



Commonwealth Benefits Group

2 Barlo Circle

Suite C

Dillsburg, Pennsylvania 17019

(717) 432-1010

<http://www.commonwealthbenefitsgroup.com>

COMPLIANCE ALERT 2015-4



U.S. Supreme Court Finds Same Sex Marriage Is Protected by the 14th Amendment

The Supreme Court ruled in *Obergefell v Hodges*, that the 14th Amendment requires a state 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 was lawfully licensed and performed out of state. The decision was reached 5-4. Justice Kennedy delivered the majority opinion and was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

The remaining four Justices dissented each with their own opinion.

The case, which originated in the 6th Circuit, was linked to related cases, *Tanco v. Haslam*, *DeBoer v. Snyder*, and *Bourke v. Beshear*.

Practical Implications

Group health plans that offer spousal benefits must extend these benefits to any individual who is validly married in any state, regardless of the sex of their spouse. Although the ruling does not explicitly extend to same-sex marriages performed out of the country, other federal regulations on the issue would indicate that employers should also recognize same-sex marriages performed validly wherever the marriage took place. It is likely that the Department of Labor and other agencies will issue guidance on this issue, but employers should be prepared to change spousal policies excluding same-sex marriages as soon as practicably possible.

For individuals with a same-sex spouse (validly married in a state allowing same-sex marriage) who reside in a state that did not recognize same-sex-marriage, the ruling in *Obergefell* likely triggers a change in status event for Section 125 plans. That is because, as of June 26, 2015, the individual is now considered married under state law, whereas they were not the day before.

In order to make a permitted election change, the plan must allow the change, an individual must have a change in status event, the requested change must be consistent with the event, and the employee must make an election change in a timely manner, often set at 30 or 60 days. Employers should work to ensure that individuals in a same-sex marriage are given the opportunity to enroll in a timely manner to prevent violation of Section 125 regulations. Employers whose plans do not permit a change in election due to a change in marital status should work with counsel to prevent a conflict between their plan and *Obergefell*.

In February the Department of Labor (DOL) issued an updated definition of "spouse" under the Family and Medical Leave Act (FMLA) to make compliance easier, and defined "spouse" as a husband or wife, which refers to a person "with whom an individual entered into marriage as defined or recognized by state law." The governing state law is that of the celebration state, or where the marriage took place. This definition was set to go into effect across the United States on March 27, 2015, but litigation in Texas, Arkansas, Louisiana, and Nebraska prevented the new rule from going into effect in those states. Employers in those states that were awaiting the conclusion of that litigation should be poised to adopt the new rule as soon as practicably possible. The definition under FMLA might be updated as a result of the ruling in *Obergefell* to simply encompass "as defined by state law" but that remains to be seen.

All employers should review employee handbooks and plan documents thoroughly to prevent conflict and avoid potential discrimination suits. Employers should also work with their accountants to ensure tax-withholdings are done accurately for affected individuals. Employers should consult with legal counsel if they have any questions or concerns.

Background

Prior to the Supreme Court's decision in *Obergefell v. Hodges*, approximately two-thirds of states recognized same-sex marriage (whether performed within the state or another state or country that recognizes same-sex marriage). In June 2013 the Supreme Court ruled unconstitutional the Defense of Marriage Act (DOMA) which provided that marriage could only be between a man and a woman for federal law purposes. In the fall of 2014, the Court declined to hear numerous cases in which the lower courts ruled unconstitutional state laws constitutional provisions prohibiting same-sex marriage.

The *Obergefell* case centered around 14 same-sex couples and two men whose same-sex partners are deceased. These couples filed suits in their home states claiming that the states (Michigan, Kentucky, Ohio, and Tennessee) violated their 14th Amendment rights by denying them the right to marry or failing to recognize their marriages which had been lawfully performed in another state. The plaintiffs prevailed in the federal district courts but were then consolidated by the 6th Circuit, which ruled against them.

Opinion

Justice Kennedy, writing for the majority, held that the fundamental liberties protected by the 14th Amendment's Due Process Clause extend to a variety of personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs. Applying this reasoning, the Court recognized that the justice system has long held that the right to marry is protected by the Constitution. In determining whether the force and rationale of previous cases apply to same-sex marriages, the majority found that "the Court must respect the basic reasons why the right to marry has long been protected." Based on these findings, "this analysis compels the conclusion that same-sex couples may exercise the right to marry."

Justice Kennedy identified four principles and traditions that demonstrate the reasons marriage is considered fundamental under the Constitution. "The first premise of this Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy." This was the basis for the decision invalidating the ban on interracial marriages. The fact that marriage is one of the most intimate decisions a person can make is true for all persons, "whatever their sexual orientation."

