Supreme Court Same Sex Marriage Decision and DOL Overtime Expansion – What Employers Need to Know Today

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On June 26, 2015, the U.S. Supreme Court decided the landmark case of *Obergefell v. Hodges*. The case involved whether the Constitution requires a state to issue a marriage license to two people of the same sex and must recognize a same-sex marriage performed out-of-state. The Court held that "same-sex couples may exercise the fundamental right to marry in all States. It follows that the Court also must hold-and it now does hold-that there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." Thus, the Court has ruled that same sex marriage is now legal in all states. Given that Michigan previously banned same-sex marriage, this ruling will impact HR administration moving forward.

What does this ruling change for employers?

- ***FMLA***: Based on *Obergefell* and recent Department of Labor regulations defining "spouse" under the Family and Medical Leave Act of 1993 (FMLA), more employees will be able to take FMLA-protected leave to care for a same-sex spouse with a serious health condition. Employers must treat a same-sex "spouse" under the FMLA equally with opposite sex spouses.

- ***State Taxation***: Michigan employers should provide same-sex employees an opportunity to change their marital status and elections for purposes of state-tax withholding and to include their same-sex spouse's children as dependents. Additionally, same-sex spousal health insurance premiums will no longer be subject to state income taxes. Owners of pass-through entities, such as a sole proprietorship, partnership, or Subchapter S corporation, may now be able to deduct the cost of same-sex spouse benefits to the same extent as for an opposite-sex spouse.

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• ***Employee Health Plans***: The Supreme Court's new decision applies only to states and their political subdivisions; it does not apply directly to other employers. This decision requires the state, when acting as an employer, to offer the same group health benefits to same-sex spouses that are offered to opposite-sex spouses. Entities that contract with the government may also have a contractual obligation to refrain from this type of discrimination.

What has not changed?

• The ruling does not require religions to condone same sex marriage or perform same sex weddings.

• It does not add "sexual orientation" as a protected classification to non-discrimination laws that do not already include it.

• No law currently requires a private employer that sponsors a self-insured group health plan to offer health coverage to spouses, or to offer the same group health benefits to same-sex spouses that are offered to opposite-sex spouses.

• Private employers providing group health benefits through a fully-insured plan are not required to offer group health benefits to spouses.

What questions remain unanswered by the *Obergefell* decision?

Employee Health and Welfare Plans: *Obergefell* has raised questions regarding group health plans. Employers are currently given a measure of leeway by insurers to define the group of individuals who will be eligible for coverage under their group health insurance policy. At this time, it appears that whether insurance policies issued by private insurance companies must offer equal benefits to same-sex spouses and opposite-sex spouses will vary from state-to-state. Depending on how an existing insurance policy defines the term "spouse," and on how the State Insurance Commissioner interprets the state insurance laws, a private insurer may be required to offer equal same-sex spousal coverage at some point in time, but that has yet to be determined.

However, private employers that fail to offer the same group health and welfare benefits to same-sex spouses that it offers to opposite-sex spouses face a greatly increased risk of discrimination claims by employees and by the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating on the basis of sex. Private employers with fewer than 15 employees are generally not subject to federal nondiscrimination laws, but will be subject to Michigan's Elliott-Larsen Civil Rights Act, which prohibits discrimination based on sex.

We expect the EEOC to issue guidance soon regarding whether it violates Title VII for an employer to offer group health coverage to a same-sex spouse that is not equal to coverage offered to an opposite-sex spouse. There is also currently a discrimination claim before the EEOC in Michigan dealing with this issue. For self-insured group health plans sponsored by a church or certain

other religious organizations, whether they risk a discrimination claim if they do not offer health coverage to an employee's same-sex spouse will depend on whether the plan sponsor is subject to federal laws prohibiting employment discrimination based on sex. Churches are generally exempt, but not all religiously-affiliated employers are exempt from these requirements in all circumstances.

Employee Retirement Benefits: Previously, qualified retirement plans sponsored by private employers were required to treat same-sex spouses the same as opposite-sex spouses in all ways except one. They were required to provide a qualified joint and survivor annuity form of benefit and a qualified preretirement survivor annuity benefit for a same-sex spouse, and were required to treat a same-sex spouse the same for purposes of plan loan waiver provisions, hardship distributions, and required minimum distribution rules. Private employers were not, however, required to extend voluntary (non-statutory) death benefits to same-sex spouses. Now private employers that draw this distinction face an increased risk of discrimination claims, as discussed above. Retirement plans sponsored by a state or local government employer are now required by the Constitution to treat same-sex spouses equally, as are many employers that contract with the government.

Employers should also consider the *Obergefell* decision in the context of quickly changing legal rules regarding LGBT employees in the workforce. While the decision did not involve the definition of "spouse" for workplace purposes, the EEOC and other administrative agencies continue to broaden protections for LGBT workers. Butzel Long will keep employers informed of this quickly changing area of law.

New Proposed DOL Regulations to Expand Overtime Coverage for "Salaried" Employees—Increase Salary Basis Test to $970 per Week

The Department of Labor is unveiling long-threatened new regulations that would expand overtime to many currently exempt employees by increasing the "salary basis" threshold. Essentially, for an employee to be exempt from minimum wage and overtime requirements, the employee must perform duties that fit into a designated exemption under the Fair Labor Standards Act, and must be paid on a salaried basis. Most exemptions, in addition to various "duties" tests to be met, currently require employees to be paid at least $455 per week or $23,660 per year. Under the new proposed rules, the salary basis test would increase to $970 per week, or $50,440 per year. It is estimated this would impact up to five million U.S. workers and could have a significant impact on businesses paying salaries less than $970 per week. The rule would take effect next year if fully implemented.

Details are still to come and there will be numerous legal challenges to the new rule. Butzel Long will keep clients advised on this issue as it develops.

For any questions regarding the *Obergefell* decision or the new proposed DOL regulations, please contact Lynn McGuire or Brett Miller.