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Religious Liberty Update: DC Federal Court Hands Key Victory to Faith-Based Colleges in HHS Mandate Battle; Other Courts Continue to Rule in Favor of For-Profit Businesses

In what is viewed as a victory for the faith-based college plaintiffs, the United States Court of Appeals for the District of Columbia on December 18, 2012 issued an Order in the consolidated cases of Wheaton College and Belmont Abbey challenging what has come to be known as the "HHS Contraceptives Mandate." The Contraceptives Mandate refers to regulations issued by the Health Resources and Services Administration (HRSA) of HHS requiring coverage of certain services including 'women's preventive health care' - which HRSA defined to include (but is not limited to) various forms of contraception. (For a full summary of the HHS Contraceptives Mandate, see G&G's Law Alert dated July 26, 2012.)

This summer the lower courts dismissed the cases initiated by Wheaton College and Belmont Abbey for lack of ripeness and standing. The colleges appealed, and the federal appellate court's recent ruling not only reinstated both cases but also held the Administration to its promise made during oral arguments that "it would never enforce [the HHS Contraceptives Mandate] in its current form against [Wheaton College and Belmont Abbey] or those similarly situated as regards [sic] contraceptive services."

Furthermore, to ensure that the Administration would fulfill its commitment to publish a different rule for entities like Wheaton College and Belmont Abbey, the court held that the Obama Administration must file regular status reports with the court every 60 days until a new Final Rule is issued. The government's Notice of Proposed Rulemaking for the new rule must be promulgated in the first quarter of 2013 and the Final Rule must be issued before August 2013. In the meantime, the Wheaton College and Belmont Abbey cases will be held at abeyance pending the new rule.

Does this ruling impact the Safe Harbor?

Until the Administration fulfills its promise to issue a new Final Rule, the HHS Temporary Enforcement Safe Harbor exemption, a one-year postponement in enforcement of the HHS Contraceptives Mandate, will remain in effect until the first plan year that starts on or after August 1, 2013.

Under the Safe Harbor, HHS will not take any enforcement action against a qualifying organization for failing to cover the mandated contraceptive services without cost sharing until August 1, 2013. To qualify, an organization must meet **all** of the following criteria (which were updated August 15, 2012 by HHS):

(1) The organization must be organized and operated as a **non-profit entity**.

(2) From February 10, 2012 onward, the group health plan established or maintained by the organization has consistently not provided all or the same subset of the contraceptive coverage otherwise required at any point, consistent with any applicable State law, because of the religious beliefs of the organization.

(3) The organization's group health plan established or maintained by the organization (or one operated by another entity, such as a health insurance issuer or third-party administrator, on behalf of the organization) must provide to participants a notice which states that contraceptive coverage will not be provided under the plan for

the first plan year beginning on or after August 1, 2012.

(4) The organization must self-certify that it satisfies criteria 1 through 3 above, and must document its self-certification using a form developed by HHS.

Other Rulings to Watch - Courts Continue to Rule in Favor of For-Profit Businesses

Days after the DC federal court ruling in the consolidated cases of Wheaton College and Belmont Abbey, courts in two other states ruled against the HHS Contraceptives Mandate in cases brought by for-profit businesses.

On December 30, 2012, a federal district court in Michigan issued a preliminary injunction in favor of Domino's Farms Corporation and its owner, Thomas Monaghan, founder of Domino's Pizza. A Roman Catholic, Monaghan claimed that the HHS Contraceptives Mandate substantially burdened his religious beliefs. The court agreed, ruling that "[Monaghan] has shown that abiding by the mandate will substantially burden his exercise of religion. The Government has failed to satisfy its burden of showing that its actions were narrowly tailored to serve a compelling interest. Therefore, the Court finds that Plaintiffs have established at least some likelihood of succeeding on the merits of their RFRA [Religious Freedom Restoration Act] claim, or at least some 'serious questions going to the merits' of the claim." (*See* Monaghan v. Sebelius)

On December 31, 2012, a federal magistrate judge in Missouri granted a temporary restraining order requested by plaintiffs Sharpe Holdings, Inc. (a dairy farming company), Charles Sharpe (founder and CEO of Sharpe Holdings), and two of Sharpe's employees who "pay a portion of the required premiums and enjoy the benefits of the self-insured program." The court concluded that the plaintiffs had shown that enforcement of the ACA mandate and its substantial financial penalties on their health plan would substantially burden their religious beliefs by forcing them to either subsidize coverage for drugs and devices used to induce abortion or to suffer very substantial economic consequences. Therefore, the court granted temporary relief and scheduled further proceedings in the case for later this month. (*See* Sharpe Holdings, Inc. v. HHS)

For more information on the HHS Contraceptive Mandate, please contact Gammon & Grange attorneys Scott Ward or Patrick Purtill.