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EXPERT ANALYSIS

Employer Considerations After the Supreme Court's Same-Sex Marriage Ruling

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In June the U.S. Supreme Court issued its long-awaited opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), striking down bans on same-sex marriage as unconstitutional and legalizing same-sex marriage in every state. In a 5-4 opinion, Justice Anthony Kennedy wrote "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and the Equal Protection Clauses ... couples of the same sex may not be deprived of that right and that liberty."

The court articulated four reasons that marriage is a fundamental right under the U.S. Constitution, including that the Supreme Court's "cases and the nation's traditions make clear that marriage is a keystone of the nation's social order. ... [Y]et same-sex couples are denied the constellation of benefits that the states have linked to marriage."

Given this reason, employers across the nation should review their policies and benefits coverage as they pertain to employee families in light of the *Obergefell* opinion.

Before the *Obergefell* ruling, employers with employees in more than one state faced a patchwork of state and federal laws on whether a same-sex spouse was a legal spouse, and if so, the legal ramifications in each state. While the ruling simplifies the law on spousal recognition, it raises additional questions about spousal benefits.

FMLA LEAVE

Under the Family and Medical Leave Act, 29 U.S.C. § 2601, employers with more than 50 employees must give eligible employees unpaid leave to "care for a spouse, son, daughter, or parent who has a serious health condition." The previous inconsistency in state law muddled FMLA issues, particularly for multi-state employers.

The U.S. Department of Labor previously defined spouse as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage." Now, no matter the state, a spouse is a spouse.

OTHER LEAVE

Employers that offer bereavement leave for the death of a spouse or an in-law relative should update such policies to reflect same-sex spouses and their family members — and offer related training to supervisors who administer those policies. Any other leaves pertaining to family, including non-FMLA medical leave or military leave, should be updated in light of the *Obergefell* decision as well.

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DOMESTIC PARTNER STATUS CONSIDERATIONS

Now that states uniformly recognize same-sex marriages, employers that previously offered benefits to same-sex domestic partners may decide to cut down or eliminate that category of benefits. This change could also affect unmarried opposite-sex couples.

While *Obergefell* simplifies the law as to who qualifies as a spouse, it complicates the domestic partner issue. Employers offering domestic partner coverage must rethink who qualifies as an eligible domestic partner. Employers considering elimination of domestic partner benefits need to consider whether continuing to offer such benefits provides a recruiting advantage, whether equal protection issues may arise if an employer covers same-sex domestic partners but not opposite-sex domestic partners, and potential unintended consequences of eliminating such benefits.

If employers are considering eliminating all coverage for unmarried partners, they should consider that some employees in same-sex partnerships might prefer to remain in a domestic partnership rather than marry. From an employee relations standpoint, maintaining domestic partner benefits and even extending them to opposite-sex domestic partnerships might be a better solution than eliminating domestic partner coverage altogether.

GOVERNMENT EMPLOYERS

Public employers, like the rest of the government, are required to comply with the Equal Protection clause of the Constitution. Although public employers are not required to offer spousal benefits, if they do offer them, such benefits must be offered on an equal basis to legally married same-sex and opposite-sex couples alike.

STATE TAX CONSEQUENCES

The Supreme Court's 2013 *Windsor* decision struck down the federal Defense of Marriage Act and thus mandated federal recognition of same-sex marriage. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013). Therefore, same-sex married couples have received federal tax recognition just like opposite-sex married couples for the past several years.

The *Obergefell* decision should, however, simplify state tax treatment of same-sex married couples — and employers' reporting and withholding obligations and payment of state employment taxes. Each state's revenue department has issued guidance or otherwise indicated that same-sex married couples will be treated just like opposite-sex married couples for state tax purposes.

PRETAX PREMIUMS AND QUALIFYING EVENTS

Employers extending health insurance coverage and other elective benefits under an Internal Revenue Service Section 125 plan must now allow pretax payment of same-sex spouse premiums.

Section 125 allows an employer to covert taxable salary into non-taxable benefits; benefit premiums are paid before taxes are deducted from an employee's paycheck.

The question remains whether a state's new recognition of already married same-sex couples (a same-sex married couple living and working in Alabama who previously eloped to Massachusetts) triggers a qualifying event to allow election changes under a Section 125 plan, and the IRS has yet to provide guidance on this.

INSURANCE COVERAGE

As a general rule, state insurance laws will now require employers offering fully insured health benefits to offer benefits to all spouses. However, self-insured employers are in a different position.

