



# High Court Sidesteps Contraceptive Coverage Decision – For Now

Insights

5.16.16

The Supreme Court declined to rule on whether religiously affiliated nonprofits can be required to affirmatively “opt out” of providing contraceptive coverage to their employees, which would have triggered separate contraceptive coverage directly from their issuers. Instead of publishing a decision, the Court took the unusual approach of suggesting the parties work out a compromise. To resolve the issues around such a compromise, the lower court decisions were vacated, and the consolidated cases were remanded for further rulings by their respective courts of appeal for the 3rd, 5th, 10th, and D. C. Circuits. (*Zubik v. Burwell*).

## Administration Created Accommodation To Avoid Conflict

The Affordable Care Act (ACA) requires most health plans to cover preventive services with no cost-sharing for participants. To implement this provision, the Institute of Medicine (IOM) provided recommendations to the Department of Health and Human Services (HHS) regarding which preventive services to offer. Among these services, the IOM recommended coverage for all FDA-approved contraceptives.

This aspect of the ACA has been controversial for religious organizations that do not believe in the use of contraceptives or certain types of contraception. While churches and other houses of worship are exempt from the requirement, other religiously affiliated organizations are not. In response to heavy criticism and multiple lawsuits, the Obama Administration issued regulations in an attempt to provide coverage for as many women as possible, but also to allow accommodation for religiously affiliated nonprofits and closely held for-profit companies.

Under final rules issued in July 2013, group health plans of “religious employers” such as churches and other houses of worship are completely exempt from providing coverage for contraceptive services. In contrast, religiously affiliated nonprofits are provided an “accommodation.”

To assist qualifying employers that sponsor fully insured health plans, the government allows them to provide a self-certification to their health insurance issuer. These issuers must then provide separate payments for contraceptive services at no cost. The final rule contends that such payments are cost-neutral for issuers.

Employers with self-insured plans can participate in the accommodation as well, by providing a self-certification to their third party administrator (TPA). The TPA must provide or arrange for

separate payments for contraceptive services at no cost. The costs of such payments can be offset by adjustments in Marketplace user fees paid by a health insurance issuer with which the TPA has an arrangement.

Follow-up regulations established another option for eligible organizations. Instead of notifying an insurance issuer or TPA, employers can instead notify HHS directly. In addition, the government made the accommodation available for closely held for profit organizations as well as nonprofits.

### **Religious Organizations Did Not Want To Jump Through Hoops**

Though some saw the regulations as a win-win solution, many religiously affiliated organizations did not. They felt the accommodation was nothing but a smokescreen; after all, contraceptives will still be covered under their plan at “no cost” to the issuer, and the employer will still be contributing to overall coverage. In addition, many organizations believed that by requesting the accommodation, they are triggering or facilitating the exact medical coverage that violates their religious beliefs.

A number of organizations brought lawsuits to challenge the accommodation, including the seven involved in the current appeal (*East Texas Baptist University v. Burwell*, *Roman Catholic Archbishop of Washington v. Burwell*, *Little Sisters of the Poor Home for the Aged v. Burwell*, *Zubik v. Burwell*, *Priests for Life v. Burwell*, *Southern Nazarene University v. Burwell*, and *Geneva College v. Burwell*). These groups claimed that the regulations created an unjust burden under the Religious Freedom Restoration Act (RFRA).

RFRA was enacted in 1993 to protect against laws that create an undue burden on the free exercise of religion. The nonprofits that brought these lawsuits sought an exemption from the contraceptive requirement, not an accommodation. They contended that if an insurer separately contracts with an employer’s workers to cover contraception at no cost, such coverage is necessarily provided by the employer. In addition, the nonprofits argued that even the act of notifying the issuer or government triggers or facilitates the medical coverage they find objectionable.

RFRA requires the government to demonstrate that a challenged law furthers a “compelling interest” in the “least restrictive means” when it “substantially burdens a person’s exercise of religion.” To resolve this issue, the Court would have needed to decide a series of questions. First, the nonprofits needed to demonstrate that the regulation substantially burdens their exercise of religion. If that burden had been met, then the government would have needed to demonstrate that the regulations further a “compelling interest” by the “least restrictive means.”

Multiple cases wound their way up to various circuit courts of appeal. However, only the 8th Circuit Court of Appeals has held the accommodation illegal, while the other circuits upheld the government’s right to enforce the accommodation. Though the cases decided by the 8th Circuit were not part of the seven consolidated cases argued before the Supreme Court in this instance, the circuit split was undoubtedly part of the Court’s decision to take on the cases.

## **Court Suggests Compromise, Remands For Further Proceedings**

In a rare move, the Court requested supplemental briefing after oral argument regarding “whether contraceptive coverage could be provided to petitioners’ employees, through petitioners’ insurance companies, without...notice from petitioners.” The unsigned *per curiam* opinion confirms that both petitioners and the Government believe the compromise may work. To resolve additional questions presented by such a compromise, the Court remanded the cases back to their respective courts of appeal.

In a separate concurrence, Justice Sotomayor (joined by Justice Ginsberg) confirmed that this opinion takes no position on the issues in the case. In particular, the concurrence warns lower courts not to interpret the new compromise as a suggestion that the existing regulations do not meet the “least restrictive means” requirement.

## **Significance For Employers**

The Court’s opinion has significance for all employers, because it suggests the eight-Justice Court may be looking for ways to delay decisions until a ninth Justice can be appointed. If the matter cannot be compromised by the parties, one would expect this issue to work its way back up to the Supreme Court sometime in the future, presumably once a full complement of Justices has been restored to the bench.

Religiously affiliated nonprofit employers should speak with counsel if they prefer not to offer contraceptive coverage. After today’s opinion, whether they are subject to the requirement is likely a question of location and time.

For more information visit our website at [www.fisherphillips.com](http://www.fisherphillips.com) or contact your regular Fisher Phillips attorney.

---

*This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

## **Service Focus**

Employee Benefits and Tax