Supreme Court Once Again Tackles the ACA, Same-Sex Marriage

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Obergefell v. Hodges: Supreme Court Says “I Do” to Same-Sex Marriage
Background
2013 US v. Windsor Ruling

• Court struck down Section 3 of DOMA as unconstitutional

• Under *Windsor*, where a same-sex couple is legally married under state law, a same-sex spouse must be recognized as a spouse for purposes of federal law

• Subsequent IRS and DOL guidance clarified that favorable tax treatment of spousal benefit coverage extends to all same-sex couples legally married in any jurisdiction with laws authorizing same-sex marriage (state of celebration rule)
Background
Question of State Law Remained

- *Windsor* did not answer questions of same-sex marriages under state law – i.e., can a state ban same-sex marriage; must a state recognize same-sex marriages performed in other states?

- A stream of litigation nationwide considered this issue – with a majority of (but not all) cases striking down state-based same-sex marriage restrictions as unconstitutional
The Decision
Constitutional Right to Marry

• 5-4 ruling, with Justice Anthony Kennedy writing for the majority
• Marriage as a fundamental right
• Due process and equal protection clauses prevent the deprivation of this right to same-sex couples
• States must both:
  1. permit same-sex marriage and
  2. recognize same-sex marriages performed in other states
The Decision
Effect on Health and Welfare Plans

• Public sector employers must treat a same-sex spouse like opposite-sex spouses for purposes of spousal benefits

• To the extent state insurance law requires coverage of same-sex spouses where spousal coverage is offered, a plan cannot purchase insured coverage that excludes same-sex spouses
The Decision
Effect on Health and Welfare Plans (cont.)

• Self-insured plans in the private sector retain flexibility in deciding whether or not to offer same-sex spousal coverage, as ERISA preempts state and local laws that would otherwise affect plan administration.

• Nevertheless – risk of Title VII sex discrimination claim if the employer provides benefits to opposite-sex spouses but not same-sex spouses.
  – State and local nondiscrimination laws, contractual provisions may also be in play.
The Decision
Effect on Health and Welfare Plans (cont.)

• Simplified benefits administration, since all legally married spouses – same-sex and opposite-sex alike – treated in a uniform manner under state law
  – Timing/effective date/retroactivity unclear, for now; could vary from state to state

• Employers no longer required to impute state income for same-sex spouse tax benefits, such as health insurance
  – Employers with “gross up” practices can discontinue those practices
  – Timing of changes and retroactive tax adjustments up to states

• Consider impact on:
  – Plan documents
  – Section 125 qualified status changes
  – HIPAA special enrollment rights
What’s Next
Review Current Benefit Practices and Plan Documents

• What about domestic partner coverage?
  – Is there still a need to offer DP coverage?

• With the issue of same-sex marriage settled, now is a good time to take a holistic look at plan eligibility provisions – taking into account factors such as:
  – Employee attraction and retention policies
  – Employee populations
  – Corporate culture
  – Relevant state law
Poll #1

Does your company offer domestic partner coverage?

A. No
B. Yes, to same-sex couples only
C. Yes, to same-sex and opposite-sex couples
Poll #2

Following the Supreme Court’s ruling, are you contemplating changes to domestic partner coverage?

A. Yes
B. No
C. Not sure
High Court Says “I Do” to Same-Sex Marriage

Today, in a 5-4 decision, the Supreme Court ruled that same-sex couples have a constitutional right to marry. The Court held that the 14th Amendment’s equal protection and due process clauses guarantee this right, and thus require all states to permit and recognize same-sex marriages. The outcome of this historic case is certainly significant in terms of social policy and has important consequences for some employee benefit plans.

Background

In the 2013 decision of United States v. Windsor, the Supreme Court declared unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which limited marriage to a union between one man and one woman under federal law. (See our July 12, 2013 FYI In-Depth.) As a result of the decision, for federal law purposes, the terms “spouse” and “marriage” now include same-sex spouses. That is, under federal law, employee benefits provided to legally married individuals are treated the same regardless of the gender of the individuals involved.

The Windsor decision, however, did not address the treatment of same-sex marriages for purposes of state law. A steady stream of litigation around the country has considered the issue. The majority of courts have struck down state same-sex marriage restrictions, finding them unconstitutional under the 14th Amendment. (See our FYI In-Depth from April 27, 2015 for a discussion of the litigation.) In contrast, the US Court of Appeals for the Sixth Circuit upheld same-sex marriage bans in Michigan, Ohio, Kentucky and Tennessee, overturning the decisions of the lower federal courts in those states.

With the conflict in the circuits, the Supreme Court took up this issue to answer two specific questions: does the 14th Amendment require a state to permit same-sex marriage and does it require a state to recognize those marriages legally performed in another state?

The Decision

Today, the Supreme Court ruled that same-sex couples have a constitutional right to marry. Justice Anthony M. Kennedy, writing the majority opinion, said that marriage is a fundamental right inherent in the liberty of the person, and under the 14th Amendment’s due process and equal protection clauses, same-sex couples may not be
King v. Burwell: Marketplace Subsidies Remain Available
The Background
ACA Marketplaces

• The ACA called for each state to establish an “exchange” or “marketplace”

• Exchange for individuals to purchase affordable health coverage

• If a state did not establish its own marketplace by the 1/1/14 deadline, the federal government established a federally facilitated marketplace (FFM) on the state’s behalf

* In Utah the federal government will run the Marketplace for individuals, while Utah will run the small business (SHOP) Marketplace

** Hawaii will switch to FFM for 2016 open enrollment.

*** Arkansas, Delaware, and Pennsylvania has received conditional approval to establish a State-based Marketplace
The Background
A Dispute Over Four Words

