



***Burwell v. Hobby Lobby Stores, Inc.* and Access to Care: Implications of the Supreme Court Decision**

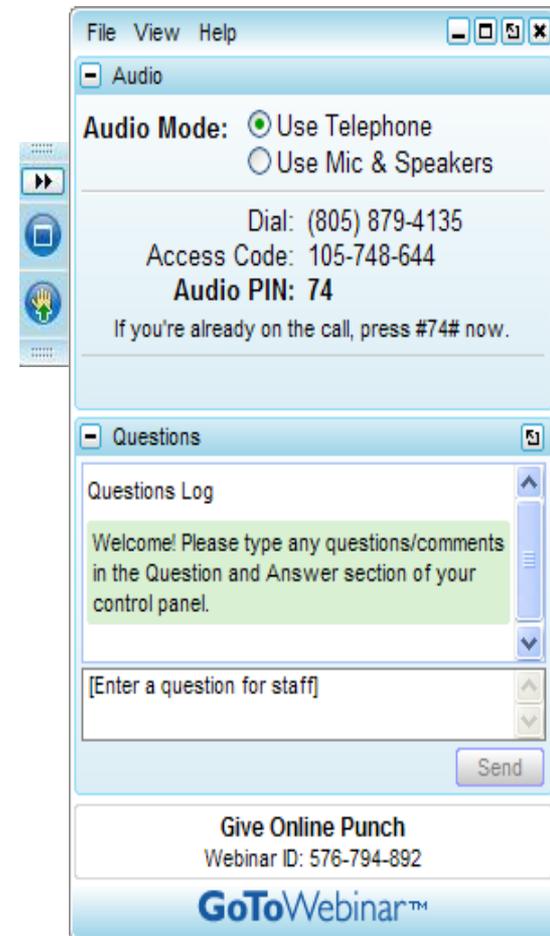
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GoToWebinar Interface

- Maximize/minimize your screen with the chevron symbol
- Telephone participants need to enter their audio pin
- Please share your questions and knowledge!
 - Ask a question using the questions log. We will answer as many questions as possible!



The National Health Law Program

- National non-profit law firm committed to improving health care access and quality for low and limited-income individuals and underserved populations
- Offices in Washington, D.C., Los Angeles, and North Carolina.

The Network for Public Health Law



- **National Coordinating Center/Northern Region**

- Public Health Law Center at William Mitchell College of Law



- **Eastern Region**

- The University of Maryland School of Law working with the John Hopkins Bloomberg School of Public Health



- **Mid-States Region**

- University of Michigan School of Public Health

- **Southeastern Region**

- UNC Gillings School of Global Public Health working with the National Health Law Program



- **Western Region**

- Sandra Day O'Connor College of Law at Arizona State University working with the University of New Mexico School of Law



The Network for Public Health Law

Areas of specialization:

- **Accreditation of public health agencies**
- **Health reform**
- **Maternal and child health**
- **Structure and organization of local health agencies**
- Emergency legal preparedness and response
- Environmental public health
- Obesity prevention
- Public health statutes and regulatory information
- Tobacco control
- Tribal public health law
- Injury prevention and safety
- Cross-border public health
- Food safety
- Health information data sharing

ACA Contraceptive Coverage Requirements

- **Plans that must comply:**
 - Plans purchased in the individual market and through the “Marketplace”
 - “New” employer-sponsored plans (new or significant changes since March 23, 2010)
 - Medicaid “Alternative Benefit Plans”

ACA Preventive Services

- Plans must cover **without cost-sharing** (copay, co-insurance, or deductible):
 - Services with ‘A’ and ‘B’ ratings from the USPSTF
 - Immunizations recommended by the CDC
 - Preventive care and screenings for infants, children and adolescents in HRSA-supported guidelines
 - **Women’s preventive services as recommended through comprehensive guidelines developed by HRSA**

Women's Preventive Services

- Well-woman visits (includes prenatal visits)
- Screening for gestational diabetes
- HPV testing
- STI counseling
- HIV counseling
- Breastfeeding support, supplies, and counseling
- Screening and counseling for interpersonal and domestic violence
- **ALL FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity**

ACA Contraceptive Coverage Requirements

Plans must also cover:

- patient education and counseling;
- services related to **follow-up and management of side effects**;
- **counseling for continued adherence**; and
- **removal** of devices

All without cost-sharing!



