FULL OF SOUND AND FURY: THE SUPREME COURT'S DECISION ON THE AFFORDABLE CARE ACT'S CONTROVERSIAL CONTRACEPTIVE COVERAGE MANDATE

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A divided Supreme Court ruled it is a violation of the Religious Freedom Restoration Act (RFRA) to mandate that certain closely held corporations provide contraceptive coverage under their group health plans. RFRA prohibits the government from acting in a way that substantially burdens the exercise of religion unless that action is the least restrictive means of serving a compelling government interest. The court determined that RFRA protections apply to closely held for-profit corporations and that requiring owners of such corporations to provide contraceptive coverage in opposition to their sincerely held religious beliefs violates RFRA because it is not the least restrictive means of serving this compelling interest.

The court observed that the government currently provides an accommodation for certain nonprofit corporations who object to providing contraceptive coverage on the basis of their religious beliefs. Under the existing accommodation, if a nonprofit certifies to its religious opposition to contraceptive coverage and notifies its group health plan participants, the plan is not required to provide the coverage. However, participants in such plans will nonetheless be able to access contraceptive coverage directly from the insurance carrier or third-party administrator (TPA).

In response to the ruling, we expect the regulations governing the implementation of the Affordable Care Act will be amended. Perhaps, the accommodation currently available to certain religious nonprofit corporations will be expanded to closely held for-profit corporations with sincerely held religious beliefs that oppose contraceptive coverage. In theory, an expansion of the existing accommodation will have little impact on covered employees because they will have alternative access to contraceptives outside the scope of the plan. However, in practice, the existing accommodation has often become a nightmare for employers. Because TPAs have had difficulty receiving reimbursements from the government for contraceptive care provided through the accommodation, some TPAs have threatened to drop their religious nonprofit clients wanting to utilize the accommodation. It is still too early for owners of closely held corporations to know if the accommodation currently available to nonprofit corporations will be expanded to include them. Moreover,

even if it eventually becomes an available option, these owners should consult with counsel and their TPAs to confirm that, as a practical matter, the accommodation is a workable solution.