The Aftermath of *Hobby Lobby*:
HSAs and HRAs as the Least Restrictive Means

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Introduction

In *Burwell v. Hobby Lobby Stores, Inc.*, the U.S. Supreme Court held that, under the Religious Freedom Restoration Act of 1993 (RFRA), closely-held corporations’ employer-sponsored medical plans need not provide forms of contraception to which the shareholders of such corporations object on religious grounds. The question now arises how the President, the Congress and the Departments of Health and Human Services (HHS), Treasury and Labor ought to respond to the *Hobby Lobby* decision.

The best alternative is to require any employer which objects to providing contraception to fund for their respective employees independently-administered health savings accounts (HSAs) or health reimbursement arrangements (HRAs). An HSA or HRA permits the covered employee to spend employer-provided, pre-tax health care dollars on any medical service the employee chooses without implicating the employer in the employee’s spending decision. The HSA/HRA alternative respects the religious rights of sponsoring employers since, unlike conventional insurance or self-insured health plans, the sponsoring employer’s plan does not provide a menu of choices which frames the employees’ decisions. Simultaneously, the HSA/HRA approach

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1 2014 U.S. LEXIS 4505.


4 Rev. Rul. 2002-41, 2002-2 C.B. 75. For discussion of health reimbursement arrangements, see Zelinsky, supra, note 3 at 81-82.
respects the autonomy of employees to spend health care dollars on whatever medical services such employees select including services to which the employer objects.

For RFRA purposes, HSAs and HRAs are analogous to cash wages which the employer pays the employee and which the employee spends as he chooses. Under the HSA/HRA approach, there would be no need for the employer objecting to contraception to certify its objections to anyone. The employer would simply establish an HSA or HRA for each employee to spend as she wishes. Such accounts are the “least restrictive means”\(^5\) by which the federal government can assure women of the ability to obtain contraception which they seek with employer-provided, pre-tax health care dollars without burdening the religious beliefs of employers who object to such contraception. The HSA/HRA response to *Hobby Lobby* is a compelling compromise as a matter of law and public policy.

The *Hobby Lobby* and *Conestoga Wood*\(^6\) Cases

“Norman and Elizabeth Hahn and their three sons are devout members of the Mennonite Church, a Christian denomination.”\(^7\) They are also successful entrepreneurs. Indeed, Norman Hahn’s story is a classic American success saga. As a young man, he started wood working in his garage. Today, Conestoga Wood Specialties Corporation, a Pennsylvania corporation wholly-owned by the Hahn family, has 950 employees.\(^8\)

The story of the Green family is similar. As a young man, “David Green started an arts-and-craft store that has grown into a nationwide chain called Hobby Lobby.”\(^9\) Hobby Lobby Stores, Inc., an Oklahoma corporation, today has 500 stores nationwide.


\(^6\) The *Hobby Lobby* case was heard by the U.S. Court of Appeals for the Tenth Circuit. The *Conestoga Wood* case was heard by the U.S. Court of Appeals for the Third Circuit. The U.S. Supreme Court consolidated the two cases and decided them together.

\(^7\) 2014 U.S. LEXIS 4505 at *29.

\(^8\) Id.

\(^9\) Id. at *32.
and “more than 13,000 employees.” Hobby Lobby Stores, Inc. remains closely-held by the Green family who are strongly committed Christians.

One of the Green “sons started an affiliated business, Mardel, which operates 35 Christian bookstores and employs close to 400 people.” Mardel is also a closely-held Oklahoma corporation.

Conestoga Wood, Hobby Lobby and Mardel all provide medical insurance to their respective employees. The Hahns and the Greens do not oppose all birth control. They do oppose abortion on religious grounds. They classify so-called “morning after” pills and certain intrauterine devices as religiously-unacceptable abortion devices rather than as permissible birth control.

