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HOBBY LOBBY: JUST A START

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As a trial lawyer, I rarely pay much attention to dissenting opinions. They do not serve as meaningful precedent, and they tend only to express the loser's frustrated perspective. But Justice Ginsburg's dissent in the Supreme Court's recent *Hobby Lobby* decision should have value for all practitioners and may serve as a forewarning to employers and employees alike to expect more litigation involving civil rights. Because of the opinion's "startling breadth," the dissent essentially predicts a future of complicated employment litigation as employers seek to enforce the logical extensions of the decision.

Burwell v. Hobby Lobby Stores concerned the dispute over the Affordable Care Act's contraceptive mandate. By a five-to-four vote, the Supreme Court held that the mandate, which requires employers to provide health insurance coverage for contraception, could not be applied to closely held for-profit corporations with religious objections to forms of contraception. Religious groups have hailed the decision for its apparent support of First Amendment freedoms. By contrast however, supporters of the original mandate, which was defeated, now suggest that the decision could lead to corporations filing suits challenging other civil rights statutes. Ginsburg's dissent makes evident the basis for their concerns.

In her persuasive dissent, Justice Ginsburg warns:

The Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, for the Court's expansive notion for corporate personhood — combined with its other errors in construing RFRA — invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith."

Litigators anticipate that the first wave of litigation will involve the scope of the decision: Does it apply to all corporations, whether public or private, large or small?

Justice Ginsburg further notes:

Federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by these statutes. See, e.g., Family and Medical Leave Act of 1993 (applicable to employers with 50 or more employees); Age Discrimination in Employment Act of 1967 (originally exempting employers with fewer than 50 employees, the statute now governs employers with 20 or more employees); Americans With Disabilities Act (applicable to employers with 15 or more employees); Title VII (originally exempting employers with fewer than 25 employees, the statute now governs employers with 15 or more employees)."

Possibly another wave of litigation could involve questions such as whether this decision applies to other civil rights statutes.

It is important for employers and employees to note that Justice Ginsburg sees no logical boundaries to the decision:

And where is the stopping point to the ‘let the government pay’ alternative? Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage, or according women equal pay for substantially similar work.”

Litigation seeking to apply *Hobby Lobby* may grow exponentially. *Hobby Lobby* may herald a new era of litigation affecting the U.S. workplace, and employers and employees should be aware of these implications, which are spelled out in Ginsburg’s dissent.