When the Court upheld the right of married couples to use contraception, it relied on the second principle; that "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individual." Same-sex couples have the same right to intimate association.

The third basis for recognizing the right of same-sex couples to marry "is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." Without this recognition and stability, Justice Kennedy held "children suffer the stigma of knowing their families are somehow lesser." Justice Kennedy also noted that precedent also protects the right of a married couple not to procreate, which leads to the logical determination that "the right to marry cannot be conditioned on the capacity or commitment to procreate."

As its fourth principle, the Court recognized that marriage is a keystone to the United States' social order. "States have contributed to the fundamental character of marriage by placing it at the center of many facets of the legal and social order. There is no difference between same- and opposite-sex couples with respect to this principle, yet same-sex couples are denied the constellation of benefits that the States have linked to marriage and are consigned to an instability many opposite-sex couples would find intolerable."

The Court held that the 14th Amendment also guarantees Equal Protection, which is "profoundly" connected to the Due Process Clause. "The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty. Same-sex couples may exercise the fundamental right to marry."

In reaching its decision, the Court dismissed the "inclination in these cases to proceed with caution - to await further legislation, litigation, and debate." Instead it found that "there has been far more deliberation than this argument acknowledges," citing referenda, debates, grassroots campaigns, studies, papers, books, and scholarly writing as well as extensive litigation at the state and federal level. The Court concluded that religious institutions are still given protection as they "seek to teach the principles that are so fulfilling and so central to their lives and faith, and to their own deep aspiration to continue the family structure they have long revered. "However, the Constitution "does not permit the state to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."

The Court also held that the Constitution requires states to recognize same-sex marriages validly performed out of state, noting that by not doing so, same-sex couples risk severe hardship when they cross state lines.

The Court's opinion concluded: "No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their 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."

Dissents

All four dissenting Justices authored their own dissent, and each was joined by at least one other dissenting Justice.

Chief Justice Roberts dissented, arguing "Although the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not. The fundamental right to marry does not include a right to make a State change its definition of marriage." Going on to call the majority opinion in *Obergefell* "extraordinary" by "ordering every State to license and recognize same-sex marriage," the Chief Justice went on to argue that the majority opinion is not based in Constitutional principles and instead "remakes society according to its own 'new insight' into the 'nature of injustice'." Arguing that marriage is not the result of political movement or any other litany of forces, Chief Justice Roberts found it instead arose out of a vital need to ensure that children are conceived by a mother and father committed to raising them in the stable conditions of a lifelong relationship. Acknowledging a rapid shift in public opinion regarding marriage, Chief Justice Roberts went on to disagree with the four principles and traditions provided by the majority, finding the opinion "indefensible as a matter of constitutional law." Chief Justice Roberts concluded that many Americans have reason to celebrate the majority opinion, but that no one should celebrate the Constitution, for "it had nothing to do with it."

Justice Scalia wrote a dissenting opinion to "call attention to this Court's threat to American democracy." Finding the majority opinion to be a "practice of constitutional revision by an unelected committee of nine always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves." Finding the debate of same-sex marriage to be a display of American democracy at its best, Justice Scalia argues that when the 14th Amendment was ratified, every state limited marriage to one man and woman with no doubt of the constitutionality of doing so. Arguing that the majority opinion would find that every state then violated the 14th Amendment for 135 years, and calling the opinion's style "pretentious" and its content "egotistic," Justice Scalia remarks that intimacy and spirituality are not freedoms. Justice Scalia concluded that by taking questions that should be properly left to the people, and basing the decision on "reasoned judgment" rather than law, "we move one step closer to being reminded of our impotence."

Justice Thomas dissented, finding that the majority opinion presents a "dangerous fiction of treating the Due Process Clause as the font of substantive rights." Finding that the majority distorts constitutional text, Justice Thomas relied heavily on the fundamental idea of "liberty" finding that the petitioners have a misconception of liberty that carries into their discussion of the right to marry. Justice Thomas found that "the majority's inversion of the original meaning of liberty will likely cause collateral damage to other aspects of our constitutional order that protect liberty."

Justice Alito dissented, finding that the Constitution leaves the question of same-sex marriage to be decided by the people of each state. Justice Alito disagreed with the majority's rationale that the purpose of marriage is to promote the well-being of those who choose to marry, and finding that marriage has always been "inextricably linked to the one thing that only an opposite-sex couple can do: procreate." Noting that the tie between marriage and procreation has worn down, Justice Alito went on to find that the decision of the majority will have important consequences, including on the Court's ability to uphold the rule of law. Justice Alito argued that "(t)oday's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed. A lesson that some will take from today's decision is that preaching about the proper method of interpreting the Constitution or the virtues of judicial self-restraint and humility cannot compete with the temptation to achieve what is viewed as a noble end by any practicable means."

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