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LEGAL ALERT

SCOTUS Extends Same-Sex Marriage Rights Nationwide

As has become its custom, the Supreme Court left one of its most high-profile decisions for the end of its term, holding today by a 5-4 vote that the Constitution requires states to recognize same-sex marriages. As a result, state bans against same-sex marriage are no longer permissible and all states are required to recognize same-sex marriages that take place in other states. Employers should update their FMLA policies and benefit plans to provide the same coverages for same-sex married couples as for other married couples. *Obergefell v. Hodges*.

Background

In 2013, the U.S. Supreme Court ruled that Section 3 of the Federal Defense of Marriage Act, which essentially barred same-sex married couples from being recognized as “spouses” for purposes of federal laws, violated the Fifth Amendment (*United States v. Windsor*). On the heels of that case, same-sex couples sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states’ same-sex marriage bans, as well as their refusal to recognize legal same-sex marriages that occurred in other jurisdictions.

For instance, the named plaintiff, James Obergefell, married a man named John Arthur in Maryland. Arthur died a few months later in Ohio where the couple lived, but Obergefell did not appear on his death certificate as his “spouse” because Ohio does not recognize same-sex marriage. Similarly, Army Reserve Sergeant First Class Ijpe DeKoe married Thomas Kostura in New York, which permits same-sex marriage. When Sgt. DeKoe returned from Afghanistan, the couple moved to Tennessee, but that state refused to recognize their marriage.

The plaintiffs in each case argued that the states’ refusal to recognize their same-sex marriages violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment. In all the cases, the trial court found in favor of the plaintiffs. The U.S. Court of Appeals for the Sixth Circuit reversed and held that states’ bans on same-sex marriage and refusal to recognize marriages performed in other states did not violate Fourteenth Amendment rights to equal protection and due process.

The Supreme Court accepted review of the controversy, focusing its analysis on whether the Constitution requires all states to recognize same-sex marriage, and whether it requires a state which refuses to recognize same-sex marriage to nevertheless recognize same-sex marriages entered into in other states where such unions are permitted.



Same-Sex Marriage Is Guaranteed By The Constitution

In its ruling today, the Supreme Court sided with the plaintiffs and held that marriage is a fundamental right; as such, same-sex couples cannot be deprived of that right pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The majority decision, authored by Justice Anthony Kennedy, starts with a lengthy discussion of the history of marriage, citing thinkers as diverse as Cicero and Confucius. The majority of the Court builds the Constitutional case for same-sex marriage primarily upon the fundamental liberties protected by the Fourteenth Amendment, which “extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs.” These “personal choices” include whether to marry and who to marry. Indeed, the Court noted, “decisions about marriage are among the most intimate that an individual can make.”

While “limitations of marriage to opposite-sex couples may long have seemed natural and just,” evolving views about homosexuality warranted a relook as to whether such limitations are allowable under the Constitution. Today, the Court unequivocally ruled they were not.

Practical Impact On Employers: FMLA Policies and Benefit Documents Must Be Updated

Following *Windsor*, the Department of Labor issued a Final Rule revising FMLA’s definition of “spouse” to ensure that same-sex married couples receive FMLA rights and protections without regard to where

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they reside. Specifically, the DOL's Final Rule adopts a "place of celebration" rule, meaning that when defining a spouse under the FMLA, it refers "to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State." In other words, this broad interpretation was intended to ensure that FMLA coverage existed for same-sex couples even in states where same-sex marriage was banned.

The Final Rule had been temporarily enjoined in Texas, Arkansas, Louisiana, and Nebraska by a federal judge who ruled that the DOL did not have the authority to change the definition of "spouse," and that the change "improperly preempts state law forbidding the recognition of same-sex marriages for the purpose of state-given benefits." That

litigation was on hold pending the outcome of this case. The Supreme Court's decision in *Obergefell* paves the way for the Final Rule to go into effect, which means that employers should update their FMLA policies accordingly.

Additionally, employers should review their benefit offerings and consider the impact this decision has on employees who are in same-sex marriages.

Ironically, the *Obergefell* decision does not change the fact that sexual orientation is still not a protected class under federal law for employment law purposes. Although many states and municipalities protect against discrimination on the basis of sexual orientation, the proposed amendment to Title VII of the Civil Rights Act of 1964 remains in limbo.

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This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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