Insights: Alerts

Supreme Court's Ruling on Same-Sex Marriage Will Affect Employers

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On June 26, 2015, in a 5-4 decision, the U.S. Supreme Court held that the Fourteenth Amendment requires all states to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage lawfully was licensed and performed out of state. Although the decision does not address employment issues, it will have practical implications for employers.

The Supreme Court's Decision in *Obergefell v. Hodges*

In *Obergefell v. Hodges*, groups of same-sex couples sued their respective state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states' bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in other jurisdictions. Addressing their claims, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects and that this analysis applies to same-sex couples in the same manner as it does to opposite-sex couples. In its rationale, the majority noted that the Supreme Court has long recognized the right to marry as a fundamental right because it is inherent to the concept of individual autonomy, it protects the most intimate association between two people, it safeguards children and families by according legal recognition to building a home and raising children, and it historically has been recognized as the keystone of social order. The Court observed that there were no differences between a same-sex union and an opposite-sex union with respect to these principles, and thus, exclusion of same-sex couples from the right to marry violates the Due Process Clause of the Fourteenth Amendment.

The Court also held that the Equal Protection Clause of the Fourteenth Amendment guarantees the right of same-sex couples to marry, as the denial of that right would deny same-sex couples equal protection under the law. According to the Court, these two clauses in the Fourteenth Amendment mean that a "fundamental right to marry" can no longer be denied because the partners are of the same sex. The Court was careful to note that it did not create a new right; rather, it opened a long-existing one to same-sex partners.

Practical Implications

Although the *Obergefell* decision did not address employment issues, it will have an impact on employers. For example, it establishes a uniform concept of marriage that will apply to state and federally mandated employment rights and benefits, such as statutory leave rights. The rapidly changing legal recognition of same-sex marriage among the states in recent years has caused headaches for employers administering leaves under the Family and Medical Leave Act ("FMLA") and similar state laws. Currently, the FMLA regulations define "spouse" using a "place of celebration" rule, meaning that employers must look to the law of the place where the couple entered into the

marriage. Because same-sex marriage is now legal in all states, employers need no longer be concerned about the marriage laws of the state in which a same-sex couple got married. Similar state family and medical leave laws also will have to extend their spousal leave rights to same-sex married couples to the same extent as opposite-sex married couples, although any statutory or regulatory definitions of “spouse” that limit the term to opposite-sex couples may not be changed immediately by the applicable legislature or agency.

At a time when same-sex marriage was unlawful in most states, many employers modified their benefit plans to extend coverage to the domestic partners of employees, and the impetus for this move was often to offer gay and lesbian employees who could not legally marry a semblance of equal access to benefits that married couples enjoyed. In some instances, domestic-partner coverage was limited to same-sex couples on the theory that opposite-sex couples had the option to marry and to obtain household coverage in that manner. Now, because there is no longer a legal impediment to same-sex marriages, some employers may feel that there is no longer a justification for these types of policies. Employers with domestic-partner benefits may want to review these policies and to consider whether they should continue to provide these benefits.

It is important to note that the *Obergefell* decision does not prohibit employment discrimination on the basis of sexual orientation, and while the decision requires states to allow same-sex marriages, it does not require private entities to recognize same-sex marriage, except to the extent they are complying with federal and state laws that refer to marriage or spouses. Employers that choose not to treat lawful same-sex marriages the same as opposite-sex marriages, however, can encounter a number of legal issues. In states, counties, and cities with laws banning employment discrimination based on sexual orientation, treating employees unfavorably because they have married a same-sex partner is likely to constitute unlawful sexual orientation discrimination. Imposing additional burdens on same-sex married couples that are not imposed on opposite-sex married couples – for example, requiring only same-sex couples to provide proof of a lawful marriage as a condition to receiving spousal benefits – also may run afoul of sexual orientation discrimination laws. Adverse employment actions taken because an employee has entered into a same-sex marriage also may violate state and local laws prohibiting marital-status discrimination.

Employers should review their personnel policies to identify policies that may be affected by the Supreme Court’s ruling. To the extent a policy relating to marriage is implementing a federal or state law such as the FMLA, the new nationwide recognition of same-sex marriage must be applied to it, and any inconsistent language defining “marriage” or “spouse” should be eliminated. With respect to marriage-related policies that an employer has adopted voluntarily, such as bereavement leave and “wedding leave” policies, the employer should decide how it wishes to apply those policies to same-sex marriages, taking into account the legal risks of a restrictive interpretation of “marriage” and the effect such an interpretation may have on recruiting and retaining employees.

Related People





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