Under the Patient Protection and Accountable Care Act of 2010 (ACA), the medical insurance offered by employers like Conestoga Wood, Hobby Lobby and Mardel must meet certain standards of “minimum essential coverage.” Pursuant to their administrative authority under ACA, the Secretaries of HHS, Labor and Treasury decreed that such minimum essential coverage requires an employer-sponsored medical plan covered by ACA to

\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id. at *33-*34.}\]
\[\text{Id. at *34.}\]
\[124\text{ Stat. 119.}\]
\[\text{124 Stat. 119.}\]

17 Internal Revenue Code (“Code”) §§4980D and 4980H, 26 U.S.C. §§4980D and 4980H. See also 42 U.S.C. § 300gg-13(a)(4). This is the codification of § 2713(a)(4) of the Public Health Services Act as amended by ACA These provisions are incorporated into the Internal Revenue Code by Code § 9815(a), 26 U.S.C. § 9815(a), and are incorporated into the Employment Retirement Income Security Act of 1974 (ERISA) by ERISA § 715(a), 29 U.S.C. § 1185d(a).
offer all 20 methods of FDA-approved contraception.\textsuperscript{18} These required methods include the morning after pills and intrauterine devices which the Hahns and the Greens consider to constitute abortion.

If the Hahns’ or the Greens’ closely-held corporations provide no medical coverage to their respective work forces, those corporations will be subject under ACA to substantial monetary penalties.\textsuperscript{19} If these corporations offer medical coverage without providing these four forms of birth control, the corporations will be subject to yet other penalties under ACA for failing to provide minimum essential coverage.\textsuperscript{20} To avoid these penalties, the Greens, the Hahns, Mardel, Hobby Lobby, and Conestoga Wood sued under RFRA.\textsuperscript{21}

While the regulations propounded under ACA generally require employers covered by ACA to offer contraception to their employees, those regulations exempt churches from providing contraceptive services to which they object.\textsuperscript{22} At the time of the Court’s \textit{Hobby Lobby} decision, these regulations also “accommodate[d]” religiously-affiliated nonprofit organizations other than churches by allowing such nonchurch religious

\textsuperscript{18} 45 C.F.R. 147.130(a)(1)(iv). Equivalent regulations were issued by the Departments of Treasury and Labor as Treas. Reg. § 54.9815-2713(a)(1)(iv), 26 C.F.R. § 54.9815-2713(a)(1)(iv), and 29 CFR § 2590.715-2713(a)(1)(iv). See also Health Resources and Services Administration, \textit{Women’s Preventive Services Guidelines}, www.hrsa.gov/womensguidelines/. These guidelines require that a qualified health plan must provide, \textit{inter alia}, at no cost “[a]ll Food and Drug Administration approved contraception methods.” These approved methods include the IUDs, Plan B and Ella to which Hobby Lobby, Mardel and the Greens object on religious grounds.

\textsuperscript{19} Code § 4980H, 26 U.S.C. §4980H.

\textsuperscript{20} Code § 4980D, 26 U.S.C. §4980D.

\textsuperscript{21} In the courts below, they also raised claims under the First and Fifth Amendments of the U.S. Constitution and under the Administrative Procedure Act. 2014 U.S. LEXIS 4505 at *31, n. 13 and at *34-*35, n. 16. The U.S. Supreme Court only addressed RFRA.

\textsuperscript{22} 45 C.F.R. § 147.131(a).
organizations to certify their objections to contraception. By virtue of such a self-certification, the insurer or third-party administrator who runs the medical plan for a self-certifying religious organization must, at its own expense, provide the contraception to the employees of such organization. However, at the time of the Hobby Lobby decision, there was no statutory or regulatory exemption for firms like Hobby Lobby, Conestoga Wood or Mardel, namely, closely-held for-profit firms whose owners hold religious objection to some or all forms of contraception.

