



Beyond DOMA; More Changes Coming For Employers?

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Last summer, the United States Supreme Court's decision to overturn a portion of the Defense of Marriage Act (DOMA) in *Windsor v United States* prompted Michigan employers to reevaluate their handbooks and benefits plans as they relate to spousal benefits for same sex spouses. The *Windsor* decision may only be the beginning of potential changes to employment laws regarding same sex marriages and sexual orientation. Lawsuits pending in Michigan and other states challenging state bans on same sex marriage could dramatically impact human resources practices.

THE WINDSOR DECISION

Before *Windsor*, the federal Defense of Marriage Act (DOMA) defined the term "marriage" to exclude same sex marriages, and defined the term "spouse" to exclude same sex partners for purposes of federal laws such as ERISA, FMLA, HIPAA and the Internal Revenue Code. The *Windsor* Court invalidated those federal definitions and held that the individual states, not the federal government, have the authority to define such terms. *Windsor* left Michigan free to define marriage in the Michigan Marriage Amendment solely as "the union of one man and one woman".^[1] Similarly, *Windsor* left nearby Illinois free to marry same sex spouses under Illinois state law. Post *Windsor*, the federal government will recognize the Illinois marriage for purposes of federal law, even if the couple lives in Michigan.

The impact of *Windsor* on Michigan employers has been complicated. Sticking with our Michigan-Illinois example, if a Michigan employer has an ERISA plan which generally offers medical benefits to "spouses" *without any reference to gender*, then the employer must likely offer the medical benefit to the employee's same sex spouse if the couple was lawfully married in Illinois.^[2] The Michigan employer will not have to offer the employee FMLA leave if his same sex spouse becomes ill, because (at least for now) the Department of Labor regulations have an additional requirement that the marriage be recognized in the employee's state of residence. As difficult as it has been to keep abreast of these complex rules, employers should be aware that more

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changes may be on the way.

MORE CHANGES ON THE HORIZON?

Michigan's ban on same sex marriage is being actively challenged in two pending federal district court cases. In *Bassett v Snyder*, five public employees assert that the Michigan Marriage Amendment violates the United States Constitution's guarantee of equal protection because it prevents them from obtaining public employment benefits for their same sex spouses. In *DeBoer v Snyder*, a female couple is asserting that they cannot adopt children under the state adoption statute because the Michigan Marriage Amendment prohibits them from marriage. The couple argues that the Michigan Marriage Amendment violates the Equal Protection Clause of the United States Constitution. One or both of these challenges to the Michigan Marriage Amendment may land in the United States Supreme Court.

Federal cases challenging other states' bans on same sex marriage are even closer to being considered by the United States Supreme Court. The outcome of those cases may impact the Michigan ban. A federal district court in Utah recently struck down the Utah same sex marriage ban on the grounds that it violated both the Due Process and Equal Protection Clauses of the United States Constitution. Just last week, a federal district court in Virginia issued what may be the strongest rebuke of a state marriage ban. Like the Utah court, the Virginia court held that marriage is a fundamental right, which can only be interfered with by a state law which is narrowly tailored to serve a compelling state interest. If the United States Supreme Court adopts the reasoning of these federal district courts, then it is likely that Michigan's ban on same sex marriage will eventually be struck down as unconstitutional.

It remains unclear how the United States Supreme Court will rule on these issues, but it seems highly likely that the highest Court will face these issues soon. The employment law and employee benefits attorneys of Foster Swift are available to discuss your business' human resources practices to make sure they comply with current laws, and that you are ready to respond to any changes in the law.

[1] Article I Section 25 of the Michigan Constitution.

[2] Michigan Employers are not obligated to offer any spousal medical benefits. Employers may also define "spouses" narrowly to specifically exclude same sex spouses.