- Individuals must have minimum essential coverage – or face a tax penalty
- To help with the purchase of minimum essential coverage, qualified individuals can receive a low-income subsidy for coverage bought through a marketplace “established by a state”
- IRS regulations said this subsidy also applies in the FFMs
- Litigants argued “established by a state” means that the subsidies are only available in state-based marketplaces – and not the FFMs
- Had Supreme Court agreed, millions would have lost their subsidy, severely disrupting the individual insurance market
The Decision
A Win for the Obama Administration

- 6-3 ruling, with Chief Justice John G. Roberts writing for the majority
- Reasoning that Congress passed the ACA “to improve health insurance markets, not destroy them,” the Court interpreted disputed language to refer to any marketplace – including FFMs
- Context, broader structure of ACA key
- Found Congress could not have intended the “death spiral” that would have resulted from the unavailability of subsidies in the FFMs
- Sharply worded dissent
What’s Next?
Congress in the Wake of *King v. Burwell*

- Enthusiasm for total repeal/replace of ACA has waned
  - Might be an additional effort using reconciliation budget procedure
  - President will veto any wholesale changes to ACA (and probably most others as well)
  - Could be some opportunities for small changes on funding bills, other “must pass” legislation
What’s Next?
Congress in the Wake of *King v. Burwell* (cont.)

- **Issues with significant support**
  - ACA 40% excise tax repeal
  - Streamline ACA reporting
  - Change ACA definition of full-time employee
  - Repeal ACA medical device tax

- **Additional issues**
  - Repeal ACA employer mandate
  - Eliminate Transitional Risk Reinsurance Premiums
What’s Next?
Key Issues in Regulatory Agencies

• Eliminate “clarification” of individual cost-sharing (OOP) limit in family coverage
  – Congressional support for withdrawal
• Second stage of Cadillac tax “guidance” from IRS/Treasury
• Regulatory guidance still to come – non-discrimination for insured plans (and probably self-funded, too)
  – Hoping for help on Service Contract Act Employees
• Expect that EEOC will soon issue proposed reg on GINA, following recent proposal on ADA
What’s Next?
For Employers, in the Meantime

• Employer mandate
• Information reporting
• Planning for the Cadillac tax
• Embedded self-only out-of-pocket maximum limits
Poll #3

In thinking about what’s next for employers as far as ACA compliance, select the topics that are big areas of concern to your company.

A. Employer mandate
B. Information reporting
C. Cadillac tax
D. Embedded self-only out-of-pocket maximums
High Court Upholds ACA Subsidies in Federally Facilitated Marketplaces

In a 6-3 decision authored by Chief Justice John G. Roberts, the US Supreme Court held today that low-income subsidies are available to offset the cost of coverage purchased in federally facilitated marketplaces (FFMs). For individuals receiving subsidies in the FFMs and for employers, this eagerly anticipated ruling affirms the status quo. The individual mandate and employer shared responsibility assessments — and associated reporting requirements — remain unchanged.

Background

The Affordable Care Act (ACA) called for each state to establish an American Health Benefit Exchange (exchange or marketplace) through which individuals can purchase affordable health coverage. If a state did not establish its own marketplace by January 1, 2014, the federal government established a federally facilitated marketplace (FFM) on the state’s behalf. At present, there are 27 FFMs, seven “partnership” marketplaces, and 17 state-based marketplaces (including the District of Columbia).

Under the ACA, individuals must obtain "minimum essential coverage" or face a tax penalty (i.e., the individual mandate). To help facilitate this purchase, the ACA added Section 36B to the Internal Revenue Code. Section 36B provides a subsidy in the form of a premium tax credit to qualified individuals who obtain coverage through a marketplace "established by a State." IRS regulations state that premium tax credits are available in the FFMs.

Focusing on the "established by a State" language from Section 36B, litigants have brought cases nationwide arguing that the subsidies should not be available in the FFMs. The Obama administration took the position that other provisions of the ACA, as well as the ACA’s overall structure and purpose, show that subsidies should be available in FFMs — in addition to the state-based marketplaces. In King v. Burwell, the Fourth Circuit Court of Appeals ruled that subsidies are available through an FFM. In Halbig v. Burwell, on the other hand, a three-judge panel of the DC Circuit Court of Appeals (DC Circuit) held that the subsidies are not available through an FFM. For more information on these and other cases, see our Analyst Perspective on this topic.
Other ACA-Related Cases
Contraceptive Coverage Mandate Challenges
Non-Profit Cases in the Spotlight

• Approximately 100 pending cases challenge the ACA’s contraceptive coverage mandate

• Lower courts have enforced Supreme Court’s 2014 decision in *Burwell v. Hobby Lobby*

• The so-called “non-profit” cases continue – issue likely to wind up in the Supreme Court
ERISA Section 510 Interference Claims
First Class Action Case Filed

• Under ERISA Section 510, it is unlawful to discriminate against a participant or beneficiary “for the purpose of interfering with the attainment of” any plan rights

• Recent complaint in New York federal court claims employer reduced employees’ hours below a 30-per-week threshold to avoid having to offer those individuals health coverage

• Likely to see more such cases with similar allegations
Other ACA Challenges
Many Procedural in Nature

• Challenges to the employer mandate
• Challenge to the transitional reinsurance program
• “Origination Clause” cases
• Transition policy cases
On Deck at the Supreme Court

Gobeille v. Liberty Mutual

Application of a Vermont state law requiring reporting by all health plans, including insured and self-funded plans

- Mandates reports that contain claims data and other information relating to health care
- Specifies how information must be recorded and transmitted

Second Circuit Court of Appeals found ERISA preemption
Questions
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