Insight

IN-DEPTH DISCUSSION

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Marriage with a Capital "M": What Employers Need to Know About the Supreme Court's Decision in *Obergefell v. Hodges*

BY DENISE M. VISCONTI, WILLIAM E. TRACHMAN AND JANE ANN HIMSEL

On June 26, 2015, the U.S. Supreme Court issued what can only be described as a landmark decision, ruling that the Fourteenth Amendment of the U.S. Constitution requires (i) all states to permit marriage between same-sex couples, and (ii) all states to recognize marriages performed in other states, including those between same-sex couples. The opinion effectively confirmed prior judicial decisions declaring state constitutional amendments and statutes unconstitutional and, at the same time, struck down bans against same-sex marriage in the 14 states where such bans remained. As Justice Anthony Kennedy, who authored the majority opinion, wrote:

> 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 greaeter 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.

The decision was close, at 5-4; Justice Kennedy's decision was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. All four dissenting justices—Chief Justice Roberts, and Justices Scalia, Thomas, and Alito—wrote separate dissents.

Issues for Court Consideration

Before the Supreme Court were, in essence, two questions:

> (1) does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? and
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> (2) does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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The questions arose out of a decision from the U.S. Court of Appeals for the Sixth Circuit, which, in November 2014, ruled on two consolidated cases from Ohio: *Obergefell v. Himes*[1] and *Henry v. Himes*. In *Obergefell v. Himes*, James Obergefell and his partner of two decades, John Arthur, traveled to Maryland to get married a few months before John died from complications of a long battle with amyotrophic lateral sclerosis (ALS). They traveled to Maryland because Ohio had both state constitutional and statutory prohibitions against same-sex marriage. Both states also statutorily barred state and local governmental officials from recognizing marriages between same-sex couples performed in other jurisdictions. David Michener, another Ohio resident, wed his partner William Ives in Delaware one month prior to William's unexpected death, and joined as a petitioner in *Obergefell* along with Robert Grunn, an Ohio funeral director who filled out death certificates and who—by virtue of the Ohio statute—was prohibited from listing John's and William's spouses on their death certificates. Similarly, in *Henry v. Himes*, four same-sex couples who entered into valid marriages outside the state of Ohio each sought various marital protections in the State of Ohio, including birth certificates listing both spouses as the parents of their respective children.

In *Obergefell v. Himes*, the federal district court in Ohio ruled that Ohio's marriage recognition bans discriminated on the basis of sexual orientation, and required Ohio to recognize out-of-state marriages between same-sex couples. In *Henry v. Himes*, the same district court re-confirmed that Ohio's refusal to recognize same-sex marriages performed in other jurisdictions was unlawful, and permanently enjoined the State of Ohio from enforcing the Ohio same-sex marriage bans.

The cases were immediately appealed to the Sixth Circuit, where they were consolidated with four other appeals from district court decisions striking down same-sex marriage bans or marriage recognition laws in Kentucky, Tennessee, and Michigan. On appeal, the Sixth Circuit—in a divided decision—reversed the lower courts in all six cases. The Sixth Circuit held that the marriage bans did not infringe upon the fundamental right to marry, stating a "right to gay marriage" was not a right that appeared in the U.S. Constitution, and it was too soon for courts to override citizen votes on the subject.

The Sixth Circuit opinion, which was in direct conflict with rulings of the Fourth, Seventh, Ninth, and Tenth Circuits, set the stage for appeal to the U.S. Supreme Court.

The *Obergefell* Majority Opinion

In writing for the *Obergefell* majority, Justice Kennedy began by outlining the history of the importance of marriage and its evolution over time. Justice Kennedy then outlined the starting point for his decision, the directive in the Due Process Clause of the Fourteenth Amendment: no state shall "deprive any person of life, liberty, or property, without due process of law." That clause, noted Justice Kennedy, has been extended to include "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[2] As the Court noted, the Supreme Court has long held that among these choices is the right to marry; thus, the right to marry is a fundamental liberty protected by the U.S. Constitution.

