



WHAT THE SUPREME COURT'S GAY MARRIAGE DECISION MEANS FOR EMPLOYERS



Ashley R. Griffith

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On June 26, 2015, a narrow majority (5-4) of the United States Supreme Court ruled that same-sex couples have a constitutional right to marry. *Obergefell v. Hodges*, No. 14-556 (2015). While some States already had recognized such marriages, the Supreme Court ruled that all States must issue marriage licenses to same-sex couples on the same basis as opposite-sex couples and must recognize the marriages of same-sex couples who were legally married in other States. In sum, the Supreme Court held, "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that liberty."

While the Supreme Court did not address the effect on its decision with respect to employers, there are a few obvious implications. Here are some points employers should bear in mind as they navigate the new landscape.

A. Family Medical Leave Act (FMLA)

One of the most significant, recent change is how employers will administer FMLA leave. Even before the Supreme Court's decision, however, the U.S. Department of Labor had already issued a final rule amending the definition of "spouse." Pursuant to the Final Rule, effective March 27, 2015, an employee is eligible for leave to care for a same-sex spouse regardless if they live in a State that recognized their marital status. Because *Obergefell* made it unconstitutional to deny same-sex couples marriage licenses or refusal to recognize valid same-sex marriages performed in another State, employers will not have to encounter same-sex couples who have

married elsewhere but reside in Tennessee—a State that previously denied marriage licenses to same-sex couples. In sum, the Supreme Court decision validated the Department of Labor's actions and now same-sex couples are eligible for FMLA benefits.

B. Health Care Benefits

Employers who offer health insurance benefits to employees and their spouses can expect insurance companies to conform their insurance policy forms to the new definition of marriage. For employers who self-insure, the plan language will determine whether the plan will provide benefits in same-sex marriage situations. For example, if an employer's plan offers health benefits to spouses, without defining the term "spouse," the plan will be interpreted to offer the same benefit to all married employees, whether same-sex or opposite-sex. By contrast, if the employer's plan defines "spouse" in accordance with the traditional definition of opposite-sex marriage, then no benefits will be available in the same-sex marriage situation. This may subject an employer to litigation. The EEOC has stated that it intends to make lesbian, gay, bi-sexual, transgender issues a top priority in the upcoming years.

Keep in mind, however, that an employer is not required to offer health insurance to spouses, even if the employer is subject to the Patient Protection Affordable Care Act (PPACA). In any event, if employers chose to offer coverage to spouses, they should do so in a uniform manner.

C. What About Domestic Partners?

This is an interesting issue, and the U.S. Supreme Court's ruling could produce some surprising results. A bit of history will provide context. For the past ten years or so, some employers offered "domestic partnership" coverage for gay employees

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and their partners as a means of providing equal benefits to couples who could not legally marry. Other employers offered coverage more broadly to unmarried domestic partners, regardless of sex, recognizing that some employees simply prefer not to marry but still wish to provide benefits to their partners. Employers that offered unmarried partnership benefits to both gay and straight couples may continue to do so, but employers that extend partnership benefits only to same-sex couples may begin to phase them out and cover only spouses. A policy of continuing to offer domestic partnership benefits only to same-sex couples (and excluding opposite-sex couples who choose not to marry) may make an employer vulnerable to a reverse discrimination lawsuit.

Editor’s Note: Next Steps

Although Obergefell certainly had a significant societal impact, one could argue that Obergefell’s impact was minor for employers. In fact, many of the changes for employers occurred after the United State Supreme Court’s ruling in United States v. Windsor, 133 S.Ct. 2675 (2013). In Windsor, the Supreme Court held that the Defense of Marriage Act (DOMA) was unconstitutional. In sum, the Windsor decision redefined the word “spouse” as it applied to Federal laws, such as FMLA, the Internal Revenue Code, and COBRA.

In any event, the decision in Obergefell should remind employers to maintain uniform, consistent policies. Every human resources department should inventory its policies and procedures, conduct training, and make necessary adjustments in response to the Supreme Court’s decision. As a starting point, employers should do the following:

- *Consider whether to use gender-neutral terminology (“spouse,” as opposed to “husband” or “wife”);*
- *Review your procedures so administrative personnel know how to deal with an employee who requests insurance and other benefits for a same-sex spouse;*
- *If the company currently offers benefits to unmarried partners, consider whether to amend or continue that policy;*
- *If the company previously offered benefits only to married couples, be prepared when an employee contacts human resources to add a same-sex spouse;*
- *Remember, marriage (like the birth of a child) may be an event that allows an employee to sign up for insurance benefits outside of the normal enrolment periods; and*
- *Review FMLA procedures, and instruct staff to be sensitive to employees with same-sex spouses (and the couple’s children).*



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DOL PROPOSES TO INCREASE SALARY THRESHOLD FOR OVERTIME EXEMPTION: WILL IT RAISE WAGES OR CUT HOURS?



Jerome D. Pinn

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On June 30, 2015, the U.S. Department of Labor (DOL) announced a notice of proposed rulemaking (NPRM) which proposes to *more than double the current salary threshold for the executive, administrative, and professional (EAP) exemptions to overtime*. The proposal aims to plug a gap that some claim has caused many lower-level managers to be unfairly deprived of overtime when they work more than 40 hours. Skeptics say the new rule likely will decrease the number of hours many employees are allowed to work, replacing full-time workers with part-timers, raise costs, and make it more difficult for hourly workers to climb the ladder to management positions. The public has 60 days to submit comments on this proposal. (Read the full text at <http://www.dol.gov/whd/overtime/NPRM2015/OT-NPRM.pdf>.)

