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The Contraceptive Coverage Gap in New York State: *Burwell v. Hobby Lobby Stores, Inc.* and Beyond

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Religious liberty is a fundamental component of our Nation’s history and identity. Reflecting these deep roots, the First Amendment’s free exercise clause protects the right to follow and practice a faith – or no faith at all. The limits, if any, that can be imposed upon the free exercise of religion remain a matter of deep controversy. In 1990, a Supreme Court decision narrowed the protections of the free exercise clause; and in 1993, Congress responded to the Supreme Court decision by expanding free exercise rights with the enactment of the Religious Freedom Restoration Act (“RFRA”). In recent years, individuals and institutions have invoked RFRA to assert religious objections to laws of general applicability. *Burwell v. Hobby Lobby Stores, Inc.*, is such a case. In it, the for-profit corporation Hobby Lobby claimed, and was ultimately granted, an exemption under RFRA from the general requirement that employer’s health plans include coverage for contraceptive care. The owners of the corporation successfully claimed that providing such care would conflict with their religious scruples.

This document describes legal requirements governing insurance coverage for contraception and how challenges to these requirements impact New York employers and employees in the wake of the Supreme Court’s *Hobby Lobby* decision. It seeks to reconcile the right of religious objection with the countervailing interests in uniform application of law and the need to prevent the imposition of religious beliefs on those who do not share those beliefs.

Contraception and Insurance Coverage

The ability to decide whether and when to have a child is essential to women’s health and equality. In fact, 99 percent of women use or have used contraception at some point in their lives.¹ But lack of contraceptive insurance coverage and high co-payments remain significant barriers to consistent access to effective contraception. To remedy this, some states, including New York, have passed contraceptive equity laws that require health insurance policies to cover contraceptive drugs and

¹ U.S. Centers for Disease Control and Prevention, *Contraceptive methods women have ever used: United States, 1982-2010* (finding that 99 percent of sexually active women of reproductive age in 2006–2010 who had ever had sexual intercourse have used at least one contraceptive method at some point in their lifetime).

devices. While these laws represent major steps forward, they are not enough to close the contraceptive coverage gap. Passed in 2010, the Patient Protection and Affordable Care Act (“ACA”) and its implementation guidelines aimed to close the gap by requiring employers to provide insurance plans that cover contraception without a co-payment.² Some religious employers are exempt from state contraceptive equity laws and the ACA’s requirements. In addition, the pool of exempt employers was further expanded by the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*³

New York’s Contraceptive Equity Law

Passed in 2002, the New York Women’s Health and Wellness Act (“WHWA”) requires insurance plans issued in New York that cover prescription drugs to include all Food and Drug Administration (“FDA”) approved contraceptive drugs and devices.⁴ This means that employers who provide comprehensive insurance to their employees are required to provide contraception coverage unless they qualify as: 1) “religious employers” within the definition of the law, or, 2) employers with self-funded insurance plans, meaning the employer provides health care to its employees using its own funds rather than contracting with an outside insurance provider.

The WHWA creates a narrow exemption for religious employers such as churches and other houses of worship.⁵ However, even when a religious employer is exempt, important employee protections exist in the law. For instance, a religious employer that refuses to provide contraceptive coverage for pregnancy prevention purposes must provide coverage for contraceptive drugs prescribed for medical or general health improvement purposes.⁶ Further,

² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 199 (2010); 42 U.S.C.A. § 300gg–13(a)(4) (in accordance with the ACA and implementing regulations, the Department of Health and Human Services issued *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, which adopt the independent Institute of Medicine evidence-based recommendations, and require coverage of eight preventive health care services, including all FDA-approved methods of contraception, without cost-sharing. The guidelines and a list of covered preventive health care services for women are available at <http://www.hrsa.gov/womensguidelines/>).

³ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014).

⁴ N.Y. Ins. Law § 3221 (1)(16) (requiring all federal Food and Drug Administration approved contraceptive services including oral contraceptives, diaphragms, Norplant, Depo Provera, cervical caps, IUDS and generic equivalents).

⁵ *Id.* at § 3221 (1)(16)(A)(1) (defining a “religious employer” as “an entity for which each of the following is true: (a) The inculcation of religious values is the purpose of the entity; (b) the entity primarily employs persons who share the religious tenets of the entity; (c) the entity serves primarily persons who share the religious tenets of the entity; and (d) the entity is “a nonprofit organization as described in Section 6033(a)(2)(A) i or iii, of the Internal Revenue Code of 1986, as amended.”).

