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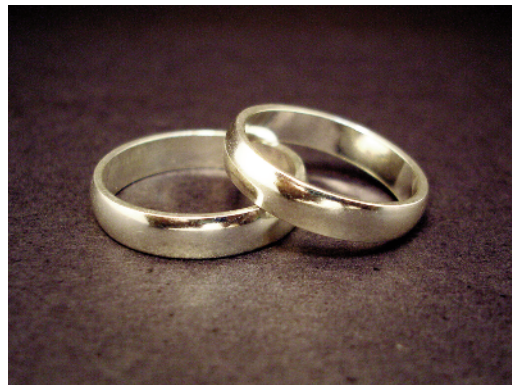
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Same-Sex Marriage: What Happens When an Employee Says, 'I Do'?



In June, the U.S. Supreme Court decision in *United States v. Windsor* stole headlines across America by striking down a key provision of the Defense of Marriage Act (DOMA) as unconstitutional, thereby allowing for federal recognition of same-sex marriages. Differing views have been espoused on these issues. Some celebrated this ruling; others rallied against it. Now that the honeymoon is over, many employers are simply left scratching their heads, wondering, "Does this ruling affect my employees, and, if so, how?"

Before addressing this question, it is important for employers to understand what the Supreme Court's decision did and what it didn't do. The court's decision *did not* make same-sex marriage legal nationwide. Nor did it *require* those states that prohibit same-sex marriage to recognize unions that are legally entered into in other states. In other words, Tennessee may still be free to disallow same-sex marriage while Minnesota permits it.....and a knot tied in Massachusetts might unravel in Kansas. Under this patchwork system, the ruling's impact may vary from state to state, leading to layers of complexity for multi-state employers. Because the court's ruling leaves a variety of yet-to-be-resolved questions, it also is important for companies to keep an eye on the rapidly shifting legal landscape, as additional states continue to join the growing minority that recognize same-sex marriages, and litigants are already gearing up to push for nationwide recognition. In fact, in the wake of the *Windsor* decision, courts from Ohio to Pennsylvania and from Michigan to Missouri are currently grappling with same-sex marriage issues not addressed by the Supreme Court.

What the Supreme Court *did* do was rule that DOMA "violates basic due process and equal protection principles applicable to the Federal Government." And it *did*

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change the *federal* definition of “marriage” and “spouse” – thereby requiring the federal government and federal laws to recognize same-sex marriages legally entered into in those states that authorize them. By this ruling, the federal government will now treat same-sex couples in the same way as other married couples. An interactive map illustrating the current status of same-sex union laws throughout the United States is available [here](#).

As savvy employers know, an employee’s federally-defined marital status can have widespread implications. From health benefits to FMLA leave.....from retirement plans to tax withholdings.....from COBRA coverage to anti-discrimination laws – an employee’s black-tie affair can lead to a lot of red tape.

With same-sex marriages now treated equally under federal law, employers should not be wedded to their existing policies. Instead, companies should revisit, review, and potentially revise, employee handbooks, benefits plans, and other materials, policies, and procedures that may be affected by this historic shift in the law. This is particularly true for companies that operate in, or have employees who reside in, states that recognize same-sex marriage. Particular employment issues to consider include:

- **FMLA Policies** – Qualifying employees may now be entitled to take leave to care for a same-sex spouse, or the child of a same-sex spouse, with a serious health condition. Since the Family Medical Leave Act relies on state law for the definition of a “spouse,” employers operating in states recognizing same-sex marriage may need to expand their leave entitlements. The Department of Labor recently issued an internal memo to staff confirming this position, according to *The Wall Street Journal*. However, it is anticipated that, in the near future, regulations may be revised at a federal level to require all covered employers to provide this federal benefit to same-sex spouses. Employers should also review any applicable state or local leave laws that may already require extending leave protections to same-sex spouses or domestic partners.

- **Health Benefits** – Given that marriage is a “qualifying event” allowing an employee to change benefit elections outside of the open enrollment period, companies should be prepared to address, based on their own plan terms and applicable state law, those requests from employees regarding same-sex spouses. Employees also will receive favorable tax treatment of employer-paid health benefits provided to their same-sex spouse, and may also be eligible for tax-free reimbursements from health savings accounts (HSAs), flexible spending arrangements (FSAs), and health reimbursement arrangements (HRAs). Further guidance regarding the impact that the court's decision may have on employee benefits is available [here](#).
- **COBRA Coverage** – Employers offering group health plans may now be required to provide federal COBRA coverage to a qualified employee’s same-sex spouse and/or the spouse’s children.
- **Retirement Plans** – Same-sex couples may now be eligible to take advantage of certain distribution, deferral, rollover, and other options previously available only to opposite-sex couples.
- **Executive Compensation** – Equity-based and deferred compensation plans often include provisions regarding survivor rights and estate tax implications. If the term “spouse” is defined in executive compensation agreements, it may need to be revised depending on applicable state law.
- **EEO Policies** – Employers might also want to review their equal employment opportunity and non-discrimination policies and consider whether to prohibit discrimination on the basis of sexual orientation. Some employers are already required to do so, as more and more states, cities, and other governmental entities now include sexual orientation as a protected classification. Other employers may wish to do so voluntarily in order to bring their written policies in line with their existing corporate culture and values, promote diversity in their workforce, or simply stay ahead of the legal curve. Multi-state employers in particular may want to revisit these issues in order

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to achieve simplicity and consistency in their employment policies throughout all facilities.

- **Immigration Authorization** – Same-sex spouses may now be eligible for certain immigration spousal categories previously unavailable, including in connection with an employee’s H-1B visa status. Employers should review work authorizations and processes closely and review the newly issued guidance from the U.S. Citizenship and Immigration Services available [here](#).

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The Supreme Court in *Windsor* readily acknowledged the country’s changing attitudes toward same-sex marriage and LGBT issues generally. That landmark decision, coupled with evolving societal attitudes toward same-sex marriage – especially among the younger generations – likely indicates that more legal changes may be on the horizon. As Chief Justice Roberts himself noted, the Supreme Court “may in the future have to resolve challenges to state marriage definitions affecting same-sex couples.” These future events will continue to alter the legal rights and privileges of same-sex couples.....and, in turn, will have a cascading effect in the workplace. ■

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