SEYFARTH SHAW LLP
ATTORNEYS

Management Alert

U.S. Supreme Court Decides Landmark Same-Sex Marriage Decisions That Will Significantly Impact U.S. Employers

United States v. Windsor

Today, a divided U.S. Supreme Court, in a 5-4 *decision*, struck down the federal Defense of Marriage Act ("DOMA") as unconstitutional, holding that it was a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. *U.S. v. Windsor*, 570 U.S. ___, 13-26 (2013).

The import of today's decision is that same-sex couples in states where they are permitted to marry, should they choose to avail themselves of that right, will also be considered married for purposes of the more than 1,100 federal statutes and all of the federal regulations which confer rights, benefits and obligations based on marital status.

The case is significant from an employer's perspective because in those states which recognize same-sex marriage, employers will no longer have to treat their married heterosexual employees differently than their married same-sex employees for purposes of providing federal rights, benefits and obligations.

Factual And Legal Background

The *Windsor* case arose because two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York, a state that deemed their Ontario marriage to be valid. When Spyer died in 2009, she left her entire estate to Windsor, who sought to claim the marital estate tax exemption for surviving spouses. She was barred from doing so, however, by DOMA, which—in Section 3 of that statute—defined, for purposes of all federal statutes and all other regulations or directives covered by its terms, the word "marriage" to mean "a legal union between one man and one woman as husband and wife" and the word "spouse" only to a person of the opposite sex who is a husband or wife." Windsor paid $363,053 in estate taxes, and then sought a refund, which the Internal Revenue Service denied. Windsor then filed suit to challenge the constitutionality of Section 3 of DOMA, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment.

When the suit was pending, the Department of Justice declined to defend the constitutionality of Section 3 of DOMA. In response, a Bipartisan Legal Advisory Group ("BLAG") of the U.S. House of Representatives voted to intervene in the litigation to defend the law. The District Court permitted the intervention, and ruled on the merits that Section 3 of DOMA was unconstitutional, and ordered the United States to pay Windsor a refund (with interest). The Second Circuit Court of appeals affirmed the decision, and the U.S. did not comply with the judgment.

The U.S. Supreme Court Decision

Today, the Supreme Court affirmed the judgment in Windsor's favor by striking down Section 3 of DOMA. Justice Kennedy delivered the Opinion of the Court in which Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Roberts filed a dissenting opinion, and Justice Scalia also filed a dissenting opinion in which both Justice Thomas and Justice Roberts joined in part. Justice Alito filed his own dissenting opinion, in which Justice Thomas joined in part.

In its majority decision, the Justices first had to cross the hurdle of whether they even had jurisdiction to hear the merits of the case, given BLAG's necessary intervention in the litigation, to defend the constitutionality of the law. The Court found that it had jurisdiction to consider the merits of the case, holding reasoning that, "here the United States retains a stake sufficient to support Article III jurisdictional requirements and the prudential limits on exercise which are essentially matters of judicial self-governance…Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction." *Id.* at *8.

On the merits, the Court held that DOMA is unconstitutional as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment. The Court explained that "[b]y history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate states…[b]y seeking to injure the very class New York seeks to protect, DOMA violates basic due process and equal protection principles applicable to federal government. The Constitution's guarantee of equality must at the very least mean that bare congressional desire to harm a politically unpopular group cannot justify separate treatment of that group." *Id.* at *14. In essence, the Court found that it frustrates New York's objective of eliminating inequality by writing inequality into the entire United States Code.

In so ruling, the majority applied a "careful consideration" standard of review, finding that "[i]n determining whether a law is motivated by improper animus or purpose, discriminations of an unusual character especially require careful consideration. DOMA cannot survive under these principles." *Id.* at *20.

The Supreme Court decision specifically addressed the burdens DOMA had imposed on same sex married couples, including in the employment relationship, reasoning:

> Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. See 5 U. S. C. §§8901(5), 8905. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. See 11 U. S. C. §§101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15). It forces them to follow a complicated procedure to file their state and federal taxes jointly. Technical Bulletin TB-55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010); Brief for Federalism Scholars as Amici Curiae 34. It prohibits them from being buried together in veterans' cemeteries. National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008).

Id. at *23. They added,

> DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers' same-sex spouses. See 26 U. S. C. §106; Treas. Reg. §1.106-1, 26 CFR §1.106-1 (2012); IRS Private Letter Ruling 9850011 (Sept. 10, 1998). And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security."

Id. at *24.

Finally, the decision states, "the federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others." *Id.* at *26.

Notably, the Justices writing the majority opinion made clear that the opinion and its holding are confined to lawful same-sex marriages in those states that recognize them. *Id.*

In their dissents, Justice Robert and Justice Scalia both felt that the court lacked jurisdiction to even review the decisions of

the Court below, and they both found that Congress acted constitutionally in passing DOMA. Roberts added that " interests in uniformity and stability amply justified Congress's decision to retain the definition of marriage that, at that point, had been adopted by every state in our nation and every nation in the world." Id. at *1 (Roberts dissent). In Justice Scalia's dissent, he also adds that the SCOTUS should have applied rational basis review to the DOMA and he chided the majority for failing to set forth the appropriate level of scrutiny to laws restricting marriage to a man or a woman.

Hollingsworth v. Perry

The Supreme Court also issued an *opinion* in the *Hollingsworth v. Perry,* 570 U.S. ___ (2013) today.