⁶ *Id.* at § 3221 (1)(16)(C); Megan L. Kavanaugh and Ragnar M. Anderson, *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers* (Guttmacher Institute, July 2013), available at <http://www.guttmacher.org/pubs/health-benefits.pdf> (describing the noncontraceptive health benefits of contraceptive methods including the reduced risk of endometrial and ovarian cancer and elimination of menopause symptoms).

employees of religious employers who invoke the exemption must get written notice and have the right to purchase contraception coverage directly from the employer's insurance vendor.⁷

Employers who maintain a self-funded health insurance plan are also exempt from the WHWA contraceptive coverage requirements.⁸ Such employers are, however, required to comply with the Affordable Care Act's contraceptive coverage mandate unless they qualify for one of the exemptions discussed below.⁹

In *Catholic Charities of the Diocese of Albany, et al. v. Serio*, Catholic Charities, a non-profit organization affiliated with the Catholic Church, but not considered a "religious employer" under WHWA, challenged the contraceptive equity law on First Amendment religious freedom grounds. In 2006, New York's highest court, the Court of Appeals, rejected the challenge and found the law constitutional.¹⁰ In doing so, the New York Court of Appeals specifically rejected arguments that requiring contraceptive coverage violated constitutional principles of religious liberty. The Court explained that ". . . when a religious organization chooses to hire nonbelievers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in doing what their own beliefs permit."¹¹ After *Serio*, some New York employers avoided compliance with the WHWA's contraceptive coverage requirement by creating self-funded insurance plans.¹²

The Affordable Care Act and Contraceptive Coverage

The ACA requires health insurance plans to cover "essential health benefits," including preventive health care services, without any co-payments or deductibles.¹³ In 2010, after the ACA was signed

⁷ *Id.* at § 3221 (1)(16)(A)(2)(B).

⁸ Employee Retirement Income Security Act, 29 U.S.C.A. § 1144 (the Employee Retirement Income Security Act, also known as ERISA, exempts self-funded employee benefit plans from complying with state insurance laws, including New York's contraceptive equity law).

⁹ Beyond specified exemptions, under the ACA, self-funded health care plans that have "grandfathered" status are allowed to maintain the same coverage that was in effect when the ACA was enacted. 45 C.F.R. § 147.140. The practical impact of grandfathered status for health care plans is that certain consumer protections, including the requirement for the provision of preventive health care services such as contraception without cost sharing, do not apply to such plans. However, to maintain grandfathered status a health plan must meet specific criteria. For example, to maintain grandfathered status a health plan cannot change in ways that substantially cut benefits or increase costs for consumers; eliminate or substantially eliminate benefits for a particular condition; add or reduce an annual limit; or lower the employer contribution rate by more than five percent for any group of covered persons.

¹⁰ *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510 (N.Y. 2006).

¹¹ *Id.* at 528.

¹² See eg., Karen Gantt, *Balancing Women's Health and Religious Freedom Under the ACA*, 17 *Quinnipiac Health L.J.* 1 (2014) (discussing the history of using self-insurance to avoid state insurance requirements, including New York Catholic institutions, such as the Archdiocese of New York and the Diocese of Brooklyn, that chose to self-insure after New York State adopted the WHWA rather than provide contraceptive coverage), available at http://www.quinnipiac.edu/prebuilt/pdf/SchoolLaw/HealthLawJournalLibrary/Volume17_gantt.pdf.

¹³ 42 U.S.C.A. § 300gg-13(a)(4), see note 2.

in to law, the Department of Health and Human Services (HHS) commissioned the Institute of Medicine (IOM) of the National Academy of Sciences to review and make recommendations as to what preventive health care services are necessary for women's health and well-being and thus should be included in the list of covered women's preventive health care services. After convening a committee of medical experts, the IOM recommended that HHS include the full range of FDA approved "contraception methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."¹⁴

In February of 2012, HHS issued guidelines that adopted the IOM's recommendations, but provided an exemption for churches and houses of worship. HHS also granted a temporary "safe harbor" (authorization to avoid compliance) to non-profit organizations with religious objections and committed to creating another rule to accommodate these organizations' objections.¹⁵

Almost immediately after HHS issued the initial rule, the U.S. Conference of Catholic Bishops led a series of protests against the rule because it did not completely exempt Catholic hospitals, universities and service agencies. In 2013, HHS issued a final rule that contained a broad accommodation provision for non-profit employers with religious objections.