Since 1940, regulations implementing the "white collar" exemption to the normal rule -- that workers are entitled to be paid time-and-a-half overtime when they work more than 40 hours -- generally have required that three tests be met for the exemption to apply:

- (1) The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test");
- (2) The amount of salary paid must meet a minimum specified amount (the "salary level test"); and
- (3) The employee's job duties must primarily involve executive, administrative, or professional EAP duties as defined by the regulations (the "duties test").

Under the current regulations, to qualify for the exemption, an executive, administrative, or professional employee must be paid at least \$455 per week (\$23,660 per year for a full-year worker). The Wage Hour Division (WHD) proposes to set the initial, standard salary level for the EAP exemption at a point equal to the 40th percentile of earnings for full-time salaried workers: \$921 per week, or \$47,892 annually for a full-year worker in 2013. Then, in order to prevent the salary levels from becoming outdated, WHD proposes to include in the regulations a mechanism to automatically update the salary and compensation thresholds on an annual basis using either a fixed percentile of wages or the consumer price index for urban consumers (CPI-U). Assuming two-percent growth between the first quarter of 2015 and the first quarter of 2016, the Department projects that the 40th percentile weekly wage in the Final Rule would likely be \$970, or \$50,440 for a full-year worker. WHD's proposal is intended to severely curtail the need to apply the duties test by restricting the number of employees who meet the salary threshold.

The new rule will not compel employers to raise the pay of all EAP workers. Instead, it is likely that many employers will shift salaried workers to hourly status, with hourly rates that approximate their former salaries, and control costs by restricting overtime. Salaried, nonexempt pay will remain a viable option for employers interested in controlling overtime expense in States where the practice is permitted (not in California). This allows an employer to pay a nonexempt employee a guaranteed salary for all hours worked, plus an overtime premium of an additional ½ the regular rate for each overtime hour. This method is desirable where an employer wants to contain costs by discouraging employees from shifting work from regular hours to overtime, since the employee's effective rate of earnings per hour actually declines the more overtime hours are worked. If either of these methods is adopted, the employer will, of course, be required to make and preserve records of hours worked for these employees.

Aside from causing many salaried, managerial employees to take perceived "demotions" to hourly status, the proposed changes will raise the first rung on the ladder of success for many workers -- a lot. If the starting threshold for managerial employees is increased from \$455/week (about \$9/hour over 50 hours) to \$921/week (about \$18.42 over 50 hours), the employer is making more than twice the investment in the employee. Some employers are not going to be willing to give inexperienced first-timers an opportunity to move up at these rates.

The proposed salary level increase will raise management issues as well. It will be necessary to maintain records of hours worked for more employees, and some with managerial responsibilities may resent being required to clock in and out. This may create an incentive to work more overtime. An employee earning \$22.50 per hour will earn \$33.75 per hour overtime and a 60-hour week will cost the employer \$1,575. And overtime can be hard to control. For example, a

nonexempt employee who checks his or her work e-mail outside of normal working hours may claim overtime for that activity. It is nearly impossible to prevent an employee with a smart phone from checking e-mail without locking them out of the system after hours.

The current Administration would undoubtedly like to see the new wage-hour salary rules go into effect before the end of calendar year 2016. A great deal of planning and budgeting will be necessitated by these new salary rules as employers have a variety of optional approaches to take, including converting salaried personnel to hourly, going to a salaried, non-exempt status, reducing the number of exempt personnel, and others. Further, the secondary effects of these options will have to be considered, including the impact on the need or desire for certain supervisors to receive salaried benefits.

SUPREME COURT ALLOWS EMPLOYER TO REDUCE RETIREE HEALTHCARE BENEFITS



Jerome D. Pinn

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Many employers provide healthcare benefits not only for active employees, but also for retirees. While pension benefits are normally thought of as vested, by and large employers have a great degree of leeway to design health and welfare plans according to their own wishes. However, once the welfare plan is written, courts will enforce the terms of the plan.

As healthcare costs have significantly increased, many employers have required employees to begin contributing to the cost of their healthcare benefits. Some retirees, in turn, have argued that their healthcare costs cannot be increased but are instead “vested” at the time of their retirement. It appears that the resolution of this issue largely depends on the terms of the particular plan.

The Supreme Court addressed this issue in a case involving free healthcare benefits for retirees under an expired labor contract. *M&G Polymers USA, LLC v. Tackett*, 202 LRRM 3201 (Jan. 26, 2015). The lower court seemed to indicate that in the absence of intrinsic evidence to the contrary, provisions of the labor contract indicated intent to vest retirees with lifetime benefits that could not be changed. The lower court noted the absence of a termination provision specifically addressing retiree benefits, and inferred from this situation intent to vest those retiree benefits for life.

The Supreme Court reversed, finding that traditional principles of contract law which applied to retiree plans also applied to collective bargaining agreements. One of those traditional principles is that courts should not construe ambiguous writings to create lifetime promises. The Court cited the principle favorably that, because vesting of welfare benefits is not required by law, an employer’s commitment to vest such benefits is not to be inferred lightly; the intent

to vest must be found in the plan documents and must be stated in clear and express language.

Editor’s Note: The Supreme Court ruling will give employers more leeway to modify or reduce healthcare benefits provided to retired workers. However, this issue remains one of the interpretation of a contract, and the primary result of the case is that the courts must apply ordinary contract principles, without presumptions, to determine whether retiree healthcare benefits are vested.



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