Employer implications arising from the Supreme Court's decision in Obergefell v. Hodges

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On June 26, 2015, the U.S. Supreme Court issued its much anticipated decision in Obergefell v. Hodges, declaring that the fundamental right to marriage, which is protected by the Fourteenth Amendment, applies with equal force to same-sex couples. The Obergefell opinion makes it clear that in the eyes of the law, there is no longer a distinction between "marriage" and "same-sex marriage." Thus, employers, particularly in those states that previously banned same-sex marriages, should review their policies, practices and benefit plans.

In its ruling, the Court declared that the Fourteenth Amendment requires states to license marriages between same-sex couples, as well as recognize the same-sex marriages of other states. Marriage, the Court noted, is a fundamental liberty and "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment[,] couples of the same-sex may not be deprived of that right and that liberty."

Justice Kennedy concluded the opinion by writing:

> No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. … [The petitioners'] plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

In a rare move, all four dissenting justices authored their own separate opinions. The central theme of the dissent attacked the judicial process itself, rather than the merits of same-sex marriage. In the leading dissent, Chief Justice Roberts disagreed with the majority's "judicial policymaking," writing, "…this Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be."

Click here to read the full opinion.

Implications for employers

Employers should take particular note of their Family and Medical Leave Act (FMLA) policies. Earlier this year, the Department of Labor changed the FMLA's definition of "spouse" to include same-sex partners in marriages that were lawfully recognized in the place where they were performed, regardless of where the employee resided. Now that same-sex marriages are legal and recognized as such in all 50 states, employers may see an increase in FMLA leave and should be sure to apply their FMLA policies so as to ensure that eligible employees in same-sex marriages are not wrongfully denied FMLA leave. Similarly, more employees may qualify for bereavement and other types of familial leave.

Regarding employee benefits plans, the Obergefell decision predominately impacts employer-sponsored health and welfare plans that do not currently extend coverage to same-sex spouses. Employers, especially those in states which previously banned same-sex marriages, should review their benefit plans to determine if they are treating all married couples equally. If plan

documents define “spouse” as an opposite-sex partner or by reference to state law, such provisions may require modification. Employers should also review state tax issues, such as imputed income from benefits previously offered to opposite-sex couples, as well as any health and welfare plan coverage offered to domestic partners. Because same-sex marriage is now legal nationwide, domestic partner coverage may not be necessary. Qualified retirement plans are less likely to be impacted, as such plans have been required since the Windsor decision to recognize same-sex couples. Qualified plan documents, however, should be reviewed to confirm all plan provisions are consistent with the Obergefell decision.

As much as Obergefell has expanded the protections and rights of same-sex couples in the employment context, there are a number of areas that remain unchanged. For example, Title VII of the Civil Rights Act of 1964 has not been expanded to prohibit discrimination against sexual orientation as a protected class. (Some states and municipalities do, however, include protections for LGBT individuals or marital or familial status.) Likewise, the decision does not appear to have any impact on federal contractors from an affirmative action standpoint, as they are already prohibited from discriminating on the basis of sexual orientation and gender identity. Similarly, employers will have the same responsibilities under the Americans with Disabilities Act with respect to associational discrimination claims, which do not require the existence of a spousal relationship in order to state a claim.

While same-sex couples now undeniably have the right to marry, questions still remain about the impact the Obergefell decision will have on employers and institutions who decline to recognize or give equal status to same-sex marriages based on religious grounds. The Supreme Court’s 2014 decision in Burwell v. Hobby Lobby Stores, Inc. suggests that the government cannot enforce its laws in a way that impairs an employer’s religious freedom without a compelling interest and in the least restrictive manner. Thus, the next wave of legal challenges will likely center on whether employers can discriminate against employees in same-sex marriages in ways that do not otherwise conflict with existing state or federal law. Employers should continue to monitor this ever-evolving area of law and consult legal counsel with questions.

Authors