

Memorandum

To: Interested Parties

From: National Women's Law Center

Date: July 22, 2014

Re: Interaction of Wisconsin's Contraceptive Equity Law and the Supreme Court's Decision in *Burwell v. Hobby Lobby Stores, Inc.*

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Some questions have arisen about whether the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.* preempts Wisconsin's state law requiring insurance plans to cover birth control. Wisconsin's state law is a separate legal requirement on insurance plans in the state that is not directly affected by the *Hobby Lobby* decision. The Wisconsin Office of the Commissioner of Insurance should ensure that all covered plans are in compliance. Moreover, employers in Wisconsin are required to comply with the state employment non-discrimination law, which has been interpreted to require insurance coverage of birth control.

### **The Supreme Court Decision**

In *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_ (2014), the U.S. Supreme Court held that certain closely held, for-profit corporations that have religious beliefs against providing insurance coverage of birth control do not have to comply with the federal Affordable Care Act's requirement that plans provide insurance coverage of all FDA-approved contraceptive methods, sterilization, and related education and counseling. The Court held that the federal requirement violates the companies' rights under the federal Religious Freedom Restoration Act (RFRA).

### **The Wisconsin Law**

Wisconsin insurance law, Wisc. Stat. Ann. § 632.895(17), requires that every disability insurance policy in the state that provides coverage of outpatient health care services, preventive treatments and services, or prescription drugs and devices must provide coverage for contraceptives prescribed by a health care provider and for related outpatient consultations, examinations, procedures, and medical services. It also prevents an insurer from imposing a different copayment, exclusion, or limitation than is imposed for other outpatient health care services, preventive treatments and services, or prescription drugs and devices.

The Wisconsin contraceptive coverage law does not contain an exemption for employers with religious beliefs against providing insurance coverage of birth control.

The state contraceptive coverage law does not apply to private employers who have self-funded insurance plans. Self-funded plans are considered to be employer benefit plans that are governed by federal law – the Employees Retirement Security Act – rather than state insurance laws.

## **The Interaction of the Supreme Court Decision and the Wisconsin Law**

The *Hobby Lobby* decision does not directly affect the Wisconsin contraceptive coverage law. First, RFRA is a federal law and the Supreme Court has made it clear that RFRA does not apply to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997). Therefore, the provisions of Wisconsin's contraceptive coverage law are not blocked by the federal RFRA. Wisconsin does not have its own state version of RFRA.

Moreover, when finalizing the contraceptive coverage requirement of the federal Affordable Care Act, the Departments of Treasury, Labor, and Health and Human Services made clear that states with contraceptive coverage laws that provide greater access to contraceptive coverage than the federal standard – for example, those without a religious exemption – will not be preempted. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,888 (July 2, 2013).

For these reasons, the Wisconsin state contraceptive coverage law is not directly affected by the Supreme Court's decision in *Hobby Lobby*. Closely-held for-profit corporations doing business in Wisconsin that do not self-insure must abide by the state law, and continue to provide birth control coverage to the same extent they provide preventive care and prescription drugs. The Wisconsin Office of the Commissioner of Insurance must continue to enforce this provision.

Moreover, Wisconsin employers, including those that self-insure, are under a separate legal obligation to provide insurance coverage of birth control when they provide otherwise comprehensive prescription drug coverage. The Wisconsin Attorney General said in 2004 that "Wisconsin law [the Wisconsin Fair Employment Act (WFEA), Wis. Stat. §§ 111.31-111.395] prohibits employers . . . from excluding prescription contraceptives from benefit plans that provide prescription drug coverage." Letter from Wisconsin Attorney General Peggy A. Lautenschlager to Helene Nelson, Secretary, Wisconsin Department of Health and Family Services, August 16, 2004. This interpretation was based in part on the fact that Wisconsin courts have long followed Title VII, the federal law prohibiting discrimination in employment. Just last week, the Equal Employment Opportunity Commission – the agency charged with enforcing Title VII – reaffirmed that "To comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy." U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014), [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#fn38](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#fn38).

The bottom line is that women in Wisconsin working for certain for-profit corporations that are able to get out of the federal requirement because of the Supreme Court's *Hobby Lobby* decision still have access to insurance coverage of birth control through state law requirements.