Generally, self-insured employers are not required to offer spousal coverage, and federal law does not necessarily dictate which spouses, if any, must be covered. The Obergefell opinion does

not apply to the Employee Retirement Income Security Act, which does not require employers to offer any spousal coverage and does not define "spouse" with respect to health and welfare benefits. Therefore, ERISA preemption precludes state law from requiring ERISA-covered benefit plans to extend to same-sex spouses.

Employers' self-insured plans may, however, face indirect regulation because state law regulates the insurers that carry them.

AVOIDING DISCRIMINATION CLAIMS

Although self-insured plans may not be legally required to cover same-sex spouses, self-insured employers must carefully consider the risk of a discrimination claim for exclusion based on sexual orientation.

Although ERISA may preempt a state law discrimination claim relating to providing benefits to a same-sex spouse, employers should be aware that 22 states and the Washington, D.C., recognize a right of action for discrimination based on sexual orientation and gender identity. Those states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington and Wisconsin.

Although federal legislation (in 2015, the Equality Act and, before that, the Employment Non-Discrimination Act) has been introduced seeking to prohibit sexual orientation discrimination, current federal laws do not explicitly recognize sexual orientation as grounds for a discrimination claim.

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Cautious employers, however, may want to proceed as though sexual orientation discrimination can form the basis of a Title VII claim. Case law is well established that Title VII bars discrimination based on gender stereotyping in addition to biological sex. *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775, 235 (1989); *see also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination.").

At least one court has reasoned that sexual orientation discrimination is "often, if not always, motivated by a desire to enforce heterosexually defined gender norms." *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

Federal courts that have addressed the issue are split on whether sexual orientation or gender identity discrimination is prohibited under Title VII's ban on sex discrimination. A number of federal district courts have recognized sexual orientation discrimination as illegal sex-based discrimination.

In *Hall v. BNSF Railway Co.*, No. 13-2160, 2014 WL 4719007, at *2 (W.D. Wash. Sept. 22, 2014), a Washington federal judge found that the plaintiff, a man married to another man, alleged sex discrimination when he claimed he was denied the spousal health benefit, because of sex, where similarly situated women with male spouses enjoyed the benefit.

Similarly, an Oregon federal judge reasoned that one way to analyze a Title VII claim "is to inquire whether the harasser would have acted the same if the gender of the victim had been different." *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002).

Other courts, however, have expressly declined to recognize sexual orientation-based adverse employment actions as a potential form of sex discrimination. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001).

The Equal Employment Opportunity Commission recently held that sexual orientation discrimination falls under sex-based discrimination. *Complainant v. Foxx*, Appeal No. 0120133080, Agency No. 2012-24738-FAA-03 (E.E.O.C. July 17, 2015).

On July 17 the EEOC held that a complainant sufficiently alleged that he was not selected for a front-line manager position for the air traffic control tower at the Miami Airport on the basis of his sex and sexual orientation. The complainant claimed his supervisor made comments about his sexual orientation, specifically asking that he not discuss his male partner.

The holding recognized:

> When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination — whether the [employer] has "relied on sex-based considerations" or 'taken gender into account" when taking the challenged employment action.

The *Obergefell* decision will likely trigger additional litigation asserting claims of discrimination based on sexual orientation.

In July a Wal-Mart employee brought suit in Massachusetts federal court claiming that the company was required to provide insurance in 2012 to her same-sex spouse, who has substantial medical debt due to her cancer treatment. *Cote v. Wal-Mart Stores Inc.*, No. 1:15-cv-12945, *complaint filed,* 2015 WL 4462245 (D. Mass. July 14, 2015).

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The plaintiff asserts claims under Title VII, the Equal Pay Act and the Massachusetts Fair Employment Practices Law, which explicitly prohibits discrimination based on sexual orientation. The proposed class action seeks to represent current and former Wal-Mart employees who were in lawful same-sex marriages but were denied spousal health insurance benefits prior to Jan. 1, 2014, when the retailer began offering domestic partnership benefits.

The plaintiff says the denial of health insurance to her same-sex spouse, and those of other employees, amounts to sex-based discrimination. Employers should keep an eye on this case as guidance on how courts may treat benefits entitlement and sexual orientation-based sex discrimination claims post-*Obergefell*.

Although the Supreme Court has not considered whether sexual orientation falls under the purview of sex-based discrimination, the trend in Supreme Court jurisprudence has been to extend recognition of rights to same-sex couples. The court is thus likely to recognize sexual orientation as a potential basis for sex discrimination, if legislation does not first render sexual orientation a stand-alone protected category.

The safest practice for employers is to avoid treating any employee differently based on sexual orientation and avoid being a test case on the issue.

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