The *Obergefell* Decision and Employers

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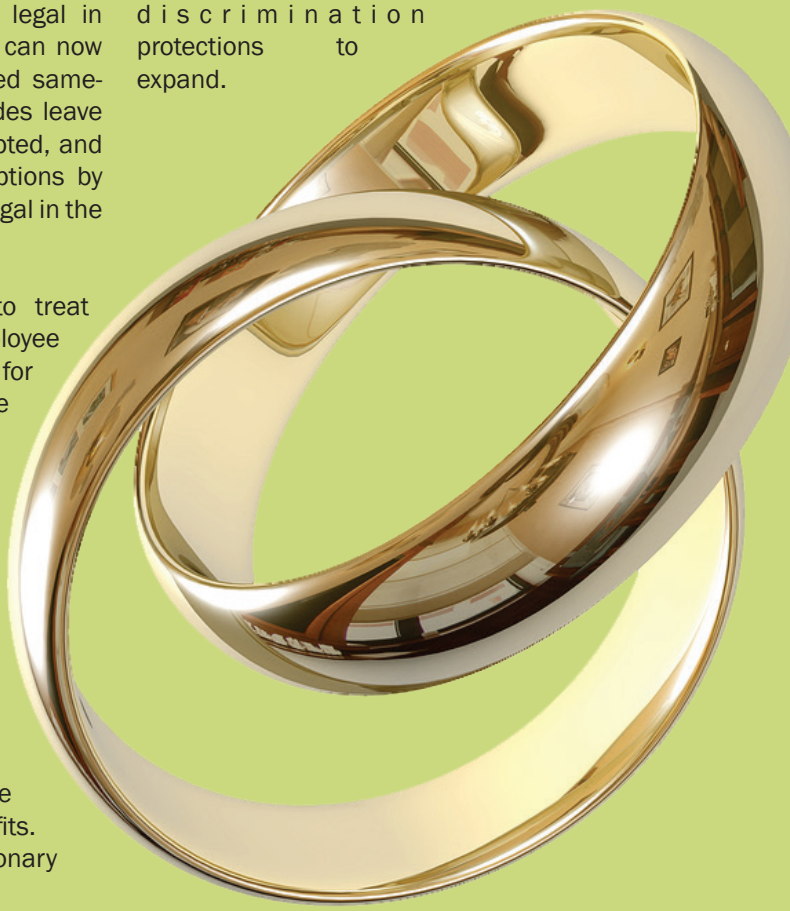
The recent United States Supreme Court decision in *Obergefell v. Hodges* significantly altered the legal landscape with respect to same-sex marriages, finding that the Fourteenth Amendment to the United States Constitution requires all states to both license in-state same-sex marriages and recognize valid same-sex marriages performed out-of-state. The Court did not, however, go so far as to reach issues such as discrimination in employment or public accommodation. So, while legal same-sex marriage is the law of the land, those newly-married couples may face legal uncertainty when it comes to discrimination in public accommodations or their place of employment, unless contravening state law applies. That said, there are still several ways that the Obergefell decision and its counterpart, *United States v. Windsor,* will affect employers and employees.

As an initial matter, *Windsor* changed how federal benefits applied to same-sex couples. Specifically, the Department of Labor published a final rule in February that defined a "spouse" for purposes of the Family and Medical Leave Act ("FMLA") to include same-sex spouses if their marriage was legal in the place of celebration. Thus, employees can now take FMLA leave to care for sick or injured same-sex spouses. In addition, FMLA now provides leave for employees when a child is born or adopted, and Obergefell opened the door to more adoptions by same-sex married couples, which are now legal in the state of Kentucky.

The real issue for employers is how to treat same-sex spouses for purposes of employee benefits. Many employers offer benefits for employee spouses, but these benefits are not mandatory under state or federal law. Private business benefits plans covered by the Employee Retirement Income Security Act ("ERISA") are required to provide qualified joint and survivor annuities ("QJSA") as a form of retirement benefits in the case of all married employees. While the terms "spouse" and "marriage" include all legally-married same-sex spouses, ERISA allows private employers that choose to sponsor an employee health plan to determine who is an "eligible dependent" for the provision of health benefits. However, benefit plans that include exclusionary language and offer benefits only to opposite-sex spouses may come into conflict with what is now the legal definition of the word "spouse" in Kentucky, and employers should be wary of continuing policies that discriminate between same-sex and opposite-sex couples for the purposes of employee benefits.

Obergefell, Title VII of the Civil Rights Act of 1964, and Kentucky state law do not explicitly include same-sex individuals as a protected class for purposes of employment discrimination. However, employers should still be cautious and consider any local laws that prohibit discrimination in employment or public accommodations on the basis of sexual orientation or gender identity. In fact, the Equal Employment Opportunity Commission ("EEOC") has already taken the position that any discrimination against LGBT employees is impermissible sex discrimination based on Title VII.

Although it will take some time for the legal consequences of Obergefell to become clear, employers should expect discrimination protections to expand.



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