



UTAH

EMPLOYMENT LAW LETTER

Part of your Utah Employment Law Service

HRHero.com
A division of BLR®

Ryan B. Frazier, Editor
Kirton McConkie

February 2014

WORKPLACE ISSUES

Legalization of same-sex marriage in Utah will affect employers

by Ryan B. Frazier

Traditionally, marriage has been defined in the United States and in the state of Utah as a legal relationship between a man and a woman. In 1996, Congress passed the Defense of Marriage Act (DOMA), which allowed states to refuse to recognize same-sex marriages granted under the laws of other states. It also defined marriage as a legal union between one man and one woman. Several states enacted similar laws limiting marriage to one man and one woman. In 2004, Utah voters passed a referendum defining marriage that way.

In recent years, same-sex marriage has taken center stage and become one of the most controversial topics in the nation. Over time, same-sex relationships have gained acceptance, resulting in same-sex marriages being permitted in an increasing number of states. Many states have enacted legislation redefining marriage to include same-sex unions.

*Recent court decisions also have had a substantial impact on the legal landscape in this area. In 2013, the U.S. Supreme Court declared key provisions of DOMA unconstitutional in *United States v. Windsor*. Then, in December 2013, the U.S. District Court for the District of Utah struck down Utah's definition of marriage as being only between a man and a woman, legalizing same-sex marriage in the state. That decision, if upheld on appeal, will have an impact on employers' responsibilities. Employers should keep a vigilant eye on this rapidly evolving area of law and the ramifications it may have on their duties to their employees.*

Same-sex marriage in Utah

In 2004, almost 66 percent of Utah voters approved a ballot referendum that amended the Utah Constitution to define marriage as a legal union between a man and a woman only. Same-sex marriage wasn't permitted under this definition. That changed on December 20,

2013, when Utah became the 18th state where same-sex marriages are legal.

On that day, U.S. District Judge Robert J. Shelby ruled that Utah's constitutional amendment was unconstitutional. Specifically, the court ruled that the amendment violates same-sex couples' rights to due process and equal protection guaranteed by the U.S. Constitution. Following that ruling, some Utah counties immediately began issuing marriage licenses to same-sex couples, and many same-sex couples were promptly married. It has been reported that more than 1,300 marriage licenses were issued to same-sex couples after Judge Shelby's decision.

The state of Utah appealed the district court's ruling to the U.S. 10th Circuit Court of Appeals (whose rulings apply to all Utah employers). The 10th Circuit refused to stay, or delay the implementation of, the decision while the appeal runs its course. On January 6, 2014, the U.S. Supreme Court stayed Judge Shelby's ruling pending the appeal, halting the issuance of marriage licenses to same-sex couples in Utah.

The 10th Circuit has set short deadlines for briefing. It is unknown whether the 10th Circuit will agree with the district court. Regardless of how the appellate court rules, the issue likely will be appealed to the U.S. Supreme Court. Interested parties throughout the country will closely watch how the case proceeds through the courts. The impact of a Supreme Court decision will be felt across the nation, and the Court's ruling undoubtedly will influence, one way or another, future challenges to state laws banning or limiting same-sex marriage.

The district court's ruling and the ensuing same-sex marriages have ramifications for employers. If upheld,



Kirton McConkie is a member of the *Employers Counsel Network*



the court's decision will have an impact on the application of several employment laws. It will also affect the administration of employee benefits. This article analyzes the implications of the ruling in the employment context.

Same-sex marriages performed before the stay

As we noted, the U.S. Supreme Court stayed the district court's ruling, halting the issuance of marriage licenses to same-sex couples until the appeals have been decided. However, there are mounting questions about the status of the more than 1,300 same-sex marriages performed before the stay took effect. Utah has stated that it will not recognize the marriages for purposes of benefits provided under state law pending further court action. By contrast, the federal government has decided to recognize the marriages for now.

On January 10, 2014, Attorney General Eric Holder issued the following statement:

For purposes of federal law, [Utah's same-sex] marriages will be recognized as lawful and considered eligible for all relevant federal benefits on the same terms as other same-sex marriages. These families should not be asked to endure uncertainty regarding their status as the litigation unfolds. In the days ahead, we will continue to coordinate across the federal government to ensure the timely provision of every federal benefit to which Utah couples and couples throughout the country are entitled—regardless of whether they are in same-sex or opposite-sex marriages.

