

August 27, 2015

How does the Supreme Court's Same-Sex Marriage Decision Affect Employee Benefits?

Presented by Benefit Comply

How does the Supreme Court's Same-Sex Marriage Decision Affect Employee Benefits?

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.

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Background

Background

- Obergefell v. Hodges
 - Supreme Court combined four cases from different states – Obergefell v. Hodges (Ohio), Tanco v. Haslam (Tennessee), DeBoer v. Snyder (Michigan), and Bourke v. Beshear (Kentucky)
 - 5-4 decision ruled that the Fourteenth Amendment requires all jurisdictions in all fifty states to:
 - License a marriage of a same-sex couple
 - Recognize a same-sex marriage lawfully licensed and performed in another state
 - Prior to Obergefell 34 states recognized same-sex marriage

Background

- Federal Laws and Marriage
 - Spouse or marriage appears in over 1000 areas of federal law
 - Generally federal law defers to state definition of marriage
 - Biggest exception to this rule of state law precedence was the 1996 Defense of Marriage Act (DOMA)
 - DOMA defined marriage as the union of one man and one woman
 - Applied to all federal laws (i.e., tax, ERISA, etc.)
 - Supreme Court ruled DOMA unconstitutional in 2013 in U.S. v. Windsor
 - DOMA unconstitutionally denies federal recognition of same-sex spouses married legally according to state law
 - However, SCOTUS did not address DOMA Section 2, which allows states to define marriage and to choose not to recognize other state definitions of marriage