WOMEN'S HEALTH & CONTRACEPTION
SANDRA FLUKE



ACA Contraceptive Coverage Requirements

- **Who is NOT covered?**
 - Anyone enrolled in:
 - Grandfathered plans (pre- March 23, 2010)
 - Self-funded student health plans
 - ***Some religious institutions (for contraception rule only)***
 - ***And....then Hobby Lobby Stores, Inc.***

Contraception Coverage Rule: Exemption

- Some non-profit religious institutions exempt
 - Houses of worship (e.g., churches)
- Employees of houses of workshop (and their dependents) **will not** receive contraceptive coverage through their employee health plans

Contraception Coverage Rule: the Accommodation

- Non-exempt, but “accommodated” entities do not have to cover contraception
 - Non-profit, religious objection covering contraception, hold out as religious
- **BUT**, employees of non-exempted, non-profit “accommodated” employers and universities **will** receive contraceptive coverage without cost-sharing

EBSA FORM 700-- CERTIFICATION
(To be used for plan years beginning on or after January 1, 2014)

<p>This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.</p> <p>Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.</p>	
Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	
<p>I certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.</p> <p>Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.</p> <p><i>I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.</i></p>	
<p>_____ Signature of the individual listed above</p>	
<p>_____ Date</p>	

Lawsuits Surrounding Contraceptive Coverage Rule

- **(49) For-profit challenges**
 - U.S. Supreme Court issued decisions in two cases, and remanded in three others.
- **(52) Non-profit challenges**
 - Cases before the 4th, 7th, 10th, 11th, and D.C. circuits.
 - U.S. Supreme Court granted preliminary injunctions in two cases.

Contraceptive Coverage Rule: Lawsuits

- Challengers claim violations of the First Amendment and the Religious Religious Freedom Restoration Act of 1993 (RFRA)
- RFRA says that the Government shall not “**substantially burden a person's** exercise of religion” unless the burden is:
 - “(1) is in furtherance of a **compelling governmental interest**; and
 - (2) is the **least restrictive means** of furthering that compelling governmental interest”

Hobby Lobby Stores, Inc.: The Road to the Supreme Court

- *Conestoga Wood Specialties Corp.*: A split 3rd Circuit panel held that a for-profit, secular corporation cannot engage in religious exercise.
- *Hobby Lobby Stores, Inc.*: The 10th Circuit, sitting en banc, concluded that companies are persons within the meaning of RFRA, that the contraceptive coverage requirement places a substantial burden on the companies' exercise of religion, and that the government failed to establish that the requirement is the least restrictive means of furthering a compelling interest.

Hobby Lobby Stores, Inc.: Key Decisions by the Court

1. *Closely Held* For-Profit Corporations Are **Persons** for the Purposes of RFRA.
2. The Contraceptive Coverage Requirement **Substantially Burdens** the Corporations' Exercise of Religion
 - Ultimately, the Court assumed that the burden is substantial because the corporations sincerely believed it was substantial.
3. The Court *Assumed* that the Contraceptive Coverage Requirement Furthers **Compelling Governmental Interests**
4. The *Accommodation* is a **Less Restrictive Means** of Ensuring that Increasing Access to Contraception

Hobby Lobby Stores, Inc.



Court's Holding:

The contraceptive coverage provision, as applied to three **closely held corporations** that object on **religious grounds** to providing insurance for certain contraceptives, violates RFRA.

Impact of *Hobby Lobby Stores, Inc.*

- **Most** health plans still have to cover contraception (and all other preventive services) without cost-sharing
 - But we could see other lawsuits
- Decision directly applies to closely held companies with religious objections
 - But we could see other lawsuits
- Decision does not impact Medicaid or other publicly funded programs
- RFRA applies to federal laws, not state laws

Nonprofit Challenges

The “Government shall not **substantially burden** a person’s exercise of religion” unless the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the **least restrictive means** of furthering that compelling governmental interest.”

