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Supreme Court Rules in Favor of Marriage Equality

On June 26th, in the case of *Obergefell v. Hodges,* the United States Supreme Court ruled, in a 5-4 decision, that based on language in the United States Constitution, a state cannot refuse marriage licenses to same-sex couples and must recognize same-sex marriages that have been legally performed in another state. As a result of this decision, state laws that define "marriage" or "spouse" as referring to opposite-sex couples only must be revised to include same-sex marriages and same-sex spouses.

The ruling came exactly two years after the United States Supreme Court's landmark *Windsor* decision, which struck down one section of the Defense of Marriage Act ("DOMA"), but did not make same-sex marriage legal in every state. Since the *Windsor* decision was released, a number of states began to recognize same-sex marriages. In fact, nearly half of the 36 states that recognized same-sex marriage immediately before the Supreme Court's decision did so for the first time in 2014.

Background

In the case before the Supreme Court, the lead petitioner ("*Obergefell*") sued the state of Ohio ("*Hodges*") challenging its ban on same-sex marriages after the state refused to acknowledge his marriage to John Arthur on Arthur's death certificate. Obergefell and Arthur were married in Maryland (a state that recognized same-sex marriages) just months before Arthur died in 2013.

The two questions before the Supreme Court were:

1. Does the United States Constitution require a state to license a marriage between same-sex individuals?

2. Does the United States Constitution require a state to recognize an out-of-state marriage of a same-sex couple?

The *Obergefell* petitioner, assisted by the federal government, asked the Supreme Court to require states to license and recognize same-sex marriages based on same-sex spouses' right to "equal protection" and "due process" under the United States Constitution. Ohio countered that under the United States Constitution, each state's own democratic process – not a federal court -- should determine the definition and treatment of marriage.

Supreme Court Ruling

In sum, the Supreme Court held that the Fourteenth Amendment's Due Process and Equal Protection Clauses require states to allow same-sex marriages and to recognize same-sex marriages performed in other states. Justice Kennedy, who authored the majority opinion, noted that same-sex couples were not asking for a new right, but rather, they were asking to share in a right already present in the Constitution – the right to marry. Within that context, Justice Kennedy stated that state bans on same-sex marriage "are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right." According to Justice Kennedy, couples that were challenging the state bans on same-sex marriage were not attempting to disrespect the idea of marriage. But rather, "[t]heir 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."

However, Chief Justice Roberts was not swayed by the majority's opinion and in his dissent he noted that the Constitution was silent on the subject of same-sex marriage. Chief Justice Roberts wrote that "[i]f you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it."

Impact of the Supreme Court's Ruling on Employers

While both proponents and opponents of same-sex marriage will likely agree that the ruling in *Obergefell* is historically significant, the impact on private employers is a bit more nuanced. The Supreme Court's decision in this case will likely have the most profound impact on employers in the fourteen states that did not recognize same-sex marriage prior to Friday's ruling. Those states were: Alabama[1], Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee and Texas.

Moreover, the decision in favor of same-sex marriage does not impact retirement plans that are subject to federal law (such as ERISA plans) because federal law already provides for recognition of same-sex marriages, including marriages that occurred out of state. The 2013 *Windsor* decision required the **federal government** to recognize same-sex marriages that had been validly licensed by a state or foreign country. In general, as a result of *Windsor*, retirement plans subject to ERISA must treat same-sex spouses the same as opposite-sex spouses. In contrast, *Obergefell's* questions centered on the obligations of the various **states** and whether they are obligated to license and/or recognize same-sex marriages.

However, while, as a general proposition the ruling does not require employers to cover spouses for purposes of employee health and welfare benefits, whether they are same-sex spouses or opposite-sex spouses, the ruling in *Obergefell* will impact employers that already provide spousal coverage. More specifically, the impact on employer-sponsored health and welfare benefits will likely depend upon

[1] Alabama is included in the list because even though a federal court had lifted the state's ban on same-sex marriage, the state contested that court ruling.

whether benefits are fully insured or self-insured. For employers that sponsor fully insured benefit plans that provide coverage to spouses, the ruling will require them to extend those benefits to same-sex spouses because fully insured plans must follow the definition of spouse under state law, and states are now required to recognize same-sex spouses. Moreover, those employers must treat same-sex spouses, for all relevant purposes including taxation (e.g., imputed income for state taxes), in the same manner that they treat opposite-sex spouses. Over time, this will result in administrative simplification for plan sponsors since all legally married spouses will be treated the same.

For employers with self-insured plans, the analysis is more complicated because those plans are not necessarily required to define spouse in the same way that state law defines spouse; however, the ultimate result is likely the same. For those employers that currently offer spousal coverage, it is likely that their plan documents define "spouse" in one of the following ways:

- Legal spouse;
- Spouse as defined by state law;
- Spouse as defined by federal law (which defers to state law); or
- Spouse as defined by the jurisdiction in which the marriage was formed.

All of these definitions would now lead to the conclusion that a same-sex spouse is a "spouse" as defined by the plan. As such, employers with self-insured plans that offer spousal coverage and define "spouse" in any of the preceding ways will have to extend the spousal benefits to all same-sex spouses and treat those same-sex spouses the same as opposite-sex spouses.

It is also possible that a self-insured employer may currently define "spouse" (or, in the future define "spouse") in such a way as to limit spousal coverage to opposite-sex spouses. However, in light of the Supreme Court's ruling, self-insured employers that attempt to limit spousal coverage to only opposite-sex spouses face heightened risk of lawsuits. In general, the Equal Employment Opportunity Commission ("EEOC") takes the position that lesbian, gay, and bisexual individuals may bring valid Title VII sex discrimination claims. The EEOC accepts and investigates charges alleging sexual-orientation discrimination, such as claims of sexual harassment or allegations that an adverse action was taken because of a person's failure to conform to sex-stereotypes. For this reason, it is possible that claims of sexual orientation discrimination could be brought under federal employment discrimination laws against employers with self-insured plans that exclude same-sex spouses from spousal benefits.

While it is not clear when the ruling would officially take effect, Supreme Court mandates are typically issued after 25 days. The delay is caused by the fact that there is a 25-day rehearing period for Supreme Court decisions. However, a rehearing in this case is highly unlikely.

Conclusion

For employers that do not currently extend benefits to same-sex spouses, it will be imperative to determine what impact, if any, the *Obergefell* ruling will have upon their health and welfare benefits. Employers that do not currently extend coverage to same-sex spouses but wish to take near-term action may be required to amend applicable plan documents and enrollment forms, issue employee communications, and provide an enrollment period for newly eligible dependents.

It is expected that the various agencies responsible for regulating employers and employer-sponsored health and welfare plans may issue additional guidance clarifying the impact of the Supreme Court's ruling. If they do, we will promptly provide our clients with additional analysis. In the interim, to further assist our clients to understand the meaning and impact of the Supreme Court decision in *Obergefell*, we anticipate releasing a recorded webinar on July 9th. Clients that have already subscribed to our webinars will receive an invitation to register for our recorded webinar on July 9th and upon registering will gain access to the recording. For clients that have not yet subscribed to our webinars, they can reach out to their Gallagher consultants to request that they be added to our webinar distribution list. In the alternative, clients can also access all our recorded webinars via AJG.com (click here). We generally add recorded webinars to AJG.com within a day of their release.

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