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Panel Presentation: Advocating for the Rights of LGBT Employees

LAWS BARRING SEX DISCRIMINATION ALSO PROTECT SEXUAL ORIENTATION

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Over the past few years, we have seen a seismic shift as discriminatory barriers against gay people have crumbled when faced with increased societal acceptance and understanding. The elimination of these barriers is not limited to groundbreaking precedent, most notably *Obergefell v. Hodges*,[1] that recognizes the equal dignity of same-sex relationships. It also includes less noticed, but equally significant, legal developments, including the U.S. Equal Employment Opportunity Commission's (EEOC) recent decision in *Baldwin v. Foxx*, where the commission held that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."[2] That ruling provides critical protections against discrimination for lesbian, gay, and bisexual workers. (In 2012, the EEOC issued a ruling recognizing that discrimination against transgender people is sex discrimination.).[3]

For advocates for the full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people, it is incumbent to communicate to the legal community at large as well as to gay people, and employers in particular, that discrimination on the basis of sexual

orientation is unlawful under Title VII. Under Title VII, it is illegal for any employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's…sex."[4]

And because "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII,"[5] discrimination on the basis of sexual orientation is prohibited. That is because discrimination on the basis of sexual orientation necessarily involves consideration of the discrimination target's sex and is rooted in gender stereotypes and the association of one person with another of the same sex, i.e., "Only women may marry men, and only men may marry women."[6]

Recent commentary in these pages suggesting that the EEOC's decision in *Baldwin* is incorrect and should be disregarded is dead wrong.[7] The reasoning that led to the EEOC's conclusion in *Baldwin* is not new. Over the years, numerous federal courts in a variety of contexts—from cases seeking the freedom to marry for gay people[8] to cases involving claims of sex discrimination in federally funded educational programs under Title IX[9] and in employment under Title VII[10]—have recognized that discrimination against an individual because of his or her sexual orientation is discrimination based on sex. The EEOC and all of these courts are correct in reaching this conclusion for several reasons.

First, discrimination on the basis of sexual orientation is literally discrimination on the basis of sex. Sexual orientation cannot be understood without reference to sex. Professor Andrew Koppelman put it this way: "If a business fires Ricky…because of his sexual activity with Fred, while th[is] action[] would not be taken against Lucy if she did exactly the same thing with Fred, then Ricky is being discriminated against because of his sex."[11] In *Baldwin*, the EEOC used a similar explanation by providing an example of two coworkers, a man and a woman, each displaying a picture on their desk of their respective wives, resulting in only the woman being disciplined. Such a disparity is sex discrimination under the "simple test" articulated by the Supreme Court—whether a person is treated "in a manner which but for that person's sex would be different."[12]

As the EEOC held in *Baldwin*, "[i]t follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations."[13]

Second, discrimination on the basis of sexual orientation is rooted in gender stereotypes. It is well established that discrimination on the basis of gender stereotypes is prohibited discrimination on the basis of sex. In its 1989 decision in *Price Waterhouse v.Hopkins*, the U.S. Supreme Court recognized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[14] As U.S. Court of Appeals Judge Marsha S. Berzon recently said, the notion underlying the prohibition on gender-stereotyping "is simple, but compelling."[15] "Nobody should be…punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender."[16]

Nearly a decade ago, the U.S. Court of Appeals for the Sixth Circuit observed in *Vickers v. Fairfield Medical Center* what is oft-ignored, yet so obvious—that lesbians and gay men "by definition, fail to conform to traditional gender norms in their sexual practices."[17] When an employer discriminates against an employee because he or she is gay or lesbian, they are discriminating because the individual's attraction to people of the same sex is inconsistent with traditional gender norms. Or, as the EEOC explained in *Baldwin*, "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."[18]

Numerous federal courts across the country, from Alabama to Washington, have held that discrimination against lesbians and gay men is prohibited by Title VII once the courts understood that the discrimination stems from the failure of lesbians and gay men to conform to gender stereotypes, such as being attracted to or in a relationship with someone of the same sex.[19] The EEOC's conclusion that sexual orientation discrimination is rooted in gender stereotypes and, thus, prohibited by Title VII is not new.

