

The Supreme Court’s Hobby Lobby/Contraceptive Coverage Case: What It Means for States

On June 30, 2014, the Supreme Court issued a decision in the *Hobby Lobby* case. It held that closely held, for-profit companies with religious objections to following the federal health care law’s requirement to provide coverage for birth control in their employee health plan do not have to do so because they are protected by a federal law known as the Religious Freedom Restoration Act (RFRA).

Some states have laws that require insurance plans to cover contraception (“contraceptive equity” laws) and some states have state versions of the federal RFRA (“state RFRA’s”). It is important to note that the Supreme Court only interpreted federal law, and not state law, in this decision. The decision therefore does not automatically change any state laws and the relevant state laws, such as state RFRA’s, will not be affected without additional action being taken by the state or the courts. It is also crucial to recognize that there are ways to demonstrate support for contraceptive coverage right now and to work towards ensuring that women continue to have access to this vital health service.

This document explains what the recent decision might mean for your state and what you can do now.

1) My state has a contraceptive equity law. Will the Hobby Lobby decision affect that law?

No, this decision does not affect your contraceptive equity law and it will remain in effect. The Supreme Court decision was limited to whether for-profit companies with religious objections can get out of providing contraceptive coverage without cost-sharing as required by the *federal* health care law (ACA). Your state contraceptive equity law is a separate legal requirement on insurance plans in your state to include contraceptive coverage.

Currently, your contraceptive equity law may have little practical effect because of the ACA requirement. But now that the Supreme Court has decided that certain corporations can become exempt from this federal requirement, your state contraceptive equity law will still require these corporations to provide contraceptive coverage, as long as they are not self-insured. The women in your state working for for-profit companies with religious objections who may have lost the federal benefit because of the Supreme Court decision will still have access to insurance coverage for contraception through your state law.¹

¹“Self-funded” or “self-insured” plans (where an employer uses its own funds to pay the health care claims of its employees rather than buying an insurance plan from an outside insurer) are not affected by state contraceptive equity laws because they are governed by federal, rather than state, law. Hobby Lobby is self-insured so its insurance plan will not be governed by state contraceptive equity laws.

a) How do I know which companies are exempt from the federal requirement but subject to our state law?

As a result of the decision, Hobby Lobby and Conestoga Wood – the companies that brought the cases before the Court – are exempt from the federal requirement. Any other closely held corporations that can credibly claim a religious objection to the federal contraceptive requirement should also be able to become exempt from the federal requirement. Several such businesses have already filed lawsuits similar to the ones decided today. Those cases should now be successful, and those businesses will have the same exemption as Hobby Lobby and Conestoga Wood. How other corporations can achieve the same exemption remains to be seen and will depend on how the Administration and Congress respond to the decision.

The Court’s decision only holds that closely held corporations can raise claims under RFRA. But, its language suggests that, at a minimum, other privately held corporations would also be allowed to make these claims and, possibly, so could publicly held corporations.

b) Does the Hobby Lobby decision affect the exceptions for religious entities in our state’s contraceptive equity law?

No, this decision does not affect the exceptions for religious entities in your state’s contraceptive equity law. Although many states exempt churches or religious institutions from the state contraceptive equity law, for-profit companies have not received such exemptions; only one state – AZ – explicitly gives certain corporations an exemption. This means that although certain corporations can now get an exemption from the federal requirement, those corporations are still required to comply with your state’s contraceptive equity law.

2) My state does not have a contraceptive equity law or a RFRA. What does the Hobby Lobby decision mean for my state?

The women in your state who work for closely held, for-profit companies with religious objections to the federal requirement have lost their right under the federal health care law to insurance coverage of contraception without cost-sharing. These women may be able to assert their right to contraceptive coverage under other federal or state anti-discrimination laws. All other women in your state will continue to benefit from contraceptive coverage without cost-sharing through the federal requirement.

3) My state has a contraceptive equity law and a state RFRA. What does this decision mean for my state?

