

## **HR Weekly Podcast October 22, 2014**

Today is October 22, 2014, and welcome to the HR Weekly Podcast from the State Human Resources Division. This week's podcast deals with a recent United States Supreme Court decision concerning the Patient Protection and Affordable Care Act, or the ACA.

In *Burwell v. Hobby Lobby Stores, Inc.*, Hobby Lobby Stores, Inc. is an arts and crafts chain with over 500 stores and about 13,000 full-time employees and is a closely-held family business. Mardel, Inc. is an affiliated chain of 35 Christian bookstores with approximately 400 employees, also run on a for-profit basis. The Green family owns and operates Hobby Lobby and Mardel.

The Green family is deeply religious and operates their companies in accordance with their beliefs. For example, Hobby Lobby and Mardel stores are not open on Sundays, the companies regularly purchase full-page newspaper ads promoting Christian messages, and Hobby Lobby refuses to engage in business activities which it feels may facilitate or promote alcohol use. Both companies offer health coverage to their employees through a self-insured group health plan.

Beginning in 2015, the ACA generally requires large employers to offer their full-time employees and their dependents the opportunity to enroll in "minimum essential coverage" under an eligible employer-sponsored health plan or face a tax penalty. The ACA also includes standards and requirements on group health plans, including those that are employer sponsored, such as requiring non-grandfathered plans to cover certain preventive-health services without requiring co-pays or deductible payments from plan participants or beneficiaries. Under regulations developed by the United States Department of Health & Human Services, or HHS, this requirement is interpreted to include all FDA-approved contraceptive methods. HHS's contraception regulations allow exemptions for "religious employers" and other related accommodations. Such exemptions and accommodations did not extend to for-profit businesses such as Hobby Lobby and Mardel.

Complying with the HHS's contraception requirements was not acceptable to the Green family because of their religious beliefs. Dropping health coverage for their employees or refusing to comply with the HHS's contraception requirements would subject Hobby Lobby and Mardel to large penalties under the ACA. The Greens asserted that they could be subject to nearly \$475 million in penalties each year for failure to provide all FDA-approved contraception methods. But if health coverage was dropped altogether, they calculated that Hobby Lobby and Mardel could face penalties up to \$26 million per year.

In a federal lawsuit, the Greens claimed that the contraception mandate violated both the Religious Freedom Restoration Act of 1993, or RFRA, and their Free Exercise rights under the First Amendment to the United States Constitution. The RFRA bars the government from substantially burdening a "person's" exercise of religion unless that burden is the least restrictive means to further a compelling governmental interest. Specifically, the Greens contended that the RFRA entitles their Plan to an exemption from the HHS's contraception requirement because the Greens objected on religious grounds.

The district court denied Hobby Lobby's request for a preliminary injunction. On appeal, the United States Court of Appeals for the Tenth Circuit ordered the government to stop enforcement of the contraception rule on Hobby Lobby and sent the case back to the district court, which granted preliminary injunction. The government appealed to the United States Supreme Court

The Court held that closely-held corporations should be provided the same accommodations under the RFRA as those provided to nonprofit organizations. In other words, the RFRA's protections could extend to for-profit corporations such as Hobby Lobby and Mardel. For the contraceptive mandate to survive, the burden was on the government to show that the contraception regulations 1) served a "compelling government[al] interest" and 2) were the "least restrictive means" of achieving its interest in guaranteeing cost-free access to birth control. The Court assumed the first prong had been met. As to the second prong, the Court found that the government failed to carry its burden to show that the contraception requirements were the "least restrictive means" of achieving its interest in guaranteeing cost-free access to birth control. The Court noted that HHS had already implemented a system for providing all FDA-approved contraceptives to employees of religious nonprofit organizations that object to HHS's contraception mode, and the government did not provide a sufficient reason why this system could not be extended to employees of closely-held for-profit companies whose owners also have religious objections.

It is unclear how far-reaching this Supreme Court decision might be. The Court warned that its decision should not be interpreted to provide a shield to employers to cloak illegal discrimination under the guise of claimed religious beliefs. In addition, this decision likely will not extend to larger corporations with diverse ownership interests. The Court noted the difficulty of determining the religious beliefs of, for example, a large publicly-traded corporation, and pointed out that the corporations in this case were all closely-held corporations, each owned and controlled by a single family, with undisputed sincere religious beliefs. Therefore, there may be relatively few employers that fit the exemption created by the Court's decision. Thank you.