

The Supreme Court's Gay Marriage Decision - Potential Impact on the Workplace

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In its recent landmark *Obergefell* decision, the United States Supreme Court held that same-sex couples have a constitutional right to marry in all states. Many employers will have to decide whether to continue benefits for unmarried "domestic partners," as the original reason they offered such benefits may now be moot. According to the Pew Research Center, Millennials cohabit with a partner at about twice the rate of Gen Xers at the same age, so a decision to do away with domestic partner benefits could have an unforeseen impact on a younger worker's choice of employer.

Employment discrimination laws are next. If your state, city, county or workplace does not already prohibit employment discrimination on the basis of sexual orientation, change is likely coming. Discrimination because of sexual orientation is currently illegal in many states, including California and the rest of the Far West, the Northeast, and Minnesota, Iowa and Illinois in the Midwest. A multitude of counties and cities have similar bans. Federal workers are now protected by Executive Order 11246 (as amended), and new regulations prohibiting federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity took effect on April 8, 2015. In addition, 89 percent of the Fortune 500 currently prohibit sexual orientation discrimination in their policies, according to the HRC's 2015 Corporate Equality Index.

In those states with laws currently in place, employers can already be held liable for adverse actions motivated by sexual orientation, or for a work environment hostile to lesbians, bisexuals or gays. For example, a New York chef obtained a verdict of \$1.6 million when the owner repeatedly stated that homosexuality was "a sin," that "gay people" were "going to go to hell," and what the court described as an "incessant barrage of offensive anti-homosexual invective." *Salemi v. Gloria's Tribeca Inc.*, 115 A.D.3d 569, 569, 982 N.Y.S.2d 458, 459 (2014) (combined religious / sexual orientation claim, as employer also held mandatory prayer meetings).

Title VII and the other federal discrimination laws, however, do not currently prohibit discrimination because of sexual orientation. (Transgender individuals are arguably covered by the current language of Title VII, a position outlined by the Justice Department in a Complaint filed against Southeastern Oklahoma State University on March 30, 2015 on behalf of a transgender professor.) The proposed Employment Non-



Discrimination Act (ENDA) was most recently defeated in Congress in 2013, but another push for its passage is looming. Since the Supreme Court's *Hobby Lobby* decision recognizing the religious rights of corporations, the draft legislation has included a religious exemption for employers that should continue to generate considerable debate.

Takeaway: Employers should be alert to changes in federal and state law in the area of sexual orientation discrimination, and bring their policies into conformity with them.

If you have questions, please contact your Lathrop Gage attorney or the attorney listed above.