The Majority Opinion

Writing for himself and four of his colleagues in Hobby Lobby, Justice Samuel Alito held that RFRA forbids the federal regulations mandating the contraception to which the Greens and the Hahns object. In reaching this conclusion, the Court held that RFRA applies to closely-held corporations like Hobby Lobby, Mardel, and Conestoga Wood; that the challenged regulations impose a substantial burden on religion by requiring these closely-held corporations to provide as “minimum essential coverage” the four types of contraception to which the corporations’ respective shareholders object on religious grounds; and that the federal government’s compelling interest in making these forms of contraception available could be implemented through less restrictive means which would not burden the Hahns’ and Greens’ religious beliefs. The federal government could itself provide contraception to women whose employers object to providing it. Alternatively, the federal government could extend to closely-held, for-profit employers like Hobby Lobby, Mardel and Conestoga Wood the same regulatory accommodation which permits religious, non-church, non-profit corporations to avoid offering contraception contradicting their religious beliefs. Under this exemption, an employer’s certification of religious opposition to some or all forms of contraception shifts the obligation to provide such contraception to the insurer or third-party administrator of the employer’s health plan.

23 45 C.F.R. § 147.131(b)-(e). Equivalent regulations were issued by the Departments of Treasury and Labor as Treas. Reg. § 54.9815-2713A, 26 C.F.R. § 54.9815-2713 and 29 CFR § 2590.715-2713A. As discussed infra, after the Hobby Lobby decision, the three federal departments – Health and Human Services, Treasury, and Labor – moved to expand these regulatory exemptions. However, the regulations do not provide any option for a nonchurch religious organization which self-administers a self-funded health plan.
RFRA applies to “person[s]” and the federal Dictionary Act provides that the term “person” includes “corporations” “unless the context indicates otherwise.” Since the federal government concedes that nonprofit corporations are “persons” covered by RFRA, there is no warrant, according to Justice Alito, for concluding that profit-making corporations like Hobby Lobby, Mardel and Conestoga Wood are not also “persons” covered by RFRA. In Justice Alito’s words, “no conceivable definition of the term [“person”] includes natural persons and nonprofit corporations, but not for-profit corporations.”

According to Justice Alito, “it seems unlikely that...corporate giants...will often assert RFRA claims.” In any event,

[t]he companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs.

Thus, “a federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with RFRA.”

Under RFRA, the question then becomes whether the regulations defining “minimum essential coverage” to include the four challenged forms of contraception “`substantially burden'
the exercise of religion."\textsuperscript{32} The Court answered this inquiry in the affirmative as the regulations then in effect left the Greens and the Hahns with no viable choice. Complying with the regulations by providing all twenty forms of contraception would violate the Greens’ and Hahns’ sincere religious belief that they must not participate in “the destruction of an embryo” by providing morning-after pills and intrauterine devices which they believe may do just that.\textsuperscript{33}

Defying the regulations by deleting these objectionable contraception choices from the menu of employer-provided health care options would cause Hobby Lobby, Conestoga Wood and Mardel to pay recurring multi-million dollar fines for maintaining employer-sponsored health insurance which fails the “minimum essential coverage” test.\textsuperscript{34} Dropping employer-provided medical coverage altogether would trigger yet another large annual financial penalty.\textsuperscript{35} Moreover, cancelling employer-sponsored health coverage to avoid complicity in abortion would violate the Greens’ and Hahns’ religiously-based commitments to their employees\textsuperscript{36} and would trigger the “conventional business”\textsuperscript{37} cost of making their closely-held companies less attractive workplaces.

The federal government and the Court’s dissenters argued that the challenged regulations impose no substantial burden on the Hahns’ and Greens’ religious belief since there is only an “attenuated” connection between the employer’s payment of an insurance premium and the subsequent decision of an employee to use that insurance to purchase one of the four forms of contraception to which the Hahns and Greens object.\textsuperscript{38} Writing for the Court, Justice Alito noted that the Hahns and the Greens sincerely believe that their religion forbids such a premium payment and that it is not the role of the courts to assess the

\textsuperscript{32} Id. at *62-*63 (quoting 42 U.S.C. §2000bb-1(a)).

\textsuperscript{33} Id. at *63.

\textsuperscript{34} Id. at *63 (quoting 26 U.S.C. §4980D).

\textsuperscript{35} Id. at *64 (quoting 26 U.S.C. §4980H)

\textsuperscript{36} Id. at *66.

\textsuperscript{37} Id.