Third, sexual orientation discrimination is also associational discrimination based on sex. The EEOC in *Baldwin* also analogized to case law holding that Title VII forbids discrimination against those in interracial marriages and relationships, because such bias takes into account the race of the employee involved (as well as the race of the employee's spouse or friend).[20] "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race."[21] The EEOC reasoned that a man fired because he "dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer's discrimination against him."[22]

That discrimination against lesbians and gay men also is associational discrimination is particularly apparent in the employee benefits context. When employers refuse to provide insurance coverage to employees' same-sex spouses or partners, but provide such benefits to different-sex spouses or partners, the association itself is the target of the discrimination. As a federal court in Seattle ruled, an employee states a Title VII claim in such a context when he "alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."[23] Or as the EEOC concluded prior to *Baldwin*, a female employee is "subjected to employment discrimination [where] she was treated differently and denied benefits because of her sex, since such coverage would be provided if she were a woman married to a man."[24]

Entitled to Deference

The EEOC's interpretation of Title VII merits deference under *Skidmore v. Swift & Co.*[25] The EEOC's position reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[26] Any insinuation that *Baldwin* has "little impact" or is "not entitled to any deference"[27] overlooks the EEOC's wealth of experience as the administrative agency responsible for enforcing Title VII or its thorough analysis in *Baldwin*.

Indeed, several federal courts have already found the EEOC's interpretation in *Baldwin* to be persuasive and warranting deference.

For example, a federal district court in Alabama rejected "the magistrate judge's conclusion that '[s]exual orientation discrimination is neither included in nor contemplated by Title VII,'" and "agree[d] instead with the view of the Equal Employment Opportunity Commission that claims of sexual orientation-based discrimination are cognizable under Title VII."[28] Similarly, Judge Jack B. Weinstein of the Eastern District of New York wrote favorably of the EEOC's "landmark ruling" in *Baldwin*, recognizing that the EEOC applied the "words of the statute Congress [] charged [it] with enforcing."[29]

Statutory Interpretation

It is of no moment that Congress has yet to explicitly include sexual orientation by name in Title VII. It is foolhardy to rely on congressional inaction in any statutory interpretation endeavor. For one, a limitation in the minds of the 88th Congress—or any subsequent Congress—that is not in the statutory words is irrelevant. To the contrary, it very well could reflect the understanding that sexual orientation discrimination already is barred by the prohibition against sex discrimination. While Congress specifically overruled part of *Price Waterhouse* (regarding mixed-motive liability) in 1991, it left intact the holding that employers cannot punish employees for their failure to conform to prevailing gender norms.

Support for the Equality Act,[30] which amends federal civil rights laws to explicitly prohibit discrimination on the basis of sexual orientation and gender identity, is consistent with the EEOC's interpretation of Title VII's prohibition on sex discrimination. The Equality Act provides clarity that should prevent discrimination from happening in the first place. And while it explicitly lists sexual orientation and gender identity as federally protected characteristics in employment, housing, and other areas of public life (including those that don't currently protect against sex discrimination, such as public accommodations), the Equality Act also defines "sex" to include "sexual orientation or gender identity."

So, employers, take heed. When we talk about discrimination on the basis of sexual orientation or gender identity, we are talking about sex.

Endnotes:

1. 135 S. Ct. 1039, 576 U.S._____(2015).

2. EEOC Doc. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015).

3. *Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995 (EEOC April 20, 2012).

4. 42 U.S.C. §2000e-2(a)(1).

5. *Baldwin*, 2015 WL 4397641, at *5.

6. *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring).

7. Nancy V. Wright and Janice P. Gregerson, "Sexual Orientation Discrimination in the Summer of #LoveWins," N.Y.L.J. (Oct. 19, 2015).

8. See, e.g., *Latta*, 771 F.3d at 480 (9th Cir. 2014) (Berzon, J., concurring); *Jernigan v. Crane*, No. 13-cv-00410, 2014 WL 6685391, at *23-24 (E.D. Ark. Nov. 25, 2014); *Rosenbrahn v. Daugaard*, No. 14-cv-04081, 2014 WL 6386903, at *10-11 (D.S.D. Nov. 14, 2014); *Lawson v. Kelly*, No. 14-cv-00622, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014); *Kitchen v. Herbert*, 961 F.Supp.2d 1181, 1206 (D. Utah 2013), aff'd on other grounds, 755 F.3d 1193 (10th Cir.), cert. denied, 135 S. Ct. 265 (2014); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D. Cal. 2010), appeal dismissed sub nom. *Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013).

