

One Minute Memo®



U.S. Supreme Court Recognizes Fundamental Right To Same-Sex Marriage Nationwide: Impact of the Decision on Employers

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In a *landmark decision*, today the U.S. Supreme Court recognized a fundamental right for same-sex couples to marry throughout the country. In a 5-4 opinion authored by Justice Anthony Kennedy, the Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require the states to license a marriage between two people of the same sex.

Today's Decision

In *Obergefell et al. v. Hodges*, No. 14-556, the Court decided four consolidated cases that presented two questions: first, whether the Constitution requires states to issue marriage licenses to same-sex couples; and second, whether states must recognize same-sex marriages performed elsewhere. The Court answered both questions in the affirmative. On Due Process grounds, the Court stated four reasons why the Constitution guarantees same-sex couples the right to marry: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy"; (2) the right to marry "supports a two-person union unlike any other in its importance to the committed individuals"; (3) the right to marry "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"; and (4) marriage is a "keystone of [the Nation's] social order" for which there is no difference between same-sex and opposite-sex couples.

The Court also relied on the Equal Protection Clause to reach its decision, but with substantially less analysis. This is relevant because while previous Court decisions on LGBT issues had relied on the Equal Protection Clause, they had not articulated what standard of review (i.e., rational basis or heightened scrutiny) applies to classifications based on sexual orientation. Today's decision likewise did not explain what standard of review applies to such classifications, and therefore the precedential impact of this decision may be difficult to gauge.

Furthermore, the opinion expressly recognized the First Amendment rights of religious organizations and individuals to oppose same-sex marriage. Thus, there may be a latent conflict between the fundamental right to marry laid out in this opinion, and the expansive view of religious liberty laid out in opinions like *Burwell v. Hobby Lobby Stores, Inc.*

Impact on Employers

With today's ruling, same-sex couples may now legally marry throughout the country. For multi-state employers that had previously been subject to a non-uniform mixture of state and federal laws regarding the recognition of their employees' same-sex marriages, today's ruling should provide administrative simplicity, as same-sex marriages are now legally valid in all 50 states.

Employers should be aware that compliance with various federal laws (such as the Family Medical Leave Act and its state counterparts), same-sex spouses will now have to be treated the same as opposite-sex spouses. Likewise, compliance with any state laws that implicate marital status will also require treating same-sex spouses the same as opposite-sex spouses. However, there is one curious result that will occur in states that do not extend anti-discrimination protections to LGBT individuals in employment: gay or lesbian individuals are now able to lawfully wed, but employers in some states may still be able to fire them because their LGBT status is not explicitly protected under state or federal law.

Although the tone of today's decision was sweeping, the reach of it will remain to be felt. For example, although it is clear that the **states** must recognize same-sex marriage, it is not clear that private employers are required to do so where policies do not flow from federal or state law. However, policies that treat opposite-sex spouses differently from same-sex spouses may become subject to legal challenge, as today's decision will likely become a basis for litigation to further expand the reach of laws such as Title VII.

Furthermore, today's decision did not address employment non-discrimination, and states without laws protecting LGBT individuals are not facially affected by the ruling, but we may expect additional litigation challenging adverse employment actions taken on the basis of sexual orientation.

Benefits Implications

The primary impact of this decision from the employer benefit plan perspective will be on health and welfare benefits. This decision does not result in a change for employers' qualified retirement plans because after the *United States v. Windsor* decision in 2013 (which struck down part of the federal Defense of Marriage Act), the IRS issued guidance providing that for federal tax purposes the IRS applied a "state of celebration" rule. (See our prior alert on this issue available [here](#)). As a result, qualified retirement plans, which rely on the Internal Revenue Code definition of spouse, have already been considering same-sex spouses as "spouses" for purposes of those plans. Today's ruling may impact the number of people who are considered spouses, but should not require a qualified retirement plan change.

Today's decision will impact, however, some employers' health and welfare benefits design and administration. After the *Windsor* decision, employers who offered same-sex spouses health and welfare benefits were able to treat those benefits as non-taxable for federal tax purposes. In those states that did not previously recognize same-sex marriage, however, those benefits may have been subject to state taxes. This created a disconnect in that some same-sex spousal welfare benefits were taxable for state tax purposes but not for federal tax purposes resulting in the potential for participant confusion and administrative burden for the plan sponsor. With today's ruling, those benefits should no longer be taxable for federal or state tax purposes which should ease administration for employers.

In addition, employers who had previously defined "spouse" for purposes of their welfare plans based on a state definition, should revisit those definitions to see if changes in administration are necessary. Employer welfare plans that continue to define "spouse" for purposes of welfare benefits to exclude same-sex marriages may have an increased chance of facing legal challenge in light of today's ruling, such as through an attempted expansion of the reach of Title VII noted above.

Next Steps

Seyfarth Shaw is continuing to analyze today's opinion and will monitor further developments on the scope of today's decision. In the meantime, with this change in the law, employers should undertake a review of their offered employee benefit plans, including a review of the definition of "spouse" in plan documents. They should also reevaluate their own internal policies and training materials to ensure that they adequately address new employee leave rights, and application of existing law protecting employees based on marital status.

We invite you to join us on Wednesday, July 8, for a webinar on the employee benefits implications of this week's Supreme Court decisions on both marriage equality and the Affordable Care Act. Please visit <http://www.seyfarth.com/events/Webinar070815-EB> to register.

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