\textsuperscript{38} Id. at *68-*69.
Because the contraceptive mandate forces them to pay an enormous sum of money— as much as $475 million per year in the case of Hobby Lobby—if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs.  

Hence, the final RFRA inquiry is whether the regulations are “the least restrictive means of furthering [a] compelling governmental interest.” For this purpose, the Court assumed that the federal government has a compelling interest in the provision of the four forms of contraception to which the Hahn and Green families object on religious grounds. However, “[t]he least-restrictive-means standard is exceptionally demanding, and it is not satisfied here.”

One less restrictive alternative to the challenged regulations is for the federal government itself to provide these forms of contraception to women who lack them from their respective workplace plans. A second option identified by Justice Alito is to extend to closely-held, for-profit corporations like Hobby Lobby, Conestoga Wood and Mardel the regulatory accommodation under which certain nonchurch, nonprofit religious employers need not provide contraception to which they object. In this case, the insurers or third party administrators who work with such nonprofit, religious employers provide contraception at no cost to such employers.

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39 Id. at *68 (internal quotation omitted).
40 Id. at *74.
41 Id. at *74 (quoting 42 U.S.C. §2000bb-1(b)).
42 Id. at *76-*77.
43 Id. at *77.
44 Id. at *77-*78.
45 Id. at *82.
46 45 C.F.R. § 147.131(b)-(e). See also Treas. Reg. § 54.9815-2713A, 26 C.F.R. § 54.9815-2713 and 29 CFR § 2590.715-
While some nonprofits criticize this accommodation as inadequate,\textsuperscript{47} for purposes of the current case, Justice Alito wrote, the accommodation remains as a less restrictive alternative to the contraception mandate to which the Greens, the Hahns and their closely-held corporations object.\textsuperscript{48}

The Dissent

Justice Ruth Ginsburg, joined by Justice Sotomayor, objected to the majority’s analysis in virtually all respects.\textsuperscript{49} Justices Kagan and Breyer concluded that the Court need not decide whether closely-held corporations are “person[s]” covered by RFRA but otherwise agreed with the rest of Justice Ginsburg’s dissent.\textsuperscript{50}

RFRA, Justice Ginsburg notes, refers to “a person’s exercise of religion.”\textsuperscript{51} For-profit corporations, like Hobby Lobby, Mardel and Conestoga Wood, are thus not “persons” under RFRA “for the exercise of religion is characteristic of natural persons, not artificial legal entities.”\textsuperscript{52} Nonprofit corporations are different since “religious organizations exist to serve a community of believers. For-profit corporations do not fit that bill.”\textsuperscript{53}

Even if Hobby Lobby, Mardel and Conestoga Wood are deemed to be “persons” covered by RFRA, Justice Ginsburg wrote, the

\textsuperscript{2713A.}


\textsuperscript{48} Justice Kennedy joined Justice Alito’s opinion for the Court and also wrote a separate concurrence. 2014 U.S. LEXIS 4505 at *92 et seq.

\textsuperscript{49} Id. at *97 et seq.

\textsuperscript{50} Id. at *155.

\textsuperscript{51} Id. at *116-117 (quoting 42 U.S.C. §2000bb-1(a) (emphasis deleted)).

\textsuperscript{52} Id. at *118.

\textsuperscript{53} Id. at *126.
majority "elides entirely the distinction between the sincerity of a challenger’s religious belief and the substantiality of the burden placed on the challenger." 54 In this case, the connection between the [Hahn and Green] families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial. 55

Under the regulatory mandate, the corporations themselves do not “purchase or provide the contraceptives they find objectionable.” 56 Rather, the corporations just pay insurance premiums, “undifferentiated funds that finance a wide variety of benefits under comprehensive health plans.” 57 Moreover,

[a]ny decision to use contraceptives made by a woman covered under Hobby Lobby’s or Conestoga’s plan will not be propelled by the Government; it will be the woman’s autonomous choice, informed by the physician she consults. 58