9. See *Videckis v. Pepperdine Univ.*, No. 15-cv-00298, 2015 WL 1735191, at *8 (C.D. Cal. 2015) ("[A] policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.").

10. See, e.g., *Boutillier v. Hartford Public Sch.*, No. 13-cv-01303, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014); *Hall v. BNSF Ry. Co.*, No. 13-cv-02160, 2014WL 4719007, at *3-4 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F.Supp.3d 100, 115-16 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F.Supp.2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1223 (D. Or. 2002); *Centola v. Potter*, 183 F.Supp.2d 403, 409 (D. Mass. 2002).

11. Andrew Koppelman, "Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination," 69 N.Y.U. L. Rev. 197, 208 (1994).

12. *Baldwin*, 2015 WL 4397641, at *5 (citing *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)) (internal quotation marks and citation omitted).

13. *Baldwin*, 2015 WL 4397641, at *5.

14. 490 U.S. 228, 251 (1989).

15. *Latta*, 771 F.3d at 486 (Berzon, J., concurring).

16. *Latta*, 771 F.3d at 486 (citing Ruth Bader Ginsburg, "Gender and the Constitution," 44 U. Cin. L. Rev. 1, 1 (1975)).

17. 453 F.3d 757, 764 (6th Cir. 2006).

18. *Baldwin*, 2015 WL 4397641, at *5.

19. See, e.g., *Isaacs v. Felder Servs.*, No. 13-cv-00693, 2015 WL 6560655, at *4 (M.D. Ala. Oct. 29, 2015) ("To the extent that sexual orientation discrimination occurs not because of the

targeted individual's romantic or sexual attraction to or involvement with people of the same sex, but rather based on her or his perceived deviations from 'heterosexually defined gender norms,' this, too, is sex discrimination, of the gender-stereotyping variety."); *Deneffe v. SkyWest*, No. 14-cv-00348, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying motion to dismiss where plaintiff alleged that he failed to conform to male stereotypes by designating his same-sex partner as beneficiary); *Hall*, 2014 WL 4719007, at *3 (denying motion to dismiss where plaintiff alleged that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males"); *Terveer*, 34 F.Supp.3d at 116 (denying motion to dismiss where "Plaintiff has alleged that he is 'a homosexual male whose sexual orientation is not consistent with the defendant's perception of acceptable gender roles….'"); *Koren*, 894 F.Supp.2d at 1038 (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse's surname after marriage); *Heller*, 195 F.Supp.2d at 1224 (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by being attracted to and dating other women and not only men).

20. *Baldwin*, 2015 WL 4397641, at *6.

21. *Baldwin*, 2015 WL 4397641, at *21 (quoting *Parr v. Woodmen of World Life Ins.*, 791 F.2d 888, 892 (11th Cir. 1986)).

22. *Baldwin*, 2015 WL 4397641, at *6.

23. *Hall*, 2014 WL 4719007, at *9.

24. Final Determination, *Cote v. Wal-Mart Stores East*, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015), available at http://www.glad.org/uploads/docs/?cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.?pdf.

25. 323 U.S. 134, 140 (1944).

26. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (internal quotation marks omitted).

27. Nancy V. Wright and Janice P. Gregerson, "Sexual Orientation Discrimination in the Summer of #LoveWins," N.Y.L.J. (Oct. 19, 2015).

28. *Isaacs*, 2015 WL 6560655, at *3.

29. *Roberts v. UPS*, No. 13-cv-06161, 2015 WL 4509994, at *18 (E.D.N.Y. July 27, 2015).

30. See Equality Act, S. 1858, 114th Cong. §2(8) (2015) (finding that "Federal agencies and courts have correctly interpreted…prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity, and sex stereotypes."); Equality Act, H.R. 3185, 114th Cong. §2(8) (2015) (same).

Employee Benefits Issues Affecting Employees in Same-Sex Marriages, Civil Unions, and Domestic Partnerships

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I. Introduction.

The twenty-first century has seen a rapid expansion of access to civil relationship recognition for same-sex couples, culminating in *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015), which eliminated state-law barriers to civil marriage. Coming two terms after *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down as unconstitutional Section 3 of the federal Defense of Marriage Act,[1] *Obergefell* completes the dismantling of the legal framework that previously supported discrimination against same-sex couples in employee benefit plans.