For now, your contraceptive equity law still stands and will continue to be enforced. Opponents may assert that the corporations affected by the Supreme Court decision do not have to comply with the state contraceptive equity law because the state RFRA enables them to “get out of” the law in the same way that certain corporations can now refuse to comply with the ACA requirement. But this is not necessarily true. A corporation in your state may pursue a legal challenge to assert its claim under the state RFRA, but whether it chooses to litigate could

depend on several factors, including the language of the state RFRA. Another possibility is that your state attorney general may issue an opinion that concludes that the state RFRA will be interpreted in that state in the same way as the federal RFRA for the purpose of its application to the state contraceptive equity law. The state determines the meaning of the state RFRA; it is not necessarily dictated by the Supreme Court's interpretation of the federal RFRA. Only 6 states have both a contraceptive equity law and a RFRA: AZ, CT, IL, MO, NM, RI.

4) My state has a RFRA but no contraceptive equity law. What does this mean for my state?

The women in your state who work for closely held, for-profit companies with religious objections to the federal requirement may have lost their right under the federal health care law to insurance coverage of contraception without cost-sharing. All other women in your state will continue to benefit from contraceptive coverage without cost-sharing through the federal requirement. Women who have lost coverage may be able to assert their right to contraceptive coverage under other federal or state anti-discrimination laws. However, it is possible that corporations in your state may try to use the state RFRA to assert objections to other laws, including those that require coverage of other health care services or laws that provide other employee protections.

States with a RFRA but no contraceptive equity law are: AL, FL, ID, KS, KY, LA, MS, OK, PA, SC, TN, TX, VA.

5) What will the opposition do next?

In the immediate, opponents will use a Court victory to continue their momentum against contraceptive coverage and to argue that corporations need to be able to exercise religion.

We also expect opponents may take the following actions:

- Opponents could try to amend your contraceptive equity law to broaden the exceptions and allow certain for-profit corporations, all corporations, or any entity with a religious objection to get out of complying with the law.
- Opponents might attempt to pass a state RFRA or amend an existing state RFRA to make it broader or to look more like the federal RFRA.
- Opponents could push administrative rules or agency actions in your state to undercut any state protections that exist. For example, there could be an opinion from your attorney general that concludes that the state RFRA should be interpreted the same way as the federal RFRA, thereby potentially undercutting your state contraceptive equity law.
- Opponents may litigate to try to apply a state RFRA to a state contraceptive equity law with the goal of allowing corporations to deny contraceptive coverage.
- Opponents might also start pressuring companies to drop coverage of this benefit.

6) **What can I do about this in my state?**

In the immediate, it is important to reassure women that you will do all you can to protect access to contraception.

- If you have a contraceptive equity law, you can reassure women that your state protects their right to coverage of birth control and that advocates will do their best to protect that law against attacks.
- There are proactive bills you can use to protect and advance women's access to contraception, such as a bill prohibiting bosses from interfering in an employee's reproductive health decisions.
- Even if you do not have a contraceptive equity law, you can send the message that despite this decision, advocates are considering all of their options and will be working to protect access to contraception for *all* women in every way that you can. Your state could also consider proactive legislation.
- You can prepare now for the defensive work that you expect next session, such as opponents trying to amend or pass a state RFRA or amend or repeal a contraceptive equity law.
- If you are in a state with a contraceptive equity law, you can work with your state agency to ensure that women are getting access to insurance coverage of contraception as guaranteed by your state law.
- Whether or not your state has a state contraceptive equity law, you can work to ensure that companies do not drop coverage of contraception, even if the Supreme Court's decision would allow them to. For instance, you could develop a campaign to target a major employer in the state and get them to pledge to continue to cover contraception.
- It may be helpful to reach out to your allies, including groups outside of reproductive rights that work on LGBT and religious freedom issues, to coordinate around what they anticipate from opponents and what proactive measures may be helpful.

7) **Is there anything that can fix this bad decision by the Court?**

Members of Congress who support women's access to birth control have announced their intention to introduce legislation to fix this bad decision by the Court. The Administration has pledged to work with Congress to restore birth control coverage to the women affected by this decision.