Thus, the contraceptive mandate imposes no substantial burden on the Green and Hahn families or on their respective corporations. Even if it did, according to Justice Ginsburg, there is a compelling public interest in the provision of “the mandated contraception coverage [which] enables women to avoid the health problems unintended pregnancies may visit on them and their children.” 59 Through ACA, “Congress sought to accomplish...comprehensive preventive care for women furnished through employer-based health plans.” 60 This goal would be implemented by neither of the allegedly less restrictive alternatives identified by the Court’s majority - government-

54 Id. at *134.
55 Id.
56 Id.
57 Id.
58 Id. at *134.
59 Id. at *136.
60 Id. at *148.
funded contraception, or the extension to Hobby Lobby, Mardel, Conestoga Wood and others similarly situated of the accommodation now just offered to religiously-oriented, non-profit corporations other than churches.\textsuperscript{61}

The Initial Regulatory Response to \textit{Hobby Lobby}

In the wake of the Supreme Court’s \textit{Hobby Lobby} decision and the Court’s subsequent interim order in \textit{Wheaton College v. Burwell},\textsuperscript{62} the Departments of Health and Human Services, Labor and Treasury, promulgated proposed\textsuperscript{63} and “interim final”\textsuperscript{64} regulations. These regulations made two important changes. First, in response to \textit{Hobby Lobby}, the proposed regulations would extend to closely-held businesses like Hobby Lobby, Mardel and Conestoga Wood the accommodation previously limited to religious nonprofit entities other than churches. The proposed regulations leave for future development the precise definition of a closely-held business qualifying as “an eligible institution” entitled to this accommodation.

Second, the new interim final regulations give the eligible institution accepting the accommodation an alternative in addition to the previous option of certifying to its insurer or third-party administrator the eligible institution’s opposition to some or all contraception. The new interim final regulations give the eligible institution the second course of certifying its opposition to contraception to HHS. HHS will then arrange with that insurer or administrator for the contraception to which the eligible institution objects. Religious groups have made clear that this new second option of certifying to HHS (rather than to the eligible institution’s insurer or third party administrator) does not satisfy their concerns as they believe that this option still involves them in the provision of contraception to which they object on religious grounds.\textsuperscript{65}

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} 2014 U.S. LEXIS 4706.

\textsuperscript{63} 79 FR 51118 (Aug. 27, 2014).

\textsuperscript{64} 79 FR 51092 (Aug. 27, 2014).

\textsuperscript{65} Louise Radnofsky, \textit{Birth-Control Fight Isn’t Over}, WALL ST. J. (Sept. 10, 2014) at A2.
Discussion

How ought the President, the Congress and the Departments of HHS, Labor and Treasury react to the Court’s *Hobby Lobby* opinion? Justice Alito’s opinion for the Court identifies two possible responses: 66 The regulatory accommodation now limited to religious nonprofit entities other than churches can be extended to closely-held for-profit firms. Alternatively, the federal government might itself, directly or through subcontractors such as Planned Parenthood, make contraception available to women who lack such coverage from their employer-sponsored health plans. The regulations proposed 67 in response to *Hobby Lobby* proceed along the first of these lines by declaring that for-profit, closely-held firms will be deemed “eligible institutions” which can use the accommodation originally promulgated just for nonchurch, nonprofit religious employers.

Commentators have expressed reservations about both the approaches identified by Justice Alito. Some women’s health groups argue that a federal program will stigmatize the women who receive their contraception from such a program. 68 Moreover, the problems of the Department of Veterans Affairs suggest the need for skepticism about the federal government as a direct provider of medical services. 69 A number of religious groups contend that the regulatory accommodation for nonchurch employers, even as recently amended, does not go far enough and still leaves such employers complicit in the provision of birth control to which they object. 70

Senator Patty Murray has proposed legislation to overturn

66 2014 U.S. LEXIS 4505 at *77-*78 and at *82.
Hobby Lobby. The “Protect Women’s Health From Corporate Interference Act of 2014, S. 2578, 113th Cong., 2nd Sess.


