



## COMPLIANCE SERVICES **ALERT** LOCKTON BENEFIT GROUP



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### **Supreme Court: Gays and Lesbians Have “Fundamental Right” to Marry**

In a close 5-4 vote, the United States Supreme Court today took its largest step yet in leveling the societal playing field for gays and lesbians when it ruled that states violate the Fourteenth Amendment to the U.S. Constitution when they refuse to allow same-sex couples to wed or to recognize same-sex marriages validly performed out of state.

The ruling has tremendous impact on the lives of gays and lesbians in the handful of states that prohibit same-sex marriage, but will have little direct and immediate impact on employer-based health insurance plans, even those that currently limit coverage to employees and *opposite-sex* spouses.

#### **Background**

Two years ago the Supreme Court ruled that the *federal* government was constitutionally required to recognize as married those same-sex couples who were lawfully wed in a state or other jurisdiction permitting such unions. The opinion did not address, however, the right of states to refuse to allow gay and lesbian couples to marry, or the right of states to decline to honor same-sex unions lawfully formed elsewhere.

The Court directly addressed those issues today, and a narrow majority declared that the right to marry is so fundamental that it is protected by both the due process and equal protection clauses of the Fourteenth Amendment, thus guaranteeing gays and lesbians the same right to marry that heterosexuals have historically enjoyed. As a result, states are also forbidden from refusing to recognize a same-sex marriage validly formed out of state.

Justice Anthony Kennedy was the swing vote and author of the Court's opinion.

Despite the close vote, this seemed like an easy decision to call, for a variety of reasons. It seemed in 2013, when the Court concluded the federal government had no compelling interest in refusing to recognize same-sex marriages, the Court would have reached today's conclusion even then, had the question been before it. In the two years since, state and federal courts have struck down same-sex marriage bans in 23 states, and legislators in five other states removed such prohibitions, bringing to 37 the number of states permitting same-sex marriages.

Recently, a federal judge in Alabama struck down the state's ban on same-sex marriages, and when advocates of the ban petitioned the Supreme Court to stay the ruling pending further proceedings, the Supreme Court declined. Some Court observers saw the refusal to issue the stay as suggesting the Court was prepared to strike down same-sex marriage prohibitions. Clearly the Court, or at least a slender majority, was so prepared.

### **Does Today's Ruling Affect Employers and Their Group Health Plans?**

Not much, for several reasons.

Today's decision focused on whether a state violates the U.S. Constitution when it refuses to allow a gay or lesbian couple to marry, or refuses to honor the couple's same-sex marriage validly formed elsewhere. In short, today's opinion addresses what states and their instrumentalities – not *employers* (at least, non-governmental employers) – must do in this context.

In any event, most employers who supply health insurance to their employees also offer coverage to eligible employees' lawfully wed spouses. In Lockton's experience, most of these employers will cover a lawfully wed spouse whether same- or opposite-sex, so today's decision will be of little consequence to them.

***Lockton Comment:*** With same-sex marriage to be legal in an additional 13 states very shortly, it's possible that some employers, particularly those with employees in the handful of states that to this point haven't permitted same-sex marriage, might see a slight increase in enrollment of same-sex spouses where the employers' health plans cover all "lawfully wed" spouses.

Some employers, based on sincerely held beliefs, continue to limit coverage to eligible employees and their lawfully wed spouses of the *opposite sex*. Today's ruling does not directly compel these employers to change their health plans' eligibility rules.

For the same reason, most employers located in states that until now have prohibited same-sex marriage and whose plans provide coverage for eligible employees and "lawfully wed" spouses could choose to amend their plans to limit eligibility to only opposite-sex spouses. Such an amendment by a private employer that self-insures its healthcare benefits would be a relatively straightforward, albeit potentially controversial, proposition.

What if the self-insured plan is maintained by a state or local government? We now know that a state cannot refuse to allow gays and lesbians to marry, and must recognize their marriages validly formed elsewhere. But can states and their instrumentalities, *when acting in their capacity as employers*, discriminate against same-sex couples in the provision of health insurance? That question was not addressed in today's ruling, but is typically resolved under state or local law. State and local governments have often led the march toward supplying health insurance to same-sex spouses and domestic partners.

