How the Supreme Court's Same Sex Marriage Decision Impacts Employers

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Categories:
Publications

In *Obergefell v. Hodges*, the U.S. Supreme Court held, in a 5-4 opinion, that the Fourteenth Amendment to the Constitution requires that all states must license marriages between two people of the same sex and must recognize a same-sex marriage lawfully licensed and performed out-of-state. Although the *Obergefell* decision did not directly address issues of employment law, it may have a wide-ranging impact, both directly and indirectly, on employers' employment practices and employee benefits plans.

Background

The case arose from challenges to Michigan, Kentucky, Ohio, and Tennessee state laws that banned same-sex marriages and those states' refusal to recognize same-sex marriages performed in other states.

Earlier this year, the DOL issued a final rule allowing an otherwise eligible employee to take FMLA leave to care for a same-sex spouse, *regardless* of whether the employee lives in a state that recognized their marital status. Now that the Supreme Court has declared same-sex marriage a Constitutional right, states can no longer prohibit same-sex marriage.

Four states (Texas, Arkansas, Louisiana, and Nebraska) recently obtained an injunction stopping enforcement of the DOL's final rule. Although we don't yet know how these four states will proceed in light of the *Obergefell* decision, the decision validates the DOL's definition of "spouse." Under the FMLA, the DOL has not yet issued any statement on enforcement in these four states, but employers operating in states that elect not to provide FMLA leave to same-sex spouses are taking on significant risk.

Employment Law Issues

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Employers should consider reviewing their equal employment opportunity, leave of absence and other employment policies to address protections for employees on the basis of marital status and sexual orientation.

Equal Employment Opportunity

Although Title VII of the Civil Rights Act of 1964 does not explicitly prohibit discrimination based on sexual orientation, many state and local anti-discrimination laws include "marital status" as a protected class or otherwise include protections for lesbian, gay, bisexual, and transgender (LGBT) individuals.

Leave of Absence Policies

Because the *Obergefell* decision mandates that all states must permit and recognize same-sex marriage, the meaning of "spouse" under the FMLA will be interpreted to include spouses of a same-sex marriage performed in any state. In light of this decision, state and local leave of absence laws may be interpreted to mean that leave to care for a "spouse" includes a same-sex spouse. Additionally, where an employer's leave of absence policy permits employees to take leave to care for a "spouse," this decision provides a basis for interpreting "spouse" to include same-sex spouses as well as opposite-sex spouses.

In light of this decision, among other things, employers should: update FMLA policies and forms, train supervisors and administrators on the new rule, and determine whether any state leave law applies.

Other Employment Policies

Employers may want to revisit other employment policies that address a "spouse" of an employee as well. For example, a confidentiality policy may prohibit employees from disclosing proprietary business information, but provide an exception for an employee to disclose such information to his or her "spouse." Similarly, a bereavement leave policy may permit an employee to take leave for the death of a "spouse" or the relative of a "spouse" and a nepotism policy may prohibit the hiring of a "spouse" of an employee.

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Employee Benefits Issues

Following the earlier *Windsor* opinion that struck down part of the Defense of Marriage Act, same-sex couples have had the full range of marital rights and benefits in all areas of federal law, including Federal taxation and spousal rights under employee benefit plans. Still, because there is no statutory mandate to cover any spouse in certain types of benefit plans (for example, health plans), some employers in states that did not allow same-sex marriage amended plans or adopted policies after *Windsor* to specifically define spouses who may be covered as only those of opposite sex. Now that *Obergefell* has determined that the right to marry is a Constitutionally-protected right, policies defining spouses as only married persons of the opposite sex will now conflict with the legal definition of "spouse" and specific plan exclusionary language will no longer be supported by specific states' bans on same sex marriage.

Other employers have, for years, had domestic partner policies that were intended to extend spouse-like rights to same-sex partners who couldn't marry under local law. Those policies might now be scaled back, since marriage is now possible in all states for all couples.

The *Obergefell* decision may actually ease the administration of employee benefit plans that grant spousal rights, by eliminating the need to determine whether a marriage was legally-performed in the state of ceremony.

Employers will need to update their payroll practices with respect to the treatment of same-sex couples from a state and local tax perspective because state and local laws may no longer refuse to recognize same-sex marriage. In jurisdictions where such changes are necessary, additional guidance is anticipated.

For more information, please contact Lacey A. Napper or any other attorney in Frost Brown Todd's Labor and Employment practice group or on the Employee Benefits service team.

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