Windsor significantly affected federal employee benefits law, including that spousal protections in pension and health plans under ERISA and the Internal Revenue Code became mandated for same-sex spouses and welfare benefits provided to couples in same-sex marriages no longer carried the federal tax consequences that they did while DOMA Section 3 was in effect. *Obergefell* further simplifies plan administration by providing nationally uniform marriage access and recognition, facilitating ERISA's goal of promoting nationally uniform plan administration. In particular, *Obergefell* should eliminate discrepancies between federal and state tax requirements for same-sex married couples.

Nonetheless, difficult transitional issues still face employee benefit plans and participants, particularly where a participant in a same-sex marriage or equivalent relationship has had a life event – such as a retirement, death, or divorce – prior to *Windsor* (or possibly prior to *Obergefell*). Additional issues involve how employee benefit plans will deal with participants in marriage-equivalent relationships created by the states prior to *Obergefell*, such as registered domestic partnerships and civil unions, which are still available to same-sex couples as an alternative to civil marriage in certain states.

This paper will discuss post-*Windsor* guidance from the IRS and the Department of Labor on federal tax and employee benefits law – guidance that, after *Obergefell*, is likely to apply to most same-sex couples nationwide as to employee benefits matters that arise in the future. The paper will then highlight outstanding issues arising from life events occurring pre-*Windsor*, issues for welfare benefit plans that continue to exclude same-sex spouses, and issues pertaining to marriage-equivalent relationships. Finally, it will focus on specific employee benefits issues for same-sex couples and how *Windsor*, *Obergefell*, and federal agency guidance applying *Windsor* have changed the outcome of those issues under federal law and plan terms.

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[1] Section 3 had defined "marriage" and "spouse" wherever those terms appeared in federal statutes and regulations to mean only an opposite-sex marriage and opposite-sex spouse. *Former* 1 U.S.C. § 7.

II. Post-*Windsor* Guidance From the IRS and Department of Labor.

A. IRS Revenue Ruling 2013-17.

On August 29, 2013, the IRS issued Revenue Ruling 2013-17, answering three questions pertinent to employee benefit plans after the demise of DOMA § 3:

(1) Whether same-sex spouses lawfully married under state or foreign law are spouses for federal tax purposes: Yes. The terms "spouse," "husband and wife," "husband," and "wife" include individuals married to a person of the same sex, if the couple is validly married under state or foreign law.

(2) Whether the IRS recognizes such a marriage for federal tax purposes even if the state in which the couple is domiciled does not recognize the marriage: Yes. The IRS has adopted a "place-of-celebration" rule, recognizing the marriage if it was validly entered into in a state or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex, regardless of whether the marriage is recognized by the state of domicile. Pre-*Obergefell*, the place-of-celebration rule created federal uniformity of marriage recognition while uniformity was still lacking in the states.

(3) Whether registered domestic partners and civil union partners are spouses for federal tax purposes: No. The terms "spouse," "husband and wife," "husband," "wife," and "marriage" do not include relationships or persons in relationships not denominated as marriage under the law of the state in which they were entered.

See Rev. Ruling 2013-17.

Taxpayers may rely on the Revenue Ruling retroactively for open years for purposes of filing tax returns, amended returns, adjusted returns, or claims for credits or refunds. This means that individuals in same-sex marriages may amend federal tax returns to file jointly and may file claims to recover taxes paid on imputed income, among other issues, and employers may also file claims to recover taxes paid on imputed income. *See* § IV.B.3.b, below.

For all other federal tax purposes, Revenue Ruling 2013-17 applies prospectively as of September 16, 2013. However, this prospective application for federal tax purposes does not control potential participant claims under ERISA Title I, as discussed more fully below in § III.C.

For the period roughly between *Windsor* and *Obergefell*, Revenue Ruling 2013-17 provided uniformity with respect to federal law where state-law uniformity was lacking.[2] Prior to *Obergefell*, whether a same-sex married couple who lived in a state that did not recognize their marriage could file joint *state* tax returns depended on state tax law, however. Post-*Obergefell*, it remains to be seen what retroactive state tax issues may arise.[3]

B. DOL Technical Release No. 2013-04.

On September 18, 2013, the Department of Labor issued Technical Release No. 2013-04, which provided additional guidance for employee benefit plans on the definition of "spouse" and "marriage" under ERISA following *Windsor*. *See* DOL Technical Release No. 2013-04. Consistent with Revenue Ruling 2013-17, the DOL's guidance provides that in Title I of ERISA, the Internal Revenue Code, and accompanying regulations:

- The term "spouse" will be read to refer to any individuals who are lawfully married under any state law, including individuals married to persons of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriage.

