *Id.* So, to be expressly clear, the Court neither considered the question nor held that the ACA's contraceptive mandate violated the plaintiffs' constitutional rights under the First Amendment; nor did the Court consider or decide whether the Free Exercise Clause of the First Amendment extends to for-profit corporations.

Second, the Court's holding is expressly limited to closely-held (i.e., non-publicly-traded) for-profit corporations. As the Court

stated, "we have no occasion in these cases to consider RFRA's applicability to [publicly traded] companies." Slip op at 29. Although the legal significance of this fact is presently unclear, the Court expressly noted that not only were the companies at issue closely held, but they were also owned by a single family. Thus, determining whether the company owners could actually be found to have sincerely held religious beliefs opposing the contraceptive mandate did not present a problem in the case nor was it at issue before the Supreme Court. In any event, when a closely held corporation is owned by multiple people and/or business entities, in order to fall within the scope of *Burwell's* holding, the owners will have to prove as a matter of fact that they have a sincerely held religious belief that would be substantially burdened by a challenged ACA mandate.

As discussed above, the scope of employers that fall within the reach of the *Burwell* holding is relatively narrowly circumscribed. It is also important to understand that the holding in *Burwell* does not automatically extend to each and every medical service, procedure, treatment, etc. that a business owner might find objectionable based on sincerely held religious beliefs. The Court's decision in *Burwell* is limited only to the ACA's contraceptive mandate. The Court reached its holding only after engaging in two separate fact specific inquiries: (i) whether the challenged mandate substantially burdened the plaintiff-owners' exercise of religion, and (ii) whether the challenged mandate was the least restrictive means of serving the compelling governmental interest at issue. The Court's determination that the contraceptive mandate substantially burdened the *Burwell* plaintiff's exercise of religion is not a determination that can be generalized and/or extended to each and every aspect of health insurance coverage that might be found objectionable by an employer on religious grounds. The same is true of the Court's determination that the contraceptive mandate is not the least restrictive means of serving the interests asserted by the government.

Analyses by the courts of whether this or that governmental action substantially burdened someone's religious beliefs and/or was the least restrictive means of serving a governmental interest take up literally thousands of pages in the case reports lining the bookshelves of your attorneys. Because of the fact-specific nature of these inquiries, no outcome in these cases can be viewed as a foregone conclusion.

The short of all this is that *Burwell* in our view is not and should not be interpreted as sanctioning all business owners *complete discretion* to amend their group health insurance plans so as to eliminate coverage for things they find objectionable on religious grounds. And unless your company is closely held and owned by persons with sincerely held religious beliefs opposing one or another medical treatment/procedure covered by your group health

insurance plan, *Burwell's* applicability to your business is relatively limited.

---

*The 60-Second Memo® is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.*



[Forward this issue](#)

**Copyright 2014 Gonzalez Saggio & Harlan LLP. All rights reserved.**

Arizona | California | Florida | Georgia | Illinois | Indiana | Iowa | Massachusetts  
New Jersey | New York | Ohio | Tennessee | Washington, D.C. | Wisconsin

[www.gshllp.com](http://www.gshllp.com)