Obviously, there is a lot of confusion and speculation about whether the marriages will be considered valid and how the law will be applied to the couples who were recently married in Utah. An employer that employs a spouse in one of these same-sex marriages is presented with a host of issues. If you are confronted with employment issues involving one of the newlyweds, you should consult with your legal counsel about your duties.

FMLA rights

If upheld, the district court's ruling will have an impact on how employers apply the Family and Medical Leave Act (FMLA). Among other things, the FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave during a 12-month period to care for a spouse with a serious health condition. The FMLA also allows eligible employees to take military caregiver leave to care for a spouse who is an eligible servicemember or veteran with a serious illness or injury sustained or aggravated during active military duty. It also provides for leave for a qualifying exigency related to a spouse's active duty in the armed forces in a foreign country. Utah

doesn't have any requirements beyond what the FMLA requires.

The FMLA regulations define a covered "spouse" as "a husband or wife as defined or recognized under state law for purposes of marriage *in the state where the employee resides*" (emphasis added). Guidance from the U.S. Department of Labor (DOL) has confirmed that only employees residing in a state that recognizes same-sex marriage can take FMLA leave to care for same-sex spouses. Accordingly, a same-sex couple lawfully married in one state isn't entitled to leave if they reside in a state that doesn't recognize same-sex marriage. For now, pending the outcome of the appeal, same-sex married couples residing in Utah are probably entitled to FMLA leave.

Tax implications

If the ruling is upheld on appeal, same-sex couples will be able to file tax returns as married individuals. On August 29, 2013, the IRS announced that same-sex marriages that are legal in the jurisdiction where they were performed would be recognized for federal tax purposes. The state of Utah has taken the position that it will accept state tax returns for same-sex married couples filing as married that were filed before the stay of the district court's ruling was entered. However, the state will not accept tax returns for same-sex couples filing as married after the stay was put in place.

Until the appeals are completed and the stay is lifted, the federal government and the state will likely treat the 1,300 marriages performed before the stay differently. Same-sex couples will probably be able to file their federal taxes as married individuals. On the other hand, they will probably not be able to file their state tax returns as married persons. Employers should consult with legal counsel and tax advisers about how to treat same-sex marriages for tax purposes until the stay is lifted or all the appeals are decided.

Employee benefits

Employers aren't required to offer health benefits to spouses. If an employer elects to provide such benefits, it must review its benefit plans and insurance policies to ensure that they comply with the current status of the law. Retirement benefits are more complicated. Spouses are granted various rights in many retirement plans. Retirement plans also need to be reviewed. On September 18, 2013, the DOL issued guidance stating that the terms "spouse" and "marriage" in the Employee Retirement Income Security Act (ERISA) and related regulations include same-sex marriages performed in any state that recognizes such marriages regardless of where the couple currently resides.

This area of the law hasn't been fully developed in light of the recent changes. As alluded to above, the type

of plan you have may affect how the same-sex marriage ruling affects the benefits you provide. Further, some entities, such as churches, are exempt from many, but not all, ERISA provisions. Employers need to ensure that their employee benefits comply with currently applicable law. They should consult with legal counsel about the ramifications of the district court's decision on ERISA-covered benefits.

Employee benefits offered by the federal government to its employees that are tied to marital status are no longer denied to same-sex couples who are legally married in Utah. That includes health and retirement plan benefits.

Immigration

After DOMA was declared unconstitutional, the U.S. Citizenship and Immigration Services (USCIS) and the U.S. State Department quickly implemented procedures to accept and process family-based visa petitions and applications for same-sex spouses and their family members if their same-sex marriages were valid in the state in which they were performed. In light of the district court's ruling, petitions and applications from

spouses in same-sex marriages legally performed in Utah will be processed.

Further, certain immigration benefits are tied to marital status. That includes the ability of non-U.S. citizens to become citizens when they marry U.S. citizens. Non-U.S. citizens who are legally married to same-sex spouses may now become U.S. citizens.

Future of same-sex marriage in Utah

The future of same-sex marriage is unclear. The state of Utah has appealed the district court's ruling to the 10th Circuit. As we noted, the issue will likely end up before the U.S. Supreme Court. There is no way to predict how the courts will ultimately rule.

The outcome of the appeal and the legality of same-sex marriage in Utah will have legal consequences for employers. Given the impact of same-sex marriage on employment laws and employee benefits, employers need to monitor legal developments in this evolving area of the law. We will continue to provide updates on the topic as information becomes available.

You can keep up to date in this rapidly evolving area of the law by contacting the author at rfrazier@kmclaw.com or 801-323-5933. ♣