The Surprising Truth about *Hobby Lobby*'s Effect in California

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On June 30, 2014, the Supreme Court of the United States handed down its decision in the *Burwell v. Hobby Lobby* case, holding that closely-held corporations could refuse to provide contraceptive coverage mandated by U.S. Department of Health and Human Services (HHS) regulations implementing the Affordable Care Act, if to do so would violate their owners' "sincerely held" religious beliefs.

The decision has sparked commentary across the country from all sides of the reproductive rights debate. But before employers gear up for litigation challenging HHS coverage requirements with which they disagree, they should consider the *Hobby Lobby* decision's effect on state law, which may be minimal.

The *Hobby Lobby* decision expressly avoided a decision on constitutional grounds, instead resting its holding on the Religious Freedom Restoration Act of 1993 (RFRA). The decision is thus an exercise in statutory interpretation, solely concerned with the meaning and application of RFRA, not the U.S. Constitution. When Congress passed the Affordable Care Act in 2010, it could have exempted that law or various of its provisions from RFRA's jurisdiction, but did not do so. The plaintiffs also sued under the Free Exercise Clause of the First Amendment, but the Court ruled only on the RFRA claim and avoided the constitutional issue.

The fact that *Hobby Lobby* implicates only RFRA and not the U.S. Constitution is critically important for California and many other states. Nearly 20 years ago, the Supreme Court ruled that RFRA does not apply to the states in the *City of Boerne v. Flores* decision. As a result, *Hobby Lobby* has no direct effect on state laws.

Twenty-eight states, including California and New York, require insurers to provide coverage of contraceptive drugs and devices. Seventeen states also require coverage of correlated outpatient services. California's leading statute on the subject, Health and Safety Code § 1367.25, is part of the state's managed

care statutory scheme, the Knox-Keene Act. It requires all individual and group health plans (though not employer self-funded plans) that include prescription drug benefits to cover "a variety of federal Food and Drug Administration approved prescription contraceptive methods designated by the plan." (California Insurance Code § 10123.196 imposes similar requirements in the traditional health insurance arena.)

Similar to federal law, California's law includes a provision permitting a "religious employer" to opt out of providing such coverage. But the California law's definition of "religious employer" is narrower than that of the *Hobby Lobby* decision. California's law defines a "religious employer" as a nonprofit whose primary purpose is to inculcate religious values, and which primarily serves and employs people who share the entity's religious beliefs. Cal. Health & Safety Code § 1367.25(b)(1). Companies like the plaintiffs in *Hobby Lobby*—for-profit retailers specializing in crafts and furniture—would not meet this definition. Consequently, the *Hobby Lobby* decision has no effect on the Knox-Keene Act's requirements for contraceptive coverage, nor does its reasoning threaten the legality of California's contraception coverage mandate.

Many commentators have suggested that *Hobby Lobby* could invite a broad range of new litigation under the Affordable Care Act. While the Justices specifically characterized their decision as narrow, advocates of all stripes argue that coverage mandates for treatments such as blood transfusions could be imperiled by *Hobby Lobby's* reasoning. This could very well be true on the federal level. But while California imposes a variety of potentially controversial coverage mandates, including for HIV testing and acupuncture, *Hobby Lobby* offers no ammunition to those seeking to challenge such state-enacted mandates.

Nor is there any immediate likelihood that a closely held California corporation could try to duplicate the results of *Hobby Lobby* on a state level. While some states have enacted copycat mini-RFRA statutes, California is not among them, leaving no clear avenue for a *Hobby Lobby*-like legal challenge. Indeed, Catholic Charities unsuccessfully attempted to challenge California's contraception coverage mandate ten years ago, and the California Supreme Court's determination that the contraception mandate was consistent with the California Constitution (*Catholic Charities v. Superior Court*, 32 Cal. 4th 527, 568 (2004)) largely settled the controversy. The majority of states mandating contraceptive drug and device coverage appear to be similarly insulated from court challenge.

Without a doubt, *Hobby Lobby* is a major decision with dramatic implications for health law (and perhaps other laws as well) in America, particularly the approximately 22 states without a state-level contraception mandate. Arising out of a legal perfect storm of reproductive rights issues, corporate personhood, and religious freedom, *Hobby Lobby's* analysis—or lack thereof—on complex issues such as the sincerity of religious faith as the basis for an exemption from statutory duties will be debated by business leaders, policymakers and scholars for years to come. Advocacy groups will weigh how to challenge or defend policies ranging from vaccination mandates to same-sex couple benefits. But for states like California with a relatively strong contraception coverage mandate already established in state law, expect a much more modest impact.

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