Employers are not covered by ACA if they employ less than fifty (50) full-time employees. Code §§4980D(d)(2) and 4980H(c)(2)(A), 26 U.S.C. §§4980D(d)(2) and 4980H(c)(2)(A).
or HRAs for all employees covered by medical insurance. These accounts could be used by each employee to defray any medical expense the employee elects including, but not limited to, the kinds of contraception to which the employer objects.

In a fortuitous paradox, the HRA/HSA approach satisfies Justice Ginsburg’s narrower definition of the federal government’s interest as employer-provided contraception while this approach also removes the religious employer from any involvement in forms of contraception to which the employer objects.

Among the many points of disagreement between the Hobby Lobby majority and the dissenters was the federal government’s interest at stake in that case. In dissent, Justice Ginsburg defined that interest as employer-provided contraception.74 So defined, neither of the alternatives identified by the Court’s majority is satisfactory. When the federal government, insurers, or third party administrators provide contraception, by definition, the employer does not. However, under the HSA/HRA proposal, the employer would fund the accounts which employees could use for all medical services including contraception.

Justice Ginsburg asserts that an employer’s involvement in contraception is “attenuated” when the employer pays an “undifferentiated” premium to an insurer and the employee then selects for herself contraceptive coverage.75 For two reasons, this assertion is unpersuasive. First, the employee selecting contraception chooses it from a pre-approved menu which is a component of the employer-sponsored plan covering the employee. That menu specifically enumerates as choices the forms of contraception opposed by religiously-objecting employers and frames the employees choices among those forms. Second, the employer’s future premium payments may be affected by the employees’ choices since those choices may increase costs and, hence, future premiums.

In contrast, with an HSA or HRA there is no pre-approved menu of acceptable medical choices. An employee can use the funds in his or her account for any form of medical care the employee selects. The employer’s plan does not frame the employees’ choices since the employee’s HRA/HSA funds can be spent on any medical services the employee elects. Moreover, the employer

74 2014 U.S. LEXIS 4505 at *148.

75 Id.
places into the account a fixed sum for each employee. That fixed sum does not vary with the employees’ subsequent medical choices.

For RFRA purposes, HSAs and HRAs are analogous to wages. A Hobby Lobby employee can spend her wages however she wants. Hobby Lobby is not implicated in the employee’s decision to use her wages to purchase contraception since the wages are the employee’s own funds to spend as she selects. The same is true of HSA and HRA funds: The employee can spend those funds (or not) on any medical outlay the employee elects.

With an HSA or HRA, there is no pre-approved menu of choices from which the employee selects and which accordingly frames the employee’s decisions. With an HRA or HSA (unlike conventional or self-funded insurance), the employee’s selections will not affect the employer’s future payments since the employer simply places into each HSA or HRA a fixed sum which does not vary with the employee’s choices using that fixed sum.

From the vantage of a religious employer, the HSA/HRA approach is less restrictive than either of the two alternatives identified by the Court in *Hobby Lobby*. If the federal government supplies contraceptives to a woman whose employer elects against covering such contraceptives, the employer will need to declare itself to the government as a religious nonprovider of birth control so that the government can furnish birth control to the employer’s female employees. Similarly, under the accommodation approach of the existing and proposed regulations, the religious employer must identify itself as opposed to contraception coverage so that the employer’s insurer or third-party administrator can furnish such coverage to the employer’s employees.

In contrast, under the HSA/HRA alternative, the religious employer will furnish an account to all of its employees, an account usable for all medical services. There need be no net premium cost to the employer since the HSA/HRA will be integrated into the employer’s medical plan to provide the same the coverage as before. The employer’s contribution to the HSA or HRA will be another form of cash wage which the employee is free to spend on

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76 Id. at *77-*78 and at *82.

77 45 C.F.R. § 147.131(b)-(e); Treas. Reg. § 54.9815-2713A, 26 C.F.R. § 54.9815-2713; 29 CFR § 2590.715-2713A.

78 79 FR 51118 (Aug. 27, 2014).
medical services as the employee wishes. The employer will not need to certify to anyone its opposition to contraception.

