

Truth & Charity
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1

Individual Employers, the HHS Mandate, and the Principle of Legitimate Cooperation

As of August 1, 2013, the Department of Health and Human Services requires that every employer with 50 or more fulltime employees must provide coverage in their group health plans for a coterie of preventive services for female employees¹: (1) annual well-woman visits; (2) screening for gestational diabetes, Human Papillomavirus (HPV), Human Immunodeficiency Virus (HIV), and domestic violence; (3) counseling for sexually transmitted infections and for domestic violence; (4) breastfeeding support and supplies, as well as (and this is the service that causes a moral bind for the religious employer) (5) “all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.”

While the department of HHS has granted a very narrow religious exemption to *non-profit* organizations deemed by the Tax Code to be “churches, their integrated auxiliaries, and conventions or associations of churches,” it does not apply to individual religious employers or to institutional religious employers such as Catholic hospitals, religious colleges or universities, and Catholic social services.

The religious/conscientious employer highlighted here is the secular, for-profit, *individual* employer—an owner, manager, director, or CEO of a manufacturing company, a retail business, a healthcare clinic, or a law firm—who has religious/conscientious objection to being coerced by the Department of Health and Human Services into providing his employees with health insurance plans that include contraceptive services contrary to his religious beliefs.

As I see it, there are two distinct, morally acceptable ways these individual employers could respond to the HHS contraceptive mandate: (1) if they have 50 or more fulltime employees, they could sue the government or, (2) if they lack the

time and money for litigation proceedings, and/or should they have less than 50 fulltime employees, they could provide the ACA-compliant insurance to their employees in a morally legitimate way.²

In respect to the first option, statistics from the Becket Fund show that, to date, their attorneys have represented 37 for-profit lawsuits. Of the 32 for-profit plaintiffs who have obtained rulings on their claims against the mandate, 29 have secured injunctive relief. On June 27, 2013, the Becket Fund happily trumpeted a landmark opinion in favor of Hobby Lobby Stores, Inc. In a 5-3 vote, the Tenth Circuit Court of Appeals held that (1) for-profit corporations can exercise religion under the Constitution and federal law; (2) the mandate “substantially burdens” Hobby Lobby’s religious exercise by forcing it to include emergency contraceptives in its health plan or pay draconian fines; and (3) the government is unlikely to justify that burden under “strict scrutiny.” The Becket Fund is quick to point out the Hobby Lobby decision is extraordinarily important for many reasons, the most important of which is that it sets a legal precedent vindicating the principle that U.S. citizens do not have to abandon their faith or moral convictions simply because they run a business.

In respect to the second option—cooperating in evil in a morally acceptable manner—the individual religious employer must discern this moral question: Would I be cooperating with evil in a morally legitimate way if I provided my employees an ACA-compliant health insurance plan that necessarily covers these immoral contraceptive services?

The Principle of Legitimate Cooperation comprehensively explains what it means to cooperate or participate in evil in a morally acceptable way. The reason we need this principle at all is that, as we’re all painfully aware, the wheat and the weeds are growing up together in our world. Certain folks are doing evil and other citizens are brought, by dint of necessity, into different levels of cooperation with

the evil or wrongdoing. The government supplying tax-payer funded abortions abroad is just one of many examples. In discerning which, if any, of these scenarios is legitimate cooperation in evil, the employer must, on one side, remember *not to do evil that good may come from it* (Romans 3:8) yet, on the other, recall that *the good that we should do is often connected to some evil*. Hence, the only reason why any employer should cooperate with wrongdoers is to achieve or preserve important goods, or to reasonably diminish or avoid worse evils or harms.

Cooperation in evil is morally acceptable, then, (A) when the cooperator's action is essentially good (the cooperator directly intends a moral good [both as a means and as an end] (B) while merely tolerating evil effects [the evil falls outside the will of the cooperator—*praeter intentionem* or *per accidens*]) and (C) when the cooperator does everything reasonably possible to eliminate or at least limit the likelihood of scandal.

The term cooperation refers to the activity between two parties (here, the wrongdoer [HHS] and the cooperator [individual religious employer]) who are working together but who are, in some important respects, in disagreement about the project (HHS has one idea of what should be included in group health plans and religious employers have another, opposing view). The wrongdoer initiates the wrongdoing, i.e., directly intends the evil: HHS intends to require institutional and individual employers who are conscientiously/morally opposed to contraception and sterilization to cover these services in their employee group health plans in direct contravention of the employers' conscience; (A) the legitimate cooperator [the individual employer] directly intends the good (i.e., provides adequate health insurance for his employees, keeps his business afloat, and secures his workers with gainful employment—a tripartite good, one could argue, that's proportionate to the evil of covering contraceptive services for his employees and (B) only

tolerates the wrongdoing *as an evil side effect* (i.e., the religious employer only accepts or allows the immoral services) because he recognizes that doing so is *the only way* that he could accomplish the three-fold good just described. In other words, the legitimate cooperator does not intend the evil effect of covering morally objectionable contraceptive services or the associated coercion of conscience and religious freedom either as an end or as a means. In fact, the employer would prevent the evil effects if this were possible without frustrating the good that he does intend.

(C) The religious employer avoids scandalizing his employees by, for instance, writing a letter to each employee explaining that: he directly intends a good—to provide high quality health insurance to his employees; to keep his business afloat by avoiding the government fines from noncompliance, and to continue to provide employment for everyone—proportionate to the evil of the contraceptive services, while he merely allows or tolerates the morally offensive contraceptive services. Furthermore, to prove where his will lies, he informs his employees that he has written, and will continue to write, President Obama and Secretary Sibelius (1) protesting the inclusion of HHS-mandated contraceptive services in his group health insurance plan as a denial of his First Amendment free exercise rights—a denial of his right to conscientiously live out his religious moral convictions in the workplace—and therefore (2) insisting that the ACA be abrogated/rescinded/repealed/overturned, or at least, bowdlerized.

In sum: Cooperation in evil is formal when the cooperator concurs in the wrongdoer's intention of a bad end and/or a bad means by encouraging, praising, advising, or otherwise supporting the wrongdoer's evil action.

Cooperation in evil is material when the cooperator does not share the bad will of the wrongdoer but is involved with the wrongdoing for a good motive and with a good means. When the cooperator's material involvement is only contingent

or accidental to the performance of the wrongdoing (HHS will require provision of these contraceptive services despite religious employers' protests), he cooperates in the evil indirectly or mediately, and if mediate material cooperation realizes a proportionate good and is without serious scandal, it is a morally legitimate kind of cooperation.

Thus, for the religious employer to cooperate as I just outlined is for him to cooperate in a mediately material way. Precisely the category of cooperation in evil that is morally legitimate.

¹ Or, if the insurance is a family plan, these services also apply to wives of male employees or female children of employees who are of reproductive age.

² Many of these smaller, for-profit, individual, religious employers are, first, cognizant of the fact that, because they employ less than 50 fulltime employees, they lack standing for litigation against the government and are, second, keenly aware that, since work-provided insurance is the only source for healthcare coverage for their employees, they are justice-bound to provide adequate healthcare insurance which, unfortunately, must include the ACA-mandated contraceptive services.