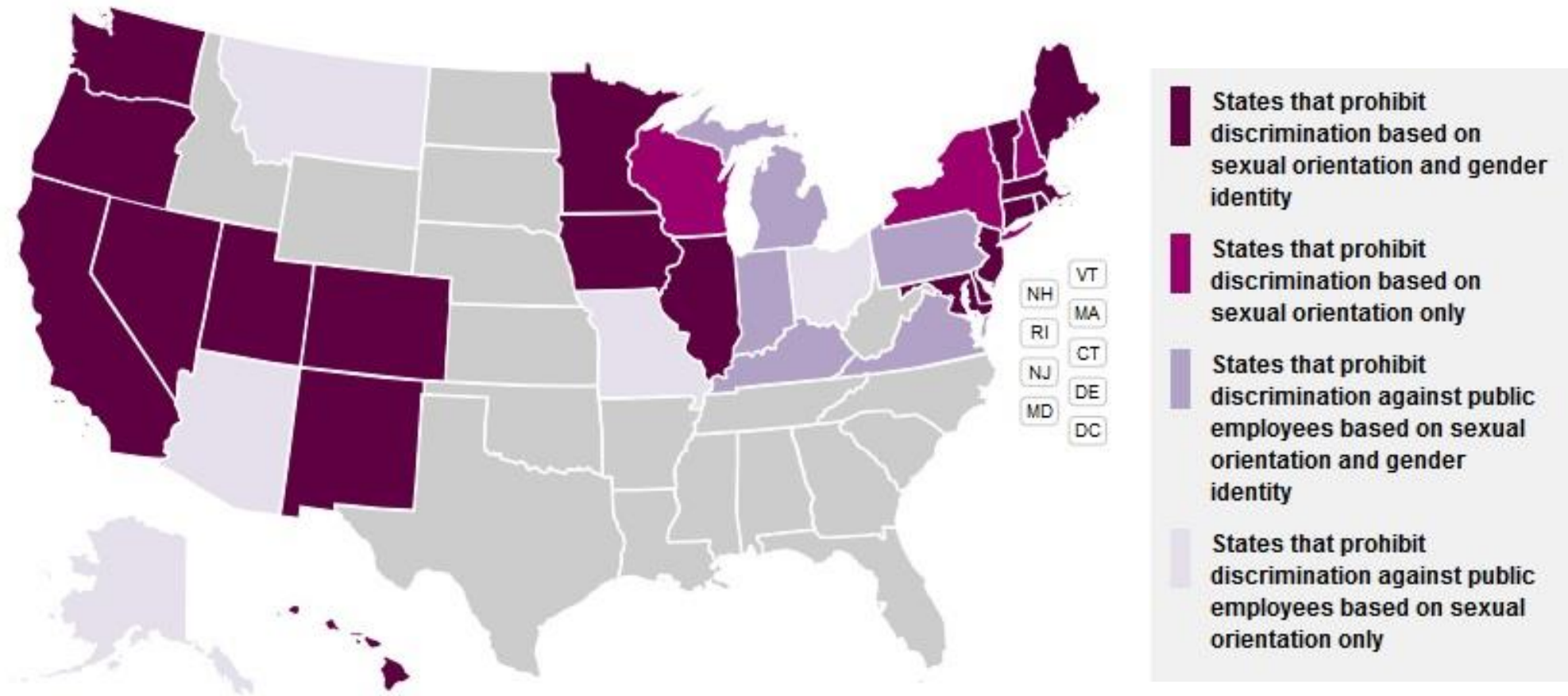
Background

- Some Terms and Definitions
 - Domestic Partner or Civil Union
 - Can refer to either same-sex or opposite sex unmarried partners
 - Many states have some domestic partner or civil union recognition for (both/either) same-sex and opposite sex partners
 - California, Colorado, Hawaii, Illinois, Maine, Nevada, New Jersey, Oregon, Washington, Wisconsin
 - Common law marriage
 - 10 states and the District of Columbia recognize some form of opposite sex “common law” marriage with various requirements
 - Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Rhode Island, South Carolina, Texas, Utah, Washington, D.C.

Questions

- Let's Answer Some of the Big Questions...
 - Does the Obergefell decision require that all states recognize same-sex marriages?
 - Yes
 - Does the decision itself require employers to provide benefits to same-sex spouses?
 - No - however the issue is complicated
 - Fully-insured plans subject to state laws may be required to cover same-sex spouses
 - There are practical limits to the pre-emption protection afforded employers by ERISA (more later)
 - Does Obergefell create a federal “protected class” based on employment discrimination purposes?
 - No – however many states have state employment discrimination laws based on sexual orientation

State Employment Discrimination Laws



© Human Rights Campaign - more information at http://www.hrc.org/state_maps

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ERISA and State Laws

ERISA and State Laws

- ERISA and State Laws
 - ERISA Preemption of state laws
 - ERISA §514:
 - “...the provisions of this title...shall supersede any and all State laws insofar as they may...relate to any employee benefit plan...”
 - Most employers are subject to ERISA
 - Exceptions for some church plans and government entities
 - Most employer welfare plans are subject to ERISA
 - Exceptions:
 - Most workers' compensation, unemployment compensation and payroll practices such as employer self-funded, short-term disability payments are not ERISA plans

ERISA and State Laws

- State Laws
 - State insurance law generally applies to the insurance company (not the employer) and the insurance policies “issued” in that state
 - Applicable state law is not based on employer location or where the employee lives
 - State insurance laws normally apply to everyone covered by that plan regardless of where they live
 - Bottom line for fully-insured plans – If you are not sure which state laws apply to the plan...ask the carrier!

ERISA and State Laws

- State Laws (cont'd)
 - State insurance laws (including eligibility rules)
 - Generally preempted by ERISA for health and welfare plans
 - State laws would clearly not apply to self-funded ERISA plans; such plans are protected from state laws due to the ERISA pre-emption
 - For fully-insured plans, state insurance laws typically apply to the insurance contract even if employer's plan is subject to ERISA
 - State insurance laws that affect fully-insured plans are a "backdoor" way for state law to apply to a fully-insured ERISA plan
 - Other state laws (not insurance laws)
 - Are also generally preempted by ERISA
 - Unlike insurance laws - other state laws may be written to specifically apply only to employees living in that state

ERISA and State Laws

- However...
 - Employers subject to ERISA may try to argue that ERISA pre-emption allows them to continue to deny coverage to same-sex spouses – however, in light of the Obergefell decision, it is likely cases will be brought against these employers under state employment discrimination laws and it is very possible courts will rule in favor of these plaintiffs

