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Supreme Court Term Ends with Employment Decisions: What They Mean for Employers

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Burwell v. Hobby Lobby Stores Inc.

On its last day of the term, the Supreme Court for the first time ruled, 5-4, that privately held corporations can have religious beliefs and concluded that the government cannot make all private employers cover the cost of contraceptive services. This decision undercuts a provision of the Affordable Care Act ("ACA") that requires that certain preventive services, including birth control, be included in all health insurance plans.

The three businesses that were the subject of the two cases before the Court were owned and run by two different families both composed of a couple and their three children. Both families argued that the ACA's mandate conflicted with their sincerely held religious beliefs. Opponents argued that corporations had no right to the free exercise of religion. Sidestepping any need to rule on the rights of publically traded companies, which it viewed as unlikely to be run on religious principles, the Court determined that the companies in these cases are closely held corporations, each owned and controlled by members of a single family.

While ruling that the closely held corporations at issue in the case could object to providing the ACA required benefits on the basis of sincerely held religious beliefs, the Court provided no further direction on whether such a rule would extend to closely held companies with larger pools of owners or owners with more attenuated relationships.

The Court also did not offer any guidance on who will bear the costs of providing the mandated preventative services in the event that a company refuses to on the basis of a religious objection, but did suggest that a similar system could be adopted as is currently in place for religious non-profits whereby the insurance companies provide the preventative services but with no cost sharing to the employer, the employer's plan or the employees.

Lesson for Employers: *Some employers who are otherwise obligated under the ACA to provide preventative services as part of their health plan may now be able assert religious objections to this obligation. However which employers can assert this objection and, how such an objection will be reviewed and handled is yet unclear. Additionally, it is yet unclear for employee what it will mean for them and the services that they receive under their health plans. Litigation under the new Supreme Court ruling is already underway so, as usual, stay tuned for further developments.*

NLRB v. Noel Canning.

On April 26, 2014, the U.S. Supreme Court issued a unanimous decision which renders invalid all actions taken by the NLRB between January 2012 and July 2013.

The Court's decision is notable for all employers, particularly in light of the fact that the NLRB has increasingly begun reaching beyond unionized workplaces and issuing decisions with broad implications for employers of all types (the *Banner Health Systems* decision that we previously examined is just one example of a broad NLRB decision that has now been invalidated).

As we previously reported, the Noel Canning case centered on the question of whether President Obama had the authority to exercise his recess appointment power to appoint three new members of the NLRB in January 2012 when the Senate was holding pro forma sessions but taking no actions. The Justices

unanimously agreed that appointments were invalid because the Senate was not in fact in recess when they were made (though the Justices were split about the President's right of appointment when the Senate is, in fact, in recess).

Although much of the focus surrounding the decision has been centered on its larger implication for constitutional law and the balance of power between the branches of government, the bottom line is that it also wipes clean 19 months of NLRB decisions between January 2012, when the recess appointments were made, and July 2013 when the Board was fully and properly constituted.

It remains to be seen precisely how the NLRB itself will react to this decision. While there has been much discussion of this case, it is not likely to change the NLRB's aggressive approach to the non-union workplace issues it has been pursuing. It has attacked social media policies, employer handbook and severance agreement policies, all on the ground that they interfere with employees' rights to engage in concerted action to challenge their wages and working conditions.

Lesson for Employers: *The standoff over NLRB members has ended and the Obama Administration NLRB has a full complement of members confirmed by the Senate, with a Democratic majority. Employers should expect the NLRB to affirm prior opinions issued between January 2012 and July 2013 which the Supreme Court invalidated. Close watchers of NLRB precedent believe that the need to address the old cases will cause a backlog affecting other priorities. Whatever happens with these, employers can assume that the aggressive NLRB positions taken in the invalidated decisions will continue. Employer should look closely at policies that can be expected to come under attack.*

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