- The term "marriage" will be read to include a same-sex marriage that is legally recognized as a marriage under any state law.

Id.

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[2] After *Windsor* and Revenue Ruling 2013-17, same-sex spouses can no longer be tax dependents under federal tax law. *See* IRS, Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law. However, as discussed below, the status of a same-sex domestic partner as a tax dependent will continue to affect a variety of issues under pension and welfare plans because domestic partners are not recognized as spouses under federal law. *See* Rev. Rul. 2013-17.

[3] Before *Obergefell*, states that did not recognize same-sex marriage took varying approaches as to whether same-sex married couples could or were required to file joint state returns. For example, in Missouri, which had a state constitutional amendment banning same-sex marriage, the governor issued an executive order providing that same-sex married couples who filed a joint federal return were required to file joint Missouri returns, because under state tax law, the state must accept jointly filed state returns from couples who file federal joint returns. *See* Executive Order 13-14 (Nov. 14, 2013). Other states that did not recognize same-sex marriages required taxpayers in same-sex marriages to file state returns as single. *See, e.g.*, La. Dep't of Rev., Revenue Information Bulletin No. 13-024 (Sept. 13, 2013).

Again reflecting the pre-*Obergefell* regime of conflicting state laws, the Technical Release notes that adopting a contrary rule for employee benefit plans based on state of domicile would raise "significant challenges" for employers that operated or had employees in more than one state or whose employees moved between states while entitled to benefits. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee or former employee moved to a state with different marriage recognition rules. *See id.* By recognizing marriages that were valid in the state where they were celebrated, the DOL's rule "provide[d] a uniform rule of recognition that can be applied with certainty by stakeholders, including employers, plan administrators, participants, and beneficiaries" in the pre-*Obergefell* world, and, as with the IRS rule, may continue to affect participants who had life events before the advent of national uniformity of marriage laws for same-sex couples. *Id.*

In addition, consistent with the Revenue Ruling 2013-17, the DOL's Technical Release further notes that the terms "marriage" and "spouse" as used in Title I of ERISA, the Internal Revenue Code, and related regulations do not include relationships and persons in relationships that are not called "marriage" under state law, such as domestic partnerships and civil unions.[4] *See id.*

The DOL's guidance means that for ERISA-governed employee benefit plans, spousal benefit requirements under ERISA and/or the IRC *must* be applied to same-sex spouses even before *Obergefell*, regardless of where the couple resided.[5] *See* § IV.C.3, below.

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[4] On October 23, 2015, the Treasury Department issued a Notice of Proposed rulemaking amending the current regulations under section 7701 of the Internal Revenue Code to provide that, for federal tax purposes, the terms "spouse," "husband," and "wife" mean "an individual lawfully married to another individual," the term "husband and wife" means "two individuals lawfully married to each other," and that "[t]hese definitions apply regardless of sex." 80 Fed. Reg. 64378-81, available at http://www.gpo.gov/fdsys/pkg/FR-2015-10-23/html/2015-26890.htm.

[5] Following the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which concerned a corporation's challenge under the Religious Freedom and Restoration Act to certain provisions of the Affordable Care Act regarding contraceptives, it is possible that some employers might assert that their religious exercise prevents them from complying with the guidance from federal agencies implementing *Windsor*. The guidance from the IRS and DOL, however, does not contain any exemption for religious organizations. Furthermore, to the best of the authors' knowledge, since *Windsor*, no employer has challenged the obligation to provide federally mandated spousal benefits to same-sex spouses.

C. IRS Notice 2014-19.

On April 4, 2014, the IRS issued Notice 2014-19, providing guidance on application of the *Windsor* decision and Revenue Ruling 2013-17 to qualified retirement plans. Under this Notice, any retirement plan qualification rule that applies because a participant is married must be applied equally to same-sex spouses. Qualified plans must reflect the outcome of *Windsor* as of June 26, 2013 or risk losing tax qualification. Through September 16, 2013, a plan will not lose its tax qualification for recognizing only same-sex spouses of participants domiciled in states that recognize same-sex marriage. After that date, plan must recognize the marriage regardless of whether the state of domicile recognizes it.