Impact on Health and Welfare Benefits

Impact on Benefits

- Residency vs. State of Marriage
 - Prior to Obergefell the impact on benefits discussed below depended on which marriages were “recognized” by federal law
 - The “location of marriage” rule was that the marriage was valid for Federal law purposes based on the location of the marriage, not where the employee lived
 - Now it does not matter – all same-sex marriages (meeting other state requirements such as age), regardless of where they take place, are recognized as valid

Taxes and Benefits

- Federal Tax Treatment of Benefits
 - Already settled after Windsor - “any legal marriage”
- State Tax Treatment of Health Coverage
 - Many states default to federal definition of spouse for state tax purposes
 - Employers will likely see changes to tax law in states that have different tax rules regarding employee benefits
 - After Windsor, benefits to same-sex spouses were treated differently for state tax purposes than for federal tax purposes
 - Employers with employees in these states should consult with their tax advisor and monitor developments
- Other Relationships (Domestic Partners and Civil Unions)
 - Employers who voluntarily provide coverage to domestic partners and employees in civil unions will still need to treat benefits provided to the employee’s partner (not legally married) as taxable income to the employee

Impact on Benefits

- Same-Sex Spouse Eligibility Considerations
 - Documentation of marriage
 - What does the employer currently require of opposite sex marriages?
 - Timing of offer of coverage for newly married same-sex couples
 - Apply same plan rules applicable to newly married opposite sex couples
 - Having different policies opens employer up to claims of discrimination

Impact on Benefits

- COBRA
 - Same-sex spouses (as recognized by federal law) now have full COBRA rights
 - Don't forget to provide initial COBRA notice to newly married same-sex spouses
- HIPAA Special Enrollments
 - HIPAA special enrollment rules require health plan to allow mid-plan year enrollment after certain HIPAA special enrollment events
 - Examples – same-sex spouse loses job, divorce from same-sex spouse, marriage
- Health Savings Accounts (HSA)
 - Same-sex married couples now subject to married couple HSA contribution limits
 - 2015 HSA annual contributions based on HDHP coverage
 - Single HDHP coverage \$3350, Family \$6650
 - Prior to Windsor decision, if each spouse in same-sex marriage carried family HDHP coverage, they could each contribute the full \$6650

Impact on Benefits

- §125 Cafeteria Plans
 - Election change rules
 - Opens up §125 election changes for same-sex spousal events such as marriage, divorce, loss of other coverage, etc.
 - Health FSA
 - Same-sex spouse medical expenses can be reimbursed through employee's health FSA
- Dependent Care Plans
 - Same election change rules as with §125 plans
 - Other spouse-related rules would now apply
 - \$5000 limit on election, same-sex spouse must be working (or looking for work), etc.

Health Reform

- Eligibility for ACA Subsidies
 - Individual's eligibility for subsidies when purchasing coverage through a public exchange is based on household income
 - Same-sex spouse's income will now be considered

Employer Considerations Going Forward

Employer Considerations

- Will employers who offered domestic partner (DP) coverage in the past continue that coverage?
 - Was the motivation to offer DP coverage based on the fact that in the past employees could not enter into same-sex marriages?
 - Now that they can – is DP coverage still necessary?
 - DP coverage presents some administrative challenges (e.g. imputed income)
 - Did the employer offer DP coverage to same-sex and opposite sex couples?

Employer Considerations

- What should employers who do not currently offer same-sex spousal coverage consider now?
 - Employers who wish to continue to deny benefits to same-sex spouses
 - Face likely challenges based on state employment discrimination laws
 - Need to monitor federal legislation around efforts to create a federal discrimination protection
 - If plan is fully-insured, employer should seek professional advice regarding difficulties in setting plan eligibility different than the carrier's eligibility rules

Employer Considerations

- What should employers who do not currently offer same-sex spousal coverage consider now?
 - If the employer wants to extend coverage to same-sex spouses for the first time, when should they make the change? ASAP or next plan year?
 - If plan is fully-insured, work with carrier to see when the carrier is changing its eligibility rules
 - Employers with employees in states with relevant state employment discrimination laws face an increased risk of employment related actions

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