Advice on the Supreme Court's Same Sex Marriage Decision

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On Friday, June 26, 2015 the United States Supreme Court issued a monumental decision in *Obergefell, et al. v. Hodges, et al.*; Case No. 14-556. In a 5-4 vote, the Supreme Court held that state bans of same-sex marriages are unconstitutional. Specifically, it held that the Fourteenth Amendment requires a state to issue marriage licenses to same-sex couples if it does so for heterosexual couples. The Court also held each state must give full faith and credit to same-sex marriages performed in another state. Chief Justice Roberts filed a vigorous dissenting opinion in which he noted that the *Obergefell* decision has no real basis in the Constitution. Regardless of whether the decision represents one where the Supreme Court is "making it up as it goes along" (the essence of Roberts' argument) this now is the law of the land. And it will have significant impacts upon public and private employers alike. Although employers are not required to change their personal or religious views about the subject, and many will strongly disagree with the decision, disregarding or resisting it will carry significant legal and financial risks for the employers.

What does the Decision Mean for Public and Private Employers?

Public and private employers should review their FMLA policies, benefit plans, and Equal Employment Opportunity and Anti-Harassment/Discrimination policies. Employers should also be aware of potential religious discrimination and harassment claims.

The United States Supreme Court in 2013 held, in *U.S. v. Windsor*, that the federal Defense of Marriage Act's limitation of "marriage" and "spouse" to heterosexual couples was unconstitutional. After the *Windsor* decision, President Obama directed the Attorney General along with governmental agencies to review federal laws to ensure the *Windsor*decision was implemented for federal benefit purposes. The Department of Labor (DOL) reviewed the Family Medical Leave Act (FMLA), and through the rulemaking process, tied the definition of spouse to the state's definition where the marriage was performed (as opposed to the prior requirement tying the definition to the state of the employee's residence). That change was quickly challenged in *Texas v. United States*, Civil Action No. 7:15-cv-00056 (N.D. Tex.). The District Court for the Northern District of Texas issued a preliminary injunction and stayed the application of the new definition, pending further review; however, the District Court subsequently stayed that matter pending the *Obergefell*decision. Based upon today's ruling, we anticipate the case will be dismissed as moot.

It is likely the DOL will revise its FMLA regulations to specifically recognize FMLA eligibility for same-sex spouses regardless of where the marriage was performed and regardless of the law of the state where the employer is located. Employers should revise their FMLA policies to reflect this.

Additionally, employers will have to review their **benefit plans** to ensure that same-sex couples are provided the same rights and privileges afforded to heterosexual couples regarding benefit policies. **Handbooks should be updated accordingly.**

Further, public and private employers should **review their Equal Employment Opportunity and Anti-Harassment/Discrimination policies**. In a number of states (other than Georgia) marital status is a protected category. Personnel Policy Manuals and Handbooks should be clear that the employer will not discriminate nor tolerate discrimination based upon same-sex marital status.

As the latest opinion notes concedes gay marriage raises religious freedom and free speech issues. Employees may be vocal about their religious beliefs and opinions on this decision. If employees express their religious views at work, employers must recognize that Title VII still protects these employees against discriminatory decisions based on a person's religion and that it also protects them against harassment based on religion. However, **employers may require all employees to be respectful of others' views in their communications**. Religious employees objecting to or supporting gay marriage should not be permitted to create a hostile working environment for employees whose lifestyles do not reflect their religious or social views.

What's Next

There are many questions about the internal logic of The next big question will be whether **sexual orientation and gender identity will be protected classes**. Many federal agencies, including the EEOC, have taken the position that sexual orientation and gender identity are protected categories, and they are actively pursuing cases to have courts recognize that position. Some cases already suggest that discrimination based on sexual orientation is direct evidence of unlawful gender bias insofar as it is based on gender-based stereotypes *(i.e.*, the stereotype that a male only should love a female, and that a real female does not have romantic or sexual relationships with other females). Additionally, Congress has considered bills, such as the Employment Non-Discrimination Act (ENDA), which would specifically recognize sexual orientation and gender identity as protected categories. Although ENDA failed and based upon the Supreme Court's position in *Windsor* and now *Obergefell*, it may be we only a matter of time before sexual orientation and gender identity are specifically recognized as protected categories. As such, employers may choose to be proactive and implement policies accordingly, including training supervisors and employees on these issues. As always clients should contact us for advice on changes to their employment policies, practices and benefit plans.