Under the final HHS rule some employers are exempt from providing contraceptive coverage altogether, such as churches and houses of worship, and other non-profit employers may seek an accommodation that exempts them from complying with the rule but ensures that their employees receive coverage.¹⁶ The accommodation provision allows non-profit religiously-affiliated organizations, such as Catholic Charities, to submit a form stating a religious objection to the requirement and thereby escape the requirement to include contraception in its insurance plan. When an organization files this form with their insurer or third party insurance administrator, the health insurance issuer must provide contraceptive coverage without charge to the exempt employer and without cost to their employees.¹⁷

In addition, on August 22, 2014, HHS amended the final rule to create an additional pathway for eligible non-profit organizations to provide notice of their objection to covering contraceptive services.¹⁸ The rule now allows eligible organizations to notify HHS of their objection directly

¹⁴Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps*, Washington, DC: The National Academies Press, 2011, available at <http://www.iom.edu/Reports/2011/Clinical-Preventive-services-for-Women-Closing-the-Gaps.aspx>.

¹⁵ 45 C.F.R. § 147 (2012), published at 77 FR 8725 (Feb. 15, 2012).

¹⁶ 45 C.F.R. § 147, 156 (2013), published at 78 FR 39870 (July 2, 2013).

¹⁷ If the group health plan is self-funded and maintained by an eligible organization, then the third party administrator of the plan would arrange for a health insurance issuer to provide contraceptive coverage to plan participants without co-payments or deductibles.

¹⁸ 45 C.F.R. § 147 (2014) published at 79 FR 51092 (Aug. 27, 2014) (although the interim final rule solicits comments, the rule went into effect upon publication).

instead of notifying their insurer or third party insurance administrator. HHS and the Department of Labor will then notify and arrange coverage with insurers and third party administrators so employees receive separate coverage for contraceptive services with no additional cost to the employee or the employer.

Nationwide, more than 100 cases have been filed by employers who claim that the ACA's contraceptive coverage requirement constitutes an infringement on their religious liberty.¹⁹ These cases fall into two categories. First, religiously affiliated non-profits, like Wheaton College and Little Sisters of the Poor, claim the accommodation rule constitutes a substantial burden on their religious rights because the act of signing the exemption form indirectly causes their employees to receive contraceptive coverage from an outside entity. Second, for-profit businesses, whose owners object to the requirement on religious grounds and who are not eligible for accommodation under the rule, also challenged the contraceptive coverage requirement. While cases in the first category wend their way through the federal courts,²⁰ the Supreme Court addressed the challenge from for-profit companies in *Burwell v. Hobby Lobby Stores, Inc.*.

What does the *Hobby Lobby* decision mean for the ACA's contraceptive coverage rule?

In *Burwell v. Hobby Lobby Stores, Inc.*, the United States Supreme Court held that “closely held” for-profit employers do not have to comply with the ACA's contraceptive coverage requirement where it violates the employers' religious beliefs.²¹ In the case (and its companion *Conestoga Wood Specialties Corp. v. Burwell*), for-profit corporations challenged the contraceptive coverage requirement under the Federal Religious Freedom Restoration Act of 1993 (“RFRA”) as a substantial burden to their exercise of religion.²² The owners of these companies objected to the

¹⁹ For a full list of cases, see: <https://www.aclu.org/reproductive-freedom/challenges-federal-contraceptive-coverage-rule>.

²⁰ *Wheaton Coll. v. Burwell*, 573 U.S. ___, 134 S. Ct. 2806 (2014). On July 3, 2014, the Supreme Court issued an emergency stay to Wheaton College, a nonprofit liberal arts college in Illinois, allowing it to refrain from compliance with the accommodation scheme while its legal challenge is ongoing. This does not necessarily indicate what the Supreme Court will ultimately decide about the rule that allows for the accommodation of non-profit employers with religious objections.

²¹ *Burwell*, 134 S. Ct. at 2764 (while the Court does not define a closely held business, it looks to a number of different characteristics of the plaintiffs' business including whether a family retains exclusive control through sole ownership, control of its board of directors and all of its voting shares).