Under Notice 2014-19, plans may recognize same-sex marriage for some or all purposes prior to June 26 or September 16, 2013. The Notice does not provide relief from any claim that an individual participant or same-sex spouse may bring asserting rights to spousal benefits based on events that happened before June 2013. Retroactivity issues are discussed in more detail below.

If amendments are required for compliance with the Notice, they must have been made by year-end 2014 in most circumstances (although Notice 2015-86, discussed below, permits later amendments to recognize same-sex marriages on a retroactive basis on a date earlier than June 26, 2013). Notice 2014-19 also provides a rule of interpretation: if a plan does not define "spouse" or "marriage" in a manner inconsistent with *Windsor*, an amendment is not required but the plan must be operated in accordance with the Notice.

D. IRS Notice 2015-86.

On December 9, 2015, the IRS issued Notice 2015-86, which provides guidance on the application of *Obergefell* to qualified retirement plans and health and welfare plans. The Notice explains that while certain marriages will be recognized for the first time for state-law purposes, because those marriages were already recognized by federal tax law purposes due to *Windsor*, the Treasury Department and the IRS "do not anticipate any significant impact from *Obergefell* on the application of federal tax law to employee benefit plans." Although plans are not required to make changes as a result of *Obergefell*, the Notice states that a plan will not lose its tax-qualified status if it applies *Windsor* prior to June 26, 2013. *See id.* at Q-3 and A-3.

III. Issues After *Windsor*, *Obergefell*, and Related Guidance From the IRS and DOL.

After *Windsor*, *Obergefell*, and related guidance from the IRS and DOL, several categories of employee benefits issues remain for same-sex couples: (1) the

status of spousal-equivalent relationships, such as domestic partnerships and civil unions; (2) the interpretation of plan terms; (3) legacy issues arising from pre-*Windsor* or *Obergefell* events; and (4) the application of federal anti-discrimination laws, particularly Title VII of the Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act.

A. Treatment of Domestic Partnerships and Civil Unions.

One set of issues continuing after *Windsor* and *Obergefell* relates to employees in spousal-equivalent statuses under state law, which continue to be available after *Obergefell*. California, Hawai'i, Illinois, New Jersey, Colorado, Nevada, and Oregon so far continue to make available either civil unions or registered domestic partnerships. These statuses, referred to in this paper as "domestic partnerships," carry the same rights and obligations as marriages under state law. In these states, state law specifically provides that domestic partners will be treated as spouses for all purposes under state law, including for purposes of marital property, taxation, intestacy, and parentage. *See, e.g.*, Cal. Fam. Code § 297.5; Colo. Rev. Stat. 14-15-107. Legislative history is often clear that the intent of these state laws is to treat domestic partners as married spouses. *See, e.g.*, Colo. Rev. Stat. 14-15-102 (stating that purpose of Colorado Civil Union Act is "to provide eligible couples the opportunities to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses").

1. Status of Domestic Partnerships in the States.

After *Obergefell*, civil marriage is available in all of the states that provide or previously provided same-sex couples with domestic partnerships. These states have taken varying approaches as to whether to continue to provide domestic partnerships. For example, as noted above, in California, New Jersey, Hawai'i, Illinois, Colorado, Nevada, and Oregon, same-sex couples may marry or enter into domestic partnerships, which will continue to be recognized as such.[6] Other states that formerly provided domestic partnerships no longer do so now that civil marriage is available to same-sex couples, however.[7]

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[6] *See* Cal. Sec'y of State, California Domestic Partnership Registry; New Jersey Dep't of Health, Frequently Asked Questions; Hawai'i Act 001; Illinois Religious Freedom and Marriage Fairness Act, Ill. Public Act 98-0597; Colo. Rev. Stat. Ann. § 14-15-112 (2013); Nevada Sec'y of State, "Domestic Partnerships"; Oregon Health Authority, FAQs: Same-Sex Marriages (noting that Oregon Registered Domestic Partnerships are "established in separate law and will continue to be an option for same sex couples until the law is changed").

[7] *See, e.g.*, State of Delaware, Delaware Marriage (noting that no new civil unions will be created); Rhode Island Dep't of Health, Rhode Island's Marriage Equality Law (noting that civil unions are not available after August 1, 2013.

