SCOTUS Refuses To Review Ninth Circuit Ruling On ACA Birth Control Rules

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The US Supreme Court declined to review a recent Ninth Circuit decision, blocking the interim rules that exempted employers with religious or moral objections from providing birth control coverage required by the Affordable Care Act (ACA). Until such time as this issue is clarified, it is prudent for employers with employees in certain states to comply with the ACA mandate and to cover contraceptives under their health plans.

In Depth

The US Supreme Court declined to review the Ninth Circuit’s decision in *The Little Sisters of the Poor Jeanne Jugan Residence v. California, et al.* No. 18-1192, a decision blocking the interim rules that exempted employers with religious or moral objections from providing birth control coverage required by the Affordable Care Act (ACA). With litigation surrounding the ACA’s contraception mandate continuing to move through the lower courts, this is not likely to be the last the justices will see of this issue.

The Court’s refusal to hear the case means that the carve-out from the ACA contraception mandate for employers with religious or moral objections will continue to be barred from being enforced in the five states that brought legal challenge: California, Delaware, Maryland, New York and Virginia. The carve-out was pushed through by the Trump Administration via the US Departments of Health and Human Services, Treasury, and Labor without a notice and comment period in October 2017. The Ninth Circuit found the agencies were not justified in bypassing notice and comment, failing to demonstrate good cause, and that the states were likely to prevail on this allegation.

The Ninth Circuit did not side with the states on the scope of the injunction, however. California, Delaware, Maryland, New York and Virginia had initially won a nationwide preliminary injunction in December 2017, one week after a similar injunction was issued by a federal judge in Pennsylvania. However, in a 2-1 decision, the Ninth Circuit held that the nationwide injunction had been too broad, and that the record did not support a showing of economic impact beyond the five states. In January, these same states moved again in California federal court to block the exemption, this time arguing that the finalized rules would impact 62 million women across the country. That litigation, and the request for a nationwide injunction, is ongoing.

No doubt the continuing litigation at the lower court levels was a factor in why the Justices thought it too soon to take up the issue. Since the Supreme Court’s 2016 ruling in *Zubik v. Burwell*, where the Court avoided answering whether the mandate’s opt-out process substantially burdens religious freedom for faith-based nonprofits, there have been inconsistencies on how the lower courts deal with requests for religious accommodations and injunctions. There is an absolute need for clarity by the Court, but it will not happen just yet. Until such time as this issue is clarified for employers in the Ninth Circuit, it is prudent for employers with employees in California, Delaware, Maryland, New York, and Virginia to comply with the ACA mandate and to cover contraceptives under their health plans.

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