***Lockton Comment:*** If the self-insured plan is maintained by a church, there are other issues. Federal law doesn't compel a church, or any other private employer, to offer health insurance coverage to same-sex spouses. State or local employment nondiscrimination laws might prohibit employers from discriminating in the terms and conditions of employment on the basis of sexual orientation, but arguably these laws are barred by ERISA's preemption of state law from dictating to an ERISA employer

who it must cover under its healthcare plans. While plans maintained by churches are similarly not protected by ERISA, a church might claim protection from state and local nondiscrimination rules under religious freedom arguments. We leave that issue for another day.

An employer (even an ERISA employer) that *buys group insurance* rather than self-insuring its healthcare benefits might find it more difficult to amend its healthcare plan to limit spousal eligibility to *opposite-sex* spouses.

With growing prevalence, state insurance laws prohibit a health insurer from distinguishing, in its coverage of “spouses,” between opposite-sex and same-sex spouses. While ERISA immunizes an ERISA plan from direct state regulation, states can and do regulate insurers. When an employer subject to ERISA buys a state-regulated insurance policy, the employer becomes contractually bound by the state-imposed rules reflected in that policy.

But some states, and even federal regulations, merely require health insurers to *offer* same-sex spouse coverage where the insurers offer coverage to opposite-sex spouses. These rules don’t require the employer to treat same-sex spouses as eligible; they merely prohibit the insurer from declining to offer to a plan sponsor the option to cover same-sex spouses under the group policy, on the same terms and conditions as opposite-sex spouses.

### **What about Title VII and Other Federal Employment Nondiscrimination Laws?**

Federal employment discrimination laws prohibit workplace discrimination on the basis of race, religion, national origin, age, disability, genetic information and gender...but not *sexual orientation*. Not yet, anyway. While Congress has kicked the idea around some, the legislative addition of gays and lesbians to the ranks of protected classifications has stalled, at least at the federal level. Thus, federal law does not yet expressly prohibit a private employer from discriminating against a gay or lesbian employee by declining to offer coverage to the employee’s same-sex spouse, even where the employer offers coverage to opposite-sex spouses.

***Lockton Comment:*** As noted above, some state and local employment discrimination laws prohibit employers from discriminating against employees based on sexual orientation. These laws have difficulty forcing private employers whose benefit plans are subject to ERISA to modify the plans’ eligibility rules. As noted in the preceding comment, benefit plans maintained by ERISA employers are regulated by federal law and are immune from direct state and local regulation.

That’s not to say danger isn’t lurking for employers intent on denying coverage to same-sex spouses. Congressional inaction has not stymied the Equal Employment Opportunity Commission (EEOC) from crafting arguments that could be extended to a challenge against the practice. While the EEOC can’t assail an employer for discriminating against an employee based on sexual orientation, it *can* challenge employers for *gender bias*. It’s likely just a matter of time until we see a groundswell of gender bias claims against employers who deny health coverage to same-sex spouses solely on account of the employee’s gender (i.e., that the employee’s gender is the same as the spouse’s gender).

***Lockton Comment:*** ERISA does not trump other federal laws, such as federal employment discrimination laws, like it does state law. This means that the ripening of the EEOC’s “gender bias” argument might soon lead to a *federal* requirement that

employers, perhaps save churches, treat same-sex spouses as they treat opposite-sex spouses.

## **A Word about Common Law Marriage and Domestic Partnerships**

A handful of states permit an individual to form a common law marriage. The U.S. Constitution requires another state to recognize that marriage, even if common law marriages cannot be *formed* in that other state. In light of today's ruling, states allowing common law marriage will have to allow *same-sex* common law marriage, and other states will have to recognize those marriages.

But some employers do not recognize, as an eligible spouse, a common law spouse of an eligible employee (typically, the restriction applies regardless of the opposite- or same-sex nature of the relationship). Nothing in today's Supreme Court opinion will compel an employer to cover a common law spouse where its health plan does not provide for that eligibility today.

Today's ruling might have significant personal significance for same-sex domestic partners who reside in one of the 13 states that, as of yesterday, did not allow them to marry. But it does not force a change in how employers may treat unwed domestic partners, insofar as health insurance eligibility is concerned. However, it's possible that employers offering domestic partner coverage might consider terminating that coverage now that same-sex couples can marry.

## **What Should Plan Sponsors Do Next?**

Many plans indicate clearly whether same-sex spouses are eligible for coverage, but we encourage all plan sponsors to review their plan language to confirm that the eligibility rule for spouses is clear and accurately reflects the sponsor's policies and intent. Where the plan document is ambiguous (e.g., the plan merely references eligibility for "spouses"), the plan sponsor might consider adopting an amendment to clarify how the employer intends to treat same-sex spouses.

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