In addition, some states also provide for the conversion of domestic partnerships to marriages, either by operation of law or by action of the couple. In Delaware, for example, same-sex couples in civil unions were permitted to convert their civil unions to marriages, and for those who did not act, on July 1, 2014, all civil unions were automatically converted to marriages. *See* 13 Del. C. § 218. The effective date of each marriage for Delaware state law purposes was deemed to be the date of the original civil union, raising issues for employee benefit plans that treated these couples as non-married. *See id.* By contrast, in Washington, domestic partnerships for same-sex couples under age 62 were dissolved and converted to marriages, either by action of the parties or by operation of law, effective on the date of the conversion or June 30, 2014, not the date of the original domestic partnership. *See* Rev. Code of Wash. Ann. § 26.60.100.

2. Federal Law Employee Benefits Issues for Domestic Partners.

Under DOMA § 3, domestic partners could not be treated as spouses under federal law even where they were treated as spouses for purposes of state law. As noted above, now that Section 3 has been struck down, the IRS and DOL have stated that for purposes of federal employee benefits law and federal tax law, the terms "spouse" and "marriage" do not include domestic partners and domestic partnerships.[89] *See also* IRS, Answers to Frequently Asked Questions for Registered Domestic Partners and Civil Union Partners.

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[8] Guidance issued on June 20, 2014 from the Social Security Administration, however, provides that these relationships will be treated as marriages for purposes of Social Security benefits. *See* § VI.B. In addition, in November 2013, a bankruptcy court in the Central District of California determined that a California Registered Domestic Partnership satisfied the definition of "spouse" for the purpose of federal bankruptcy law. *In re Cusimano*, No. 8:10-bk-23646-ES (C.D. Cal. Nov. 12, 2013) (Dkt. 56) (holding that California RDPs are spouses for purposes of federal bankruptcy law, and therefore non-support obligations to an RDP are nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(15)).

[9] It is possible to imagine a challenge to this guidance – that is, a case in which domestic partners seek to enforce spousal rights under federal law on the basis that their status is equivalent to marriage. It could be argued that *Windsor*'s focus on the states' "power in defining the marital relation" supports exactly the opposite conclusion from the one the agencies have reached: that where a state has created a status with all the rights and obligations of marriage, federal law must recognize that status as a marriage. *See* Deborah A. Widiss & Andrew Koppleman, *A Marriage by Any Other Name: Why Civil Unions Should Receive Federal Recognition*, 3 Ind. J. of Law & Soc. Equality (2015).

Employee benefit plans will likely face questions regarding the status of domestic partners under their terms, however. For example, if a plan does not define "spouse" but incorporates California law, California registered domestic partners may argue that they are entitled to be treated as spouses under the plan terms even if the plan terms do not explicitly provide benefits for domestic partners. Other issues may also arise under plan terms, particularly for claims that arise pre-*Windsor*. In addition, for same-sex couples who were in a domestic partnership and later married each other, issues may arise as to the duration of the marriage for purposes of employee benefits, such as pension plans that have a marriage duration requirement for survivor benefits.[10]

B. Plan Interpretation Questions.

Plan language establishing spousal benefits has been subject to interpretation, but the DOL's Technical Release 2013-04 and IRS Notice 2014-19 resolve some previous questions. Plan language generally falls into the following categories:

- Plan does not define "spouse" with reference to sex or with reference to any state's law. This language includes all legally married spouses, although plans might dispute this interpretation where events occurred pre-*Windsor*.

- Plan does not define "spouse," but incorporates the law of a state that recognized same-sex marriages prior to *Obergefell*, or made available a marriage-equivalent status: same-sex spouses and domestic partners can claim benefits available to legally married spouses.

- Plan defines "spouse" by specific reference to DOMA: there is an argument that invalidity of DOMA means that the plan provides benefits to all legally married spouses.

- Plan defines "spouse" as "opposite-sex spouse": the plan term is clear, but plans are required to treat same-sex spouses as spouses for federal tax purposes due to Revenue Ruling 2013-17, and qualified pension plans must provide certain mandatory benefits to same-sex spouses pursuant to Technical Release 2013-04. *See* § IV.C.3, below. In addition, plans defining "spouse" as "opposite-sex spouse" may be subject to sex discrimination claims. *See* § III.E, below.

[10] *See Kapple v. Office of Pers. Mgmt.*, discussed below.

To the extent plans have discretion to define eligibility for spousal benefits not mandated by ERISA or the Code, for the reasons cited in Technical Release 2013-04, a rule providing the broadest marