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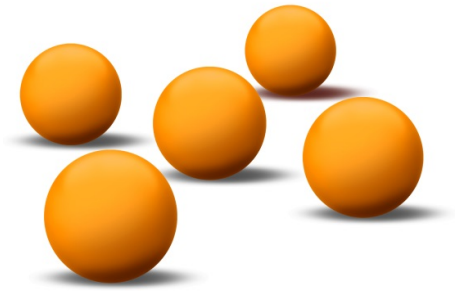
Same-Sex Marriage Issues for Employers *By Debra Mackey*



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In the case of Searcy v. Strange, 2015 WL 328825 (S.D. Ala Jan. 25, 2015), the federal Court for the Southern District of Alabama held that Alabama's ban on same-sex marriage is unconstitutional. Alabama news headlines have been filled with same-sex marriage talk ever since, and the Alabama Supreme Court has weighed in on the issue. The status of the Searcy case is up in the air, with conflicting views on the constitutional issues involved. So, what are the implications of Searcy for Alabama employers?

First, let's briefly review how we got to where we are today.

The federal Defense of Marriage Act (DOMA) (Pub.L. 104-199, 110 STAT. 2419, enacted September 21, 1996, 1 USC § 7 and 28 USC § 1738C) defined marriage for *federal* law purposes as a legal union between one man and one woman as husband and wife, and defined spouse as a person of the opposite sex who is a husband or wife. These definitions were struck down as unconstitutional in the case of U.S. v. Windsor, 133 S.Ct. 2675 (2013). DOMA also provides that states are not required to recognize a same-sex marriage that occurs in another jurisdiction. This part of DOMA still stands. As a result, legally married same-sex couples are entitled to the same *federal* rights as are legally married opposite sex couples, but *states* are not required to recognize a same-sex marriage from another jurisdiction.

In the aftermath of Windsor, federal agencies (such as the Internal Revenue Service and Department of Labor) issued guidance stating that the agencies will apply a "state of celebration" rule to determine the legality of a marriage. Under the state of celebration rule, the marriage will be considered legal for federal law purposes if it was legal when and where celebrated (*e.g.*, the location of the marriage ceremony), regardless of the couple's state of residence or domicile. Windsor does not apply to state law, but Searcy does. The Searcy Court entered a temporary stay on its holding, which stay was lifted causing it to become effective on February 9, 2015. The Alabama law invalidated by Searcy had provided: no marriage license shall be issued in Alabama to parties of the same-sex; the state of Alabama shall not recognize as valid any same-sex marriage that occurred in another jurisdiction; and the state of Alabama shall not recognize as valid a common law marriage between same-sex parties. Chief Justice Roy Moore of the Alabama Supreme Court on February 8 ordered all probate judges in the state not to issue marriage licenses to same-sex parties. Many probate judges did, many did not. Then, on March 3, the Alabama Supreme Court ordered a halt to the issuance of same-sex marriage licenses in the state. Any marriages performed during the intervening period however, are unaffected.

On April 28, 2015, the U.S. Supreme Court hears oral arguments on a set of same-sex marriage cases consolidated as Obergefell v. Hodges. This case will answer the following same-sex marriage questions nationwide: does the U.S. Constitution require a state to issue marriage licenses to same-

sex parties; and does the U.S. Constitution require one state to recognize a same-sex marriage lawfully performed in another state. The Supreme Court should rule on this case by June 30, 2015.

So, for employers, what does all of this mean? Let's look at this in two contexts: general employment law and employee benefits.

General employment law. It is important to note that there is no Alabama or federal law that prohibits discrimination based on sexual orientation. In a very real sense, this means that nothing has changed. However, the landscape is changing. Since 2011 the EEOC has issued decisions involving same-sex claims by federal employees, finding that the same-sex claims are protected by Title VII's prohibition against discrimination based on sex (*i.e.*, gender). Historically, these types of claims were not protected because they were seen as based on sexual orientation. Title VII prohibits discrimination based on sex, but not sexual orientation. Just last year, a federal court in Washington allowed a same-sex marriage based claim to proceed. In Hall v. BNSF Railway Company, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), Title VII and Equal Pay Act claims survived a motion to dismiss as claims based on sex, not sexual orientation. The employer's health plan covered spouses but defined marriage as between a man and a woman. The Court said the claim was that the male plaintiff, who was married to a male, was treated differently than his female coworkers who were married to males — which the Court characterized as a distinction based on sex. The case was dismissed after a private settlement. Prior to the settlement, the employer voluntarily changed the terms of its health plan to extend coverage to same-sex spouses. While the cases seem to be trending in the direction of recognizing same-sex marriage claims as a sex based claim, there is no such binding precedent applicable to employers in Alabama.

A very recent change in FMLA regulations (effective March 27, 2015) modifies the definition of spouse to include a same-sex spouse, and replaces a state of residence rule with the state of celebration rule to determine the legality of a same-sex marriage. This means that the FMLA will apply to all legally married couples (opposite sex, same-sex, common law) — except in four states. On March 26, 2015 a federal court in Texas issued a temporary injunction to prevent the enforcement of the new regulation in Texas, Arkansas, Louisiana and Nebraska. A hearing is set for April 14, 2015. This expansion of FMLA rights applies to employers in Alabama now.

Employee benefits. Turning to employee benefits, we must make a distinction between qualified retirement plans and all other benefits. Qualified retirement plans are the benefit most directly affected by the same-sex marriage issues under Windsor. Qualified retirement plans include pension (defined benefit), money purchase, profit sharing, 401(k), and 403(b) plans that are subject to ERISA (generally, all such plans except those having governmental or church status). The Internal Revenue Code and ERISA mandate certain survivor benefits and related rights for the spouse of a qualified retirement plan participant, such as qualified joint and survivor annuities, qualified pre-retirement survivor annuities, spousal consent to benefit elections and designations of beneficiary, as well as rights under qualified domestic relations orders. After the Windsor decision, qualified retirement plans are required to extend survivor benefits and related rights to same-sex spouses or else fall out of tax and ERISA compliance.

There is no federal mandate to provide health plan coverage or other welfare benefits to a spouse (but if spousal health plan coverage is provided, federal COBRA rights extend to them). Most

employer sponsored group health plans do extend coverage to spouses. Currently neither federal law nor Alabama law require that same-sex spouses be covered, even if opposite sex spouses are covered. Whether coverage is provided is solely a function of the terms of the plan (or insurance policy in the case of an insured plan). Frequently, especially prior to Windsor, spouse and marriage were not defined in these plans, even though they provided spousal coverage. In that case, whether a same-sex spouse is included in the word "spouse" is a question of interpreting the plan language. This issue has not been litigated. The Searcy case does not require that coverage be offered to same-sex spouses either. Beginning in 2015, federal health care reform requires insurance carriers offering nongrandfathered insured plans to offer the employer the option of extending coverage to same-sex spouses in any policy that covers opposite sex spouses. Whether to extend coverage to a same-sex spouse is the decision of the employer. Self-insured plans remain free to establish their own eligibility terms.

Aside from the narrow mandates for qualified plans, there are no benefit mandates for spouses — opposite sex or same-sex. When spouses are covered under health and other welfare plans, it is important to know how spouse and marriage are defined and it may be necessary to add a definition in order to avoid uncertainty and minimize litigation risks. Employers should review any employment policies involving spouses as well as plan language on this issue. Despite the lack of a legal mandate to extend coverage to same-sex spouses, employers are moving in that direction for a variety of reasons — employee morale, ease of administration, a sense of social responsibility, or a desire to avoid litigation.

Stay tuned. The Supreme Court will provide more answers this summer.

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