

## Weston Hurd Employment Alert - July 2015

# Employment Implications of the Supreme Court's Same-Sex Marriage Decision

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On June 26, 2015, the U.S. Supreme Court issued a decision in *Obergefell v. Hodges* legalizing same-sex marriage nationwide. The case before the Supreme Court arose out of a decision from the U.S. Court of Appeals for the Sixth Circuit which had reversed decisions of lower district courts from Kentucky, Tennessee, Michigan and Ohio which had struck down same-sex marriage bans or marriage recognition laws. The Sixth Circuit reversed these decisions, which placed their ruling in direct conflict with multiple other circuits, thus setting the stage for the appeal to the U.S. Supreme Court.



The Supreme Court ruled that the Fourteenth Amendment of the U.S. Constitution required (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.

In Justice Kennedy's opinion, he cited the directive of the due process clause of the Fourteenth Amendment that no state shall "deprive any person of life, liberty, or property, without due process of law." Justice Kennedy noted the due process clause has been extended to include "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." One of these choices is the right to marry and, therefore, the right to marry is a fundamental liberty protected by the U.S. Constitution. The opinion also noted the right of same-sex couples to marry was supported by the Equal Protection Clause of the Fourteenth Amendment and 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." Finally, the Court addressed the full-faith and credit issue and found that states must recognize same-sex marriages performed elsewhere.

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

What is the implication for you as an employer? One thing is clear: distinguishing between "marriage" and "same-sex marriage" is no longer permitted in light of this decision.

Employers should review and update their policies and benefit plan documents to make sure they are treating all married couples equally. This includes leave policies and non-discrimination policies, FMLA, benefit plans, retirement plans, and other benefits offered to spouses of employees. Payroll information and administrative procedures should also be updated to be certain that same-sex marriage is recognized. The employer should update language used in the policies so that "spouse" is used in a gender-neutral way. One of the benefits of this decision is that employers can make human resources and benefit policies uniform regardless of in what states they operate.

Some employers may want to consider whether or not to continue affording benefit coverage for domestic partners. With this decision, benefits are uniform for all married couples. Thus, same-sex couples who want the same benefits as other spouses could be required to get married in order to receive them.

In the private employment sector federal laws currently do not prohibit discrimination on the basis of sexual orientation or gender identity. However, some states have adopted laws prohibiting discrimination on the basis of sexual orientation or gender identity although Ohio is not one of these states. While the decision did not address the LGBT movement issues, with this decision stating "the fundamental liberties protected by the Fourteenth Amendment extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity," it could be anticipated that additional laws governing sexual orientation and gender identity are not far off. Employers in Ohio should keep in mind that Ohio recognizes public policy wrongful discharge employment claims and therefore should exercise the same caution in disciplining and discharging LGBT employees as they do with any other protected group. As always, discipline should be based on work performance which should be documented.

If you have any questions, comments or concerns about this Employment Alert, please contact Deirdre Henry or your Weston Hurd attorney.



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