A religious employer might retort that some of the funds the employer contributes to HSAs or HRAs can be used for contraception to which the employer objects. Such a retort is not compelling for RFRA purposes and does not disqualify HSAs or HRAs as the “least restrictive means” for RFRA purposes. Some of the wages a religious employer pays to its employees might be used by such employees to purchase contraception. State and federal law strongly protects the rights of employees to receive their wages free from employer interference.79

There is no realistic prospect that RFRA allows employers to withhold wages when such employers disagree with their employee’s choices as to the spending of such wages. For RFRA purposes, HRAs and HSAs are analogous to cash wages. The HSA/HRA alternative respects both the religious rights of employers who do not want to be complicit in contraception and the autonomy of employees who want to spend employer-provided pre-tax health dollars to obtain such contraception.

The HSA/HRA approach also potentially has political legs. The Departments of Health and Human Services, Treasury, and Labor could adopt regulations implementing this approach. Legislatively, conservatives like HSAs and HRAs since such accounts implement a consumer-driven approach to health care. The HSA/HRA approach eliminates the self-certification which troubles some religious groups. Liberals want to assure employees of contraception even if employers object to such contraception. The HSA/HRA response to Hobby Lobby thus has bi-partisan appeal and is a compelling compromise as a matter of law and public policy.

The most difficult quandary posed by the HRA/HSA proposal is the amount a religious employer should contribute annually to its employees’ accounts to be relieved of the contraception mandate. Justice Ginsburg indicates that intrauterine devices generally

79 Massachusetts v. Morash, 490 U.S. 107, 109-110 (1989) (Forty-eight “States, the District of Columbia, and the United States” have statutes protecting the payment of wages to employees). Under many of these statutes, it is a criminal offense to fail to pay wages earned by employees. See, e.g. § 290.080 R.S. Mo. (failure to pay “wages and salaries” is a misdemeanor).
cost "more than $1,000"\textsuperscript{80} and that this expense discourages low income women from using such devices.\textsuperscript{81} Planned Parenthood indicates that such an intrauterine device "[c]osts between $500 and $1,000 up front, but lasts up to 12 years."\textsuperscript{82} Planned Parenthood also says that birth control pills cost between $15 and $50 per month.\textsuperscript{83} At stores like CVS and Wal-Mart, Plan B (a form of contraceptives to which the Greens and Hahns object) is available at prices ranging from $35 to $50.\textsuperscript{84}

There is no magic number here. My instinct is that a religious employer should be able to opt out of the contraceptive mandate if it funds for each of its employees annually an HRA or HSA in the amount of $500 or so. However, this is a judgment call about which reasonable people may disagree, particularly since the vast majority of the funds employers transfer to HSAs and HRAs will be spent on medical services other than contraception.

**Conclusion**

In the wake of *Hobby Lobby*, the best alternative is to require any employer which objects to providing contraception to fund for its respective employees independently-administered HSAs or HRAs. An HSA or HRA lets employees spend employer-provided pre-tax health care dollars on any medical services the employees elect without implicating the employer in the employees’ decisions.

The HSA/HRA alternative respects the religious rights of sponsoring employers since, unlike conventional insurance or self-insured health plans, the sponsoring employer’s plan does not include contraception.

\textsuperscript{80} 2014 U.S. LEXIS 4505 at *137 (n. 22).

\textsuperscript{81} Id. at *138.

\textsuperscript{82} www.plannedparenthood.org/health-info/birth-control/iud.

\textsuperscript{83} www.plannedparenthood.org/health-topics/birth-control/birth-control-pill-4228.htm.

\textsuperscript{84} health.usnews.com/usnews/health/articles/061109/9.planb.htm. HSA funds can purchase Plan B (or any other drug or medicine) only with a prescription. Internal Revenue Code 223(d)(2)(A), 26 U.S.C. § 223(d)(2)(A). See also Pam Belluck, *F.D.A. Grants Exclusivity to Plan B One-Step*, *N.Y. TIMES* (July 24, 2013) at A16 ("Plan B One-Step retails for about $50; generics sell for at least $10 or $15 less.").
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