

Foulston Siefkin Employment & Labor Issue Alert

How Will the Supreme Court's Ruling on Same-Sex Marriage Impact Kansas Employers?

July 7, 2015

by Jason P. Lacey & Teresa L. Shulda



The Supreme Court has had a busy summer. Between ruling in favor of religious dress accommodations in *EEOC v. Abercrombie and Fitch*, fashioning a new test to apply in pregnancy bias cases in *Young v. UPS*, and ensuring the viability of the Affordable Care Act in *King v. Burwell*, you'd think that the Supreme Court had given employers enough to contemplate. But the nine Justices waited until the end of their term to deliver one of the most hotly anticipated decisions all year in *Obergefell v. Hodges*. By a 5 to 4 margin, the Court held that state bans on same-sex marriage are unconstitutional. Now, same sex couples can legally wed in all 50 states, and presumably, will be entitled to the same state and federal marriage-related rights and benefits that opposite-sex married couples enjoy.

But the *Obergefell* ruling raises questions for many employers, who are wondering what employment-related benefits are now required for same-sex couples. *Obergefell* was not an employment case and did not directly address any employment law issues; however, employers can expect to feel some impact from the decision.

Currently, there is no federal law that prohibits discrimination on the basis of an employee's sexual orientation or gender identity. The 50 states are a patchwork of varying anti-discrimination laws in that regard. Indeed, some states are a patchwork of laws among cities within the state. While some states and cities prohibit discrimination and harassment on the basis of an employee's sexual orientation, other state and municipal laws are silent on the subject. On top of that, President Obama signed an Executive Order prohibiting federal contractors from discriminating against employees on the basis of sexual orientation and gender identity.

So what does all of this mean for Kansas employers? Now that gay couples can legally marry, are you required to extend health and other fringe benefits to your employees' same sex spouses? What if an employee asks for leave to care for her same-sex spouse who has fallen ill? What if the employer has a religious objection to homosexuality and does not want to employ lesbian, gay, bisexual, or transgender ("LGBT") people? Some of these questions are still unsettled in Kansas, but there are guidelines that can help employers maneuver through these issues until they are finally decided by the legislatures or courts.

EMPLOYEE BENEFIT PLANS

For employee benefit plans, the *Windsor* decision in 2013 was arguably a more significant case than *Obergefell*, because *Windsor* recognized same-sex marriages for purposes of federal law, and many benefit plan issues are governed by federal law. Thus, for example, as a result of *Windsor*, same-sex spouses became eligible for tax-free coverage under health and cafeteria plans and became entitled to spousal rights under qualified retirement plans.

But *Obergefell* will impact employee benefit plans. In many cases the impact will be less direct than in *Windsor*, because the legal effect of the decision (recognition of a constitutional right to same-sex marriage) won't directly affect all benefit plans, particularly those sponsored by private sector employers. The impact will also differ depending on the type of plan and employer.

Here is a summary of key impacts, by plan type.

- **Insured Plans.** For employee benefits provided through insurance policies, state insurance law may now require uniform treatment of same-sex spouse and opposite-sex spouses. This may make it easier for same-sex spouses to obtain coverage (such as spousal coverage under health insurance policies) or receive spousal rights (such as through beneficiary provisions under life insurance policies).
- **Self-Insured Plans.** For employee benefits provided through self-insured plans, particularly self-insured health plans, the impact will vary depending on the nature of the plan and plan sponsor. For plans sponsored by state and local governmental entities, *Obergefell* likely requires uniform treatment of same-sex spouses and opposite-sex spouses, which will result in a change for plans that have not previously provided uniform treatment. For plans sponsored by private sector employers, *Obergefell* does not clearly require extending coverage to same-sex spouses, but it will make it easier for same-sex couples to get married, thereby potentially increasing the focus on any unequal treatment of same-sex spouses.

Note: Risks Under Employment Discrimination Laws. Although *Obergefell* does not clearly require private sector employers to extend benefits coverage to same-sex spouses, there are still risks associated with treating same-sex marriages differently than opposite-sex marriages. Perhaps the greatest risk is that of claims for gender discrimination under employment discrimination laws, such as Title VII of the Civil Rights Act. The EEOC is already taking the position in litigation that unequal treatment of same-sex spouses is prohibited gender discrimination, although it remains to be seen how courts will address the EEOC's position.

