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One Minute Memo®

The Supreme Court Grants Review In Two Cases With Direct Implications For Employers

On Friday, December 7, 2012, the Supreme Court of the United States ("SCOTUS") granted review in two cases which may have direct implications for employers in states which recognize same-sex marriage, and even those states that do not. See 568 U.S -- (December 7, 2012).

United States v. Windsor (Case No. 12-307) is a federal challenge to the constitutionality of Section 3 of the 1996 Defense of Marriage ACT ("DOMA")—an Act of Congress—which defines marriage under federal law as the union of one man and one woman. The case was brought on behalf of Edie Windsor, who had to pay an exorbitant tax bill upon the death of her partner where every heterosexual widow would not. On review, the SCOTUS will determine: (1) whether Section 3 of DOMA violates equal protection under the 5th Amendment of the federal constitution; (2) whether the government's agreement with the lower court's decision deprives the Court of jurisdiction to hear and decide the case; and (3) whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in this case. If a party doesn't have standing to bring an appeal, the court cannot hear an appeal.

So far, four federal district courts and two appeals courts have struck down the DOMA statute as unconstitutional. Although other cases were presented to the SCOTUS for review, *Windsor* is the only case for which the SCOTUS has yet granted review.

The second case, ***Hollingsworth v. Perry*** (Case No. 12-144) is a federal challenge to California's state ballot initiative—the 2008 amendment to the California Constitution known as Proposition 8, which eliminated the pre-existing right of same-sex couples to marry in California granted by California's highest court. The SCOTUS reviews Proposition 8 after the Ninth Circuit Court of Appeals declared it to be unconstitutional, and will review two questions: (1) whether the Fourteenth Amendment of the U.S. Constitution bars California from defining marriage as between one man and one woman; and (2) whether the proponents of Proposition 8 have standing to pursue the case under Article III of the U.S. Constitution. The question about standing is raised in the Proposition 8 case because the proponents of the initiative, and not the state defendants named in the lawsuit, are the party seeking Supreme Court review.

At present, nine states and the District of Columbia recognize same-sex marriage (Connecticut, Maine, Maryland, Massachusetts, Iowa, New Hampshire, New York, Vermont, Washington). New Mexico and Rhode Island explicitly respect out-of-state marriages of same-sex couples, while nine states now offer broad protections short of marriage. Delaware, Hawaii, Illinois, New Jersey, and Rhode Island allow civil unions, while California, Oregon, and Nevada offer broad domestic partnership laws akin to marriage. In contrast, thirty-one states have amended their constitutions to affirmatively prohibit same sex marriage.

Based on this patchwork of state laws relating to relationship recognition for same-sex couples, the two cases now on review with the SCOTUS may have far-reaching effects on the employment relationship. Because same-sex marriages and/or same-sex relationships are recognized under some state's laws, a federal law withholding marital benefits from some lawful marriages, but not others, creates a non-uniform mixture of state and federal law that impacts multi-state employers provision of benefits and employment protections. For example, as a result of DOMA:

- 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) but these protections currently do not apply to same-sex spouses, even if an employee is legally married in one of the nine states that recognize such a union;
- 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, however, under DOMA, this exemption does not apply to a same-sex spouse unless the spouse is also a tax "dependent" of the employee; and,
- A same-sex spouse does not have the same entitlement to federal FMLA leave for his or her spouse's illness as his heterosexual peers.

Similarly, because the *Hollingsworth* decision would allow the Supreme Court justices to decide whether the U.S. Constitution's guarantee of equal protection means that states may not limit the right to marry to heterosexuals, the SCOTUS ruling could have far-reaching impact. Employers in states where the law is impacted by the SCOTUS decision could face a flood of questions regarding whether and how employers are required to recognize 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 SCOTUS decision to review the *Windsor* and *Hollingsworth* cases will certainly raise employee awareness regarding issues related to same-sex marriage. This may cause employees to raise questions related to employer policies or benefit plans. In addition, it could increase workplace tensions for some employers. Accordingly, employers are well advised to review their policies and ensure timely and appropriate training regarding discrimination and harassment.

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