1. Courts tend to recognize free exercise rights of churches and other religious nonprofit entities.
2. But, does completing the self-certification form violate nonprofit entities’ religious beliefs by facilitating the subsequent provision of contraceptive coverage by a third party?
3. And, is a less restrictive means for the Government provide contraception directly to employees or through tax incentives?

The Supreme Court & Nonprofit Challenges

- *Wheaton College*
 - Subject to the accommodation
 - Days after *Hobby Lobby*, Court granted temporary injunction
 - Government's response to *Wheaton College*

The path to contraceptive equity

1994	Nearly 50% of indemnity plans did not cover contraceptives; only 15% of large-group health plans covered all main methods of contraception (more covered sterilization)
2000	EEOC: failure to cover contraception when cover other Rx = sex discrimination
1996-2010	26 states pass contraceptive equity laws
1997 - 2009	The Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC); 2004 Putting Prevention First Act
2009	ACA Women's Health Amendment
2011	Institute of Medicine recommends contraceptive coverage

State Contraceptive Equity Laws

- 26 states have laws requiring insurers that cover prescription drugs to cover contraception.
 - AZ, AK, CA, CO, CT, DE, GA, HI, IL, IA, ME, MD, MA, MO, NV, NH, NJ, NM, NY, NC, OR, RI, VT, WA, WV, WI
- TX, VA: employers must be offered option to cover
- 2 states require coverage of contraception as a result of administrative rules or attorney general opinions
 - MI, MT

State Contraceptive Equity Laws

- Gender Equity/Sex discrimination framework
- No cost-sharing protections (except Texas)
- Do not apply to all employers
 - Self-funded plans are not governed by state benefit laws
- Exceptions
 - No EC (AR); no abortion causing drugs (MO)
- Often do not require coverage of “all” FDA-approved methods

State Contraceptive Equity Laws: Religious Exemptions

- None: 8 states (CO, GA, IA, MT, NH, VT, WA, WI)
- Only houses of worship: 3 states (CA, NY, OR)
 - CA & NY: Upheld by State Supreme Courts
- Most religious organizations:
 - 7 states (AR, ME, MA, MI, NJ, NV, NC, RI)
 - Religious charities, schools, some universities
- Broad exemption:
 - 9 (AZ, CT, DE, HI, MD, MO, NM, WV)
 - Also exempts hospitals
 - Also secular organizations: 1 (IL)

Source: Guttmacher Institute

California Statute as Introduced: SB 1053

- Must cover **ALL** FDA-approved methods
 - Challenges to define “method” to ensure all delivery mechanisms are covered
- Almost no medical management
- Must cover OTC products without a Rx
- No cost-sharing
- Gender neutral
- Applies to Medi-Cal managed care (state Medicaid)
- Maintains prior law narrow religious exemption for houses of worship (upheld by CA Supreme Court)

California statute today: SB 1053 status

- Must cover ALL FDA approved methods
 - Challenges to define “method” to ensure all delivery mechanisms are covered
 - Proposed distinctions based on “therapeutic equivalents”
- Almost no medical management
- Must cover OTC products ~~without~~ a Rx
- No cost-sharing
- ~~Gender neutral~~ **Women only**
- Applies to Medi-Cal managed care (state Medicaid)
- Maintains prior law narrow religious exemption for houses of worship (upheld by CA Supreme Court)

Other State Efforts

- NY: Reproductive Rights Disclosure Act – employers must disclose change in benefits
- Ohio: Contraceptive coverage + prohibits discrimination based on reproductive decisions
- WI: Reports that Gov. Walker's administration will not enforce state contraceptive equity law

Resources and Strategies

- Please **share examples with NHeLP** to support and inform advocacy efforts!
- NHeLP's initial summary of Supreme Court's decision on the ACA:
<http://www.healthlaw.org/publications/browse-all-publications/Hobby-lobby-analysis#.U8VckPldWSo>
 - In-depth analysis forthcoming
- Encourage patients to file internal appeals!
 - Suggested resource: National Women's Law Center's appeal toolkit (www.coverher.org)
- Report non-compliant plans to appropriate government officials (US Dept. of Labor, State Insurance Commissioner, State Marketplace)
- FAQs about women's preventive services requirements:
<http://www.dol.gov/ebsa/faqs/faq-aca12.html>



THANK YOU!

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