In 2008, California state voters passed a ballot initiative known as Proposition 8, amending the California State Constitution to define marriage as a union between a man and a woman. In response, same-sex couples who wish to marry filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and naming California's Governor and other state and local officials responsible for enforcing California's marriage laws as defendants. The officials refused to defend the law, so the U.S. District Court allowed petitioners—the initiative's official proponents—to intervene to defend it. After a bench trial, a U.S. district court declared Proposition 8 unconstitutional and enjoined the public officials named as defendants from enforcing the law. Those officials elected not to appeal, but petitioners did. The Ninth Circuit certified a question to the California Supreme Court: whether official proponents of a ballot initiative have authority to assert the State's interest in defending the constitutionality of the initiative when public officials refuse to do so. After the California Supreme Court answered in the affirmative, the Ninth Circuit concluded that petitioners had standing under federal law to defend Proposition 8. On the merits, the court affirmed the District Court's order.

Today, the Supreme Court determined that the Petitioners did not have standing to appeal the District Court's order. Noting that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of the first instance," the Court determined that petitioners only interest was to vindicate the constitutional validity of a generally applicable California law; accordingly, their action was insufficient to confer standing because—once Proposition 8 was approved—it became a duly enacted law in California, and petitioners had no role in the enforcement of that law. *Hollingsworth v. Perry*, 560, U.S. at *7.

The Court noted, "we have never before upheld the standing of a private party to defend the constitutionality of a state statue when state officials have chosen not to. We decline to do so here." *Id*. at *17. The Court then held that it—and Ninth Circuit Court of Appeals—was without jurisdiction to hear the proponents appeal of the district court determination that Proposition 8 was unconstitutional.

Notably, the Supreme Court acknowledged that the parties did not contest that respondents had standing in the District Court. Therefore, the Ninth Circuit will be required to lift the stay it issued, and the district court's injunction will stand.

Implications For Employers

There are significant implications for employers following these decisions. As an initial matter, while the *Windsor* case clearly declares Section 3 of DOMA unconstitutional, the practical administration of more than 1,000 federal rights as they pertain to same-sex couples will be a process that employers (and employees) will watch unfold, following issuance of this historic decision. Certainly, employers will need to watch the Obama Administration and government agency action very carefully as the impact of the *Windsor* becomes clear.

For California employers, the impact of the *Perry* decision is not yet known. The case has been remanded to the Ninth Circuit, which will likely dismiss the case based on the Supreme Court ruling. After that, the district court ruling stands; however, the legal impact of the lower court is also unknown. The lower court ruling is widely-speculated to be far reaching, as compared to limited to the parties in the case, but there could be challenges regarding the scope and impact of that ruling. For now, we understand that California's Governor, Jerry Brown, has—based on an advisory opinion from the California Attorney General, Kamala Harris— directed the California Department of Public Health to advise the state's counties that they must begin issuing marriage licenses to same-sex couples in California as soon as the Ninth Circuit confirms the stay is lifted.

At present, 11 states and the District of Columbia recognize same-sex marriage (Connecticut, Delaware [effective July 1, 2013], Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Vermont and Washington). In 2012, the legislature in New Jersey passed a freedom to marry bill, and work is now underway to override the governor's veto. New Mexico explicitly respects out-of-state marriages of same-sex couples, while seven states now offer broad protections short of marriage, including Colorado, Hawaii, Illinois and New Jersey, which allow civil unions, Oregon and Nevada offer broad domestic partnership, and Wisconsin has more limited domestic partnership.

Based on this patchwork of state laws relating to relationship recognition for same-sex couples, the two cases have far-reaching effects on the employment relationship. Because same-sex marriages and/or same-sex relationships are recognized under some states' laws, multi-state employers are faced with a non-uniform mixture of state and federal law that impacts their provision of benefits and employment protections. For example, the *Windsor* decision impacts the interpretation of the following federal laws and rights impacting employees:

- The Employee Retirement Income Security Act ("ERISA")—a federal law— provides certain protections to spouses (e.g., a spouse is the beneficiary under retirement plans unless the spouse consents to another beneficiary);
- The cost of health benefits provided by employers to their employees (and family members) is generally exempt from federal income taxation under sections 105 and 106 of the Internal Revenue Code; and,
- The federal Family Medical Leave Act provides leave to care for a "spouse" with a serious health condition.

For this reason, employers in states where the law is impacted by the *Windsor* decision will likely face a flood of questions regarding whether and how employers are required to recognize lawful same-sex marriages. Indeed, whether a person is married with a "spouse" impacts numerous employment-related issues, for example:

- Whether and how employer policies or benefit plans that contain a definition of "spouse" should be applied to same-sex couples;
- Whether state or federal COBRA continuation coverage for "spouses" applies;
- Whether an employer is required to recognize same-sex marriages from other states in applying employer policies or benefits plans; and,
- Whether state laws prohibiting discrimination or granting employment protections based on "marital status" are applicable.

The Supreme Court's decision will also have a substantial impact on the design and operation of employee benefit plans. The Seyfarth Shaw employee benefits department is preparing an analysis of the impact on benefit plans which will be issued this week. Stay tuned for more information as we digest these opinions, and their implications for employers.

By: *Lynn A. Kappelman* and *Laura J. Maechtlen*

Lynn A. Kappelman is located in Seyfarth Shaw's Boston office and *Laura J. Maechtlen* is located in the firm's San Francisco office. If you would like further information, please contact your Seyfarth attorney, Lynn Kappelman at *lkappelman@seyfarth.com* or Laura Maechtlen at *lmaechtlen@seyfarth.com.*