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SCOTUS Alert: Same-Sex Marriage is a Go, and ACA Stays Alive

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Two big decisions in two days from the Supreme Court. Read on for details.

Same-Sex Marriage is a Go!

Today, 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, 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.

What does the Decision Mean for Employers?

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.

In 2013, the United States Supreme Court held, in *U.S. v. Windsor*, that the 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. **We expect the DOL to revise the FMLA regulations to specifically recognize FMLA eligibility for same-sex spouses. Employers should revise their FMLA policies to reflect the same.**

Additionally, companies should review their **benefit plans** to make certain same-sex couples are provided the same rights and privileges with regards to all benefits afforded heterosexual couples. **Handbooks should be updated accordingly.**

Further, companies should **review their Equal Employment Opportunity and Anti-Harassment/Discrimination policies**. In some states, marital status is a protected category. Manuals should be clear that the company will not discriminate based upon same-sex marital status.

As noted in the opinion, 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 should recognize Title VII protects against discriminatory decisions based on a person's religion and protects against harassment based on religion. However, **employers may require all employees to be respectful of others' views in their communications**.

What's Next

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. 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*, we anticipate that it is 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.

Supreme Court Upholds Affordable Care Act – Authorizes Subsidies for Both Federal and State Exchanges

In the latest challenge to the Affordable Care Act (ACA), the Supreme Court yesterday in *King v. Burwell* upheld the provision of subsidies to individuals, regardless of whether the individual is enrolled in a state-sponsored or federal exchange / marketplace. By way of background, a key portion of the ACA is the individual mandate, which requires all individuals to obtain health insurance or pay a penalty. To assure that health coverage is available to everyone, including those without employer-sponsored coverage, the ACA provides for the creation of an online marketplace in each state, referred to an "exchange." In drafting the ACA, Congress anticipated that each state would establish its own exchange. However, as prior interpretations of the ACA provided, states cannot be **required** to establish an exchange. Therefore, many of the states declined to establish exchanges. To assure access to health coverage for all individuals, regardless of state of residence, the federal government authorized a federal online marketplace – the Federal Exchange.

As part of the individual mandate and to assure "affordability" of coverage, the ACA provides that individuals enrolled in exchange coverage "established by the State" will be eligible for subsidies based upon household income. The issue before the Court in *King v. Burwell* was whether or not the phrase "established by the State" would apply only to state-sponsored exchanges and not to the Federal Exchange. Rather than apply the literal wording of the statute, the Supreme Court opined that the intent of the law was to provide subsidies for those enrolled in exchanges – whether established by a state or by the federal government.

By a vote of six to three, the Supreme Court agreed with the Obama administration that subsidies are available for all taxpayers who buy health insurance through an exchange, no matter whether that exchange was created by a state or the federal government. This ruling effectively maintains the status quo.

King v. Burwell does not appear to be the end of challenges to the ACA. Challenges by non-profit religious groups to the mandatory access to birth control will likely be making their way to the Supreme Court.