The Court drew from prior state court decisions, as well as prior decisions of the Court, to outline four central principles as to why the fundamental right to marriage protected by the Fourteenth Amendment applies with equal force to same-sex couples:

- The right to personal choice regarding marriage is inherent in the concept of individual autonomy, and "[t]he nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation."
- The right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. Same-sex couples have the same right as opposite-sex couples to enjoy such an intimate association.
- Protecting the right to marry safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. Excluding same-sex couples from marriage conflicts with the central premise of the right to marry.
- Marriage is a keystone of our social order and, as states have made marriage the basis for an ever-expanding list of rights, benefits and responsibilities, there is no basis upon which to differentiate between same- and opposite-sex couples with respect to this principle.

1 Richard Hodges became the Director of the Ohio Department of Health on August 11, 2014, replacing Interim Director Lance Himes. Therefore Himes—not Hodges—is listed as the defendant in the lower-court action.

2 *Obergefell v. Hodges,* 576 U.S. __ (2015) (Kennedy, J., Slip Op. at 10).

The Court also found the right of same-sex couples to marry also was supported by the Equal Protection Clause of the Fourteenth Amendment. As prior decisions of the Court have made clear, invidious sex-based classifications in the past have denied the equal dignity of men and women. As applied to same-sex couples, the laws banning the right to marry "are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right."[3]

Finally, the Court addressed the full-faith and credit issue of whether states must recognize marriages performed elsewhere. On that issue, Justice Kennedy noted: "[b]eing married in one State but having that valid marriage denied in another is one of 'the most perplexing and distressing complication[s]' in the law of domestic relations."[4] Such disruption caused by having conflicting recognition of a spousal relationship that varied from state to state "is significant and ever-growing."[5]

Hence, the Court held that same-sex couples may exercise the fundamental right to marry in all states. The Court also held that no state may refuse to recognize a lawful same-sex marriage performed in another state.

Understanding the religious objections to same-sex marriage, the Court went out of its way to stress that individual citizens are free to disapprove same-sex marriage in the context of their faith, and to abide by personal principles regarding "the family structure that they have long revered."[6] Acknowledging this First Amendment right for individuals, however, does not mean that a state may "bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex."

The Dissenting Opinions

In a rare move, all four dissenters—Chief Justice Roberts, and Justices Scalia, Thomas, and Alito—drafted separate dissenting opinions. Chief Justice Roberts wrote the main dissent, which was joined by Justices Thomas and Scalia. In that dissent, Roberts argued that "[a]lthough the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not."[7] He concluded by stating:

> If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.[8]

Echoing the Chief Justice, the other dissenters also stressed the argument that the democratic process on the issue of same-sex marriage had worked to date, and that the majority's decision removed a public-policy decision from the broader electorate. In a derisive footnote to his own dissent, Justice Scalia commented that if he had set forth the rationale adopted by the majority, he would "hide his head in a bag."[9]

In a similar vein, the Chief Justice and Justices Thomas and Alito questioned the majority's comments that the First Amendment would continue to protect religious objectors to same-sex marriage. For his part, Chief Justice Roberts noted that the majority's suggestion that "religious believers may continue to 'advocate' and 'teach' their views of marriage," ominously left out the word "exercise" with respect to those religious beliefs.[10] He further noted the possibility, acknowledged by the Solicitor General at oral argument, that some religious institutions may be in danger of losing their tax-exempt status if they discriminate against married same-sex couples.

Justice Thomas, citing amicus briefs filed in the case, argued the decision would have "unavoidable and wide-ranging implications for religious liberty." It is "all but inevitable," argued Justice Thomas, that churches will be confronted with demands to "participate in and endorse civil

3 Slip Op. at 22.

4 Slip Op. at 27.

5 Slip Op. at 28.

6 Slip Op at 27.

7 Roberts, C.J. (dissenting), Slip. Op. at 2.

8 *Id.* at 29.

9 Scalia, J. (dissenting), Slip. Op. at 7, n.22.

10 Roberts, C.J. (dissenting), Slip Op. at 28.

marriages between same-sex couples."[11] In his own separate dissent, Justice Alito expressed his fear that, while individuals opposed to same-sex marriage may be able to "whisper their thoughts in the recesses of their homes," such individuals would be "labeled as bigots and treated as such by governments, employers, and schools."[12] Justice Alito even accused the Court of giving ammunition to those who would vilify objectors to same-sex marriage, by comparing laws denying recognition of same-sex marriage to laws that denying equal treatment for African Americans and women.

Whether religious institutions and religious employers will face consequences for declining to recognize or give equal status to same-sex marriages—even if they maintain a First Amendment right in the abstract to oppose such marriages—is thus likely the next frontier of the legal battle. However, it is important to remember that the Fourteenth Amendment restricts government action, not private action. Therefore, it is not at all clear that private employers must recognize same-sex marriages for all purposes. Indeed, the Supreme Court's decision in *Hobby Lobby*[13] indicates that under the Religious Freedom Restoration Act, a government cannot enforce its laws in a way that impairs an employer's religious freedom (even the religious beliefs of the owners of a for-profit corporation), without a compelling government interest and in the least restrictive manner. Thus, we can expect continued battles over whether employers can discriminate against employees in same-sex marriages in ways that do not otherwise conflict with applicable federal or state law.

The Implications for Employers

While the ink still is drying on the *Obergefell* opinion, one thing is clear: distinguishing between, on the one hand, "marriage," and, on the other hand, "same-sex marriage," no longer is permissible in light of *Obergefell*. Marriage is to be considered marriage for all.

Employers navigating this issue should undertake a review of their policies and benefits plans and make sure they are treating all married couples equally. This is true with regard to not only leave policies and non-discrimination provisions, but also benefit plans, retirement plans, and other benefits offered to spouses of employees. Past practices of, for example, requiring differing forms of proof of marriage, depending upon whether the marriage involved same- or opposite-sex couples, likely no longer will be permissible following *Obergefell*.

Some employers may want to consider whether to reconsider or modify prior practices that afforded benefit coverage for domestic partners. Now that all employees are free to marry their domestic partners (assuming they are not already married to someone else), there may no longer be a need for domestic partner coverage, with its inherent tax and payroll difficulties.

After *United States v. Windsor*, the Internal Revenue Service and Department of Labor issued guidance and requirements for coverage of same-sex spouses, where retirement plans and other benefit plans may have specified recognition of opposite-sex marriages.[14] Employers located in states that have not previously recognized same-sex marriages may have ignored this guidance. Those employers should review their plans now and make sure that their plans are compliant with the law as now interpreted. In this regard, while it is clear that tax-qualified retirement plans must recognize same-sex marriages for purposes of spousal rights, it is not at all clear that same-sex marriages must be recognized for plan-based rights that are not mandated by law, such as the right to spousal coverage under welfare benefit plans.

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11 Thomas, J. (dissenting), Slip. Op. at 15.

12 Alito, J. (dissenting), Slip. Op. at 7. Particularly in light of the dissenting Justices' concerns about backlash against religious persons, employers also must be mindful of their Title VII and state law obligations to attempt to offer reasonable accommodation to those whose religious beliefs create conflicts with their work duties if such accommodations can be made without creating undue hardship on the employers' businesses.

13 *See* Denise M. Visconti, Jane Ann Himsel, Darren E. Nadel and William E. Trachman, *Supreme Court Rules in Favor of Hobby Lobby, Opens Door to Religious Objections to Statutes Covering Employers*, Littler Insight (July 7, 2014).

14 *See* William Hays Weissman, Susan Katz Hoffman, GJ Stillson MacDonnell and Finn Pressly, *IRS Provides FICA Reporting, Withholding, and Other Guidance Regarding Married Same-Sex Couples*, Littler Insight (Oct. 7, 2013); Susan Katz Hoffman, *Treasury Department Issues Guidance on Application of Same-Sex Marriage Ruling to Retirement Plans*, Littler Insight (Apr. 9, 2014).