²² 42 U.S.C. §§ 2000bb–1(a), (b) (the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the “Government [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability” unless the Government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”).

requirement that they cover certain types of contraceptive methods because they believed those methods cause abortion.²³

As a threshold question, the Court found that closely held for-profit corporations have religious freedom rights under RFRA.²⁴ After concluding this, the Court held that the contraceptive requirement imposed a substantial burden on these employers' religious beliefs. And while the Court assumed that the government has a compelling interest in requiring insurance plans to cover contraception, the Court found that the contraceptive coverage requirement was not the "least restrictive" means for the government to guarantee access to contraceptive methods. The Court pointed to two alternative options: 1) the government could directly pay for contraceptive services for women working at companies that object to contraception, and 2) the government could provide for-profit employers the ability to opt-out of providing contraception similar to the accommodation provision already in place for non-profit organizations.²⁵

In light of the Court's decision, on August 22, 2014, HHS proposed a rule to extend the accommodation available to non-profit religious organizations to closely held for-profit entities, like Hobby Lobby.²⁶ Under the proposed rule, these companies would not have to contract, arrange, pay or refer for contraceptive coverage to which they object on religious grounds. Instead, as similar to non-profit organizations, closely held for-profit companies would have the choice to notify their insurer, third party insurance administrator or HHS of their religious objection and would thereby be relieved of their obligation to provide contraceptive coverage.²⁷

The Effect of *Hobby Lobby* and other Court Challenges in New York

The *Hobby Lobby* decision has no immediate impact on New York's contraceptive equity law. Thus, while churches and other houses of worship remain exempt from providing contraceptive coverage under New York law, employers with insurance plans issued in New York State will still be required to provide insurance coverage for contraceptive services. Further, because of the ACA,

²³ While the decision allows for-profit organizations to deny coverage for all contraceptive methods regardless of purpose, the types of contraceptive methods to which the plaintiffs inaccurately equated to abortifacients are two types of emergency contraception and two types of IUDs.

²⁴ *Burwell*, 134 S. Ct. at 2783-84 (although failing to provide a meaningful distinction, the Court attempted to limit the scope of the decision to the contraceptive coverage requirement by stating that the decision would not impact other coverage requirements, such as immunizations, or provide a shield to employers seeking to discriminate in hiring on the basis of race or other prohibited factors).

²⁵ *Id.* at 2781-83.

²⁶ 45 C.F.R. § 147 (2014) published at 79 FR 51118 (Aug. 27, 2014) (the proposed rule seeks public comments on how to define a closely held for-profit company and whether other steps might be appropriate to implement the policy).

²⁷ Further, Congress has proposed a federal bill in response to the *Hobby Lobby* decision that would restore the contraceptive coverage requirement guaranteed by the Affordable Care Act and also protect coverage of other health services from employers who want to impose their beliefs on their employees by denying benefits. Protect Women's Health From Corporate Interference Act, S. 2578, H.R. 5051, 113th Cong. (2014).

these organizations will be required to provide contraceptive coverage without a co-payment or deductible.

For organizations that do not have to comply with New York's contraceptive equity law, namely organizations with self-funded insurance plans, the landscape remains complicated and incomplete. Where a self-funded organization has a religious objection, the future of contraceptive coverage largely turns upon whether or not an organization is considered non-profit or for-profit and whether their insurance plan retains "grandfathered" status.²⁸ The Supreme Court has yet to decide whether the HHS accommodation rule that allows non-profits to escape the coverage requirement is a violation of RFRA.²⁹ Further, while HHS released a rule on August 22, 2014 that extends the accommodation provision to closely held for-profit companies, the scope of eligible companies has yet to be finalized and this rule may well be challenged in the courts. Once these legal aspects are settled, implementation of the rules is equally important, including ensuring the notification of employees, monitoring seamless coverage, and general compliance with the rules.

For New Yorkers, the promise of the ACA was to close the contraceptive coverage gap for employees at self-funded organizations; and HHS has clearly signaled its intent to do so. However, while we await final guidance from HHS and the Supreme Court's decision regarding the accommodation rule, New York women employed by self-funded organizations with religious objections may be stuck with health insurance coverage that fails to cover their basic health care needs. For women across the country without contraceptive coverage, this may mean they will continue to be forced to pay out of pocket for contraceptive services, choose less reliable methods of preventing pregnancy, or even no contraception at all.

The Future of Contraceptive Equity and the ACA's Contraceptive Coverage Requirements

Contraception plays a central role in women's health and lives. The NYCLU and ACLU will continue to pursue contraceptive equity for all women in the courts, in state and federal legislatures, and with the federal administration. While religious freedom gives us all the right to make personal decisions about how to express faith, it should not give institutions or individuals the right to impose their beliefs on others or to discriminate. We will stand with women and fight for fundamental fairness and equality, in health care coverage and beyond.

To find out more about the disposition of current court challenges, HHS rules and what you can do, please contact Katharine Bodde with the New York Civil Liberties Union's reproductive rights program at 212.607.3375.

²⁸ See note 9 (insurance plans with "grandfathered" status are not required to comply with the contraceptive coverage mandate).

²⁹ See *Wheaton Coll.*, note 20.