- **Retirement Plans.** As a matter of federal law, qualified retirement plans already are required to recognize same-sex marriages. But *Obergefell* may result in more uniform treatment of same-sex spouses under state domestic relations laws, perhaps making it more likely that plans will see QDROs involving in the case of divorcing same-sex spouses.
- **Tax Treatment.** State tax treatment of benefits provided to same-sex spouses has been a lingering issue following *Windsor*. Not all states have followed federal law in recognizing same-sex marriages for tax purposes. This has created a situation where benefits for same-sex spouses that are tax-free under federal law are nonetheless taxable under some state law. *Obergefell* should change that by providing uniform treatment of same-sex spouses and opposite-sex spouses under state tax law.
- **Contractual Requirements.** Broader recognition of same-sex marriage could lead to contractual requirements to extend coverage to same-sex spouses, such as in collective bargaining agreements or vendor contracts. Although ERISA preemption may affect contractual requirements in some contexts (e.g., contractor laws established by state and local governments), employers generally will be bound to follow any contractual terms they actually agree to, including any provision whereby they agree to treat same-sex spouses and opposite-sex spouses equally.
- **Dependents.** Recognition of same-sex marriages may lead to broader rights for dependent children of an employee's same-sex spouse. For example, a benefit plan that provides coverage for an employee's step children may be required to extend that coverage to children of the employee's same-sex spouse.
- **Domestic Partner Benefits.** Employers that have historically offered benefits to domestic partners of employees may be less inclined to do so now that employees in same-sex relationships have a greater ability to actually get married. Benefit coverage provided to domestic partners generally is treated less favorably for tax purposes than benefit coverage for spouses, which may create additional pressure to eliminate coverage for domestic partners.

Bottom line, the impact of *Obergefell* on employee benefit plans may vary from employer to employer and from plan to plan, so each employer will need to evaluate the impact of the decision in light of their specific facts and circumstance.

FAMILY AND MEDICAL LEAVE ACT

The FMLA allows employees of employers (who have 50 or more employees) to take up to 12 weeks of unpaid leave for various family and medical situations, including to care for a spouse with a serious health condition. Until recently, the FMLA defined "spouse" as "a husband or wife as defined or recognized under state law for purposes of marriage *in the state where the employee resides.*" So, if an employee could be legally married in the state where he resided, he could take FMLA leave to care for his same-sex spouse. In Kansas, which banned same-sex marriage, that meant employers were not required to grant FMLA to employees living in Kansas to care for a same-sex spouse.

But after the *Windsor* decision, the Department of Labor revised its regulations to define spouse as a husband or wife, as recognized *in the state where the marriage was entered into*. This meant that Kansas employers had to grant employees FMLA leave to care for a same-sex spouse so long as the same-sex marriage was legal in the state where it was celebrated. The DOL's "place of celebration" regulation went into effect on March 27, 2015.

The *Obergefell* decision now means that same-sex marriage will be legal in all 50 states. Thus, employers will now be required to grant FMLA to employees to care for same-sex spouses across the board. Employers should review their FMLA policies to determine if they need revision in light of this outcome.

ANTI-DISCRIMINATION LAWS

Kansas' anti-discrimination laws – the Kansas Act Against Discrimination and the Kansas Age Discrimination in Employment Act – prohibit discrimination on the basis of an employee's race, color, national origin, ancestry, sex, disability, genetic information, and age (over 40). But the law is silent on sexual orientation and gender identity. Lawrence and Roeland Park are the only municipalities in Kansas that have ordinances prohibiting private employers from discriminating against employees on the basis of sexual orientation or gender identity.

But Kansas laws aren't the only laws employers need to consider. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of an employee's sex. While that law does not mention sexual orientation or gender identity as a protected categories, the Equal Employment Opportunity Commission, which administers Title VII, takes a broad view of what exactly "discrimination on the basis of sex" means.

The EEOC takes the position that discriminating against a transgender person (or based on a person's gender identity) is discrimination "because of sex" and is therefore covered under Title VII. And the EEOC and courts have long taken the position that discriminating against employees based on "sex-stereotyping" (for example, discriminating against a woman because she's not stereotypically feminine or against a man because he's not stereotypically masculine) also violates Title VII. Some LGBT employees have found relief under Title VII with these types of claims.

And if an employer is a federal contractor, it is governed by the requirements of Executive Order 13672. In July 2014, President Obama signed that order prohibiting federal contractors and subcontractors from discriminating against employees on the basis of sexual orientation and gender identity. The Office of Federal Contract Compliance Programs issued regulations, effective April 8, 2015, which mandate federal contractors and subcontractors that have federal government contracts of \$10,000 or more to treat applicants and employees without regard to sexual orientation or gender identity.

OTHER STATE LAWS

Kansas employers who operate facilities and employ individuals in other states need to make sure they know the laws in those other states. Twenty-two states have passed laws prohibiting discrimination against employees on the basis of sexual orientation and 19 states include gender identity among their anti-discrimination laws' protected categories.

Moreover, several states include "marital status" as among the bases employers cannot discriminate against. In light of the *Obergefell* ruling, we can expect state agencies and courts to interpret some of those state anti-discrimination laws to prohibit discrimination against employees because of their marital status to a same-sex spouse.

WHAT TO EXPECT

The rapid pace regarding changes to LGBT rights will likely continue in the upcoming months and years. Kansas employers may see more cities adopting local ordinances that prohibit discrimination against LGBT applicants and employees.

And on the federal legislature front, expect to see a resurgence of activity surrounding the Employment Non-Discrimination Act ("ENDA"). ENDA, if passed, would be the Title VII counterpart for LGBT employees, and would prohibit employment discrimination on the basis of an individual's sexual orientation or gender identity. As proposed, and like Title VII, the law would apply to all employers with 15 or more employees. The law was first proposed in the U.S. Congress in 1994, and a version of the bill has been reintroduced in most years since then. However, the bill has never been able to garner enough votes to pass through the Congress and Senate to the President. After *Obergefell*, we can expect LGBT-rights activists to reignite the discussion over ENDA.

Another anticipated issue of contention will be centered on how religious objections to homosexuality will be handled with regard to any law addressing LGBT rights. The majority opinion in *Obergefell* specifically addressed those with religious objections to same-sex marriage:

[I]t must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

While the Supreme Court acknowledges that the debate over religious objections to homosexuality and same-sex marriage will be rigorous, the *Obergefell* decision provides no insight or guidance on how that debate will impact employment decisions. Kansas employers will need to stay tuned on this issue, as we're sure there will be more employment law news to come in the near future.

FOR MORE INFORMATION

If you have questions or want more information regarding the Supreme Court's ruling on same-sex marriage and how it will impact Kansas employers, you should contact your legal counsel. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs.

Jason Lacey is a partner at Foulston Siefkin, practicing in the areas of employee benefits, ERISA, and executive compensation. He can be reached at jlacey@foulston.com or 316.291.9756.

Teresa Shulda practices employment law at Foulston Siefkin, specializing in FMLA, ADA, and civil rights law. She can be reached at tshulda@foulston.com or 316.291.9791.

For more information on the firm, please visit our website at www.foulston.com.

Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Wichita, Kansas City, and Topeka, Foulston Siefkin provides a full range of legal services to clients in the areas of Administrative & Regulatory, Agribusiness, Antitrust & Trade Regulation, Appellate Law, Banking & Financial Services, Commercial & Complex Litigation, Construction, Creditors' Rights & Bankruptcy, E-Commerce, Education & Public Entity, Elder Law, Emerging Small Business, Employee Benefits & ERISA, Employment & Labor, Energy, Environmental, Estate Planning & Probate, Family Business Enterprise, Franchise, General Business, Government Investigations & White Collar Defense, Health Care, Immigration, Insurance Defense Litigation, Insurance Regulatory, Intellectual Property, Life Sciences & Biotechnology, Mediation/Dispute Resolution, Mergers & Acquisitions, Native American Law, OSHA, Public Policy and Government Relations, Product Liability, Professional Malpractice, Real Estate, Securities, Tax Exempt Organizations, Taxation, Water Rights, and Workers Compensation. This document has been prepared by Foulston Siefkin for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.