

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

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## High Court Says “I Do” to Same-Sex Marriage

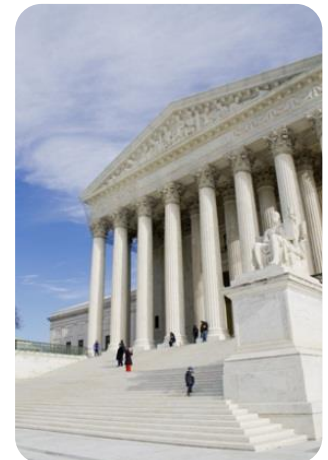
Today, in a 5-4 decision, the Supreme Court ruled that same-sex couples have a constitutional right to marry. The Court held that the 14th Amendment’s equal protection and due process clauses guarantee this right, and thus require all states to permit and recognize same-sex marriages. The outcome of 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 14<sup>th</sup> 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 14<sup>th</sup> 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 14<sup>th</sup> Amendment’s due process and equal protection clauses, same-sex couples may not be

deprived of that right. With this decision, states must permit same-sex marriage and recognize such marriages performed in other states.

## Impact

### Health and Welfare Benefit Plans

Among other things, the decision will have the following effect on employer health and welfare plans:

- Public sector employers, such as state and local governments, will be required to recognize same-sex spouses and treat them the same as opposite-sex spouses if spousal benefits are offered.
- Private employers will not be required to recognize same-sex spouses, nor provide equal treatment, but could face litigation alleging sex discrimination. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination with respect to compensation, terms, conditions or privileges of employment because of race, color, religion, sex or national origin, applies to employer-provided benefits. The EEOC [recently announced](#) that lesbian, gay, bisexual and transgender individuals may bring valid sex discrimination in employment claims under Title VII. Plans that provide benefits for opposite-sex spouses, but exclude same-sex spouses, will be at increased risk of legal challenges.
- With this decision, to the extent state insurance law requires coverage of same-sex spouses when spousal coverage is offered, a plan will not be able to purchase insured coverage that excludes same-sex spouses.
- Self-insured plans in the private sector are not required to comply with state and local laws affecting plan administration (i.e., ERISA preempts these laws) and, therefore, sponsors of those plans will have more flexibility in deciding whether to offer coverage to same-sex spouses. Plan sponsors that don't offer benefits to same-sex spouses, though, may still be at increased risk of claims of sex discrimination (as noted above).

Additionally, the decision will help to simplify benefit administration since all legally married spouses will be treated uniformly. Employers will no longer be required to impute state income tax for benefits (like health insurance) provided to same-sex spouses. Benefit and tax treatment will be more efficiently administered. This is likely to mean a savings in related administrative fees.

**Comment.** Employers that currently offer domestic partner coverage may want to consider whether they want to continue to do so in light of this decision. For some employers, offering domestic partner coverage will continue to make sense, for others, it might not. Note that some states require insured plans to provide domestic partner coverage.

### Retirement Plans

The decision has little impact on private employer retirement plans that are subject to federal law (such as ERISA plans). Those plans are already required to recognize same-sex marriages to comply with the various spousal protection rules. For public sector employers, the ruling will require that plans extend to same-sex spouses the same spousal protection under their retirement plans as they extend to opposite-sex spouses.

## In Closing

Today's decision settles the issue of same-sex marriage and provides employers with some options to simplify plan administration. The decision will preempt much of the existing litigation and relieve current uncertainty about the definition of marriage. Plan sponsors may want to take the opportunity to consider the terms of their benefit plans and who will be eligible — taking into account their attraction and retention policies, employee populations, corporate culture and relevant state law.

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

Please join us on Thursday, July 9, from 2:30-3:30 p.m. for a Buck Consultants at Xerox [webinar](#) to discuss the same-sex marriage decision, the recent decision on ACA subsidies in *King v. Burwell* and other recent cases involving key employee benefits issues. (The link above will bring you to a registration page.)

In this webinar, Tami Simon and Julia Zuckerman (Managing Director of the Career Practice and Knowledge Resources Center and Director in the Knowledge Resources Center at Buck Consultants At Xerox, respectively), and Gretchen Young (Senior Vice President, Health Policy, for the ERISA Industry Committee (ERIC)) will discuss:

- The basis for these decisions
- The impact of these decisions on employers' ACA and benefit compliance strategies
- Possible actions Congress and the regulators may take in response to these decisions

(See our *FYI Alert* from [June 25, 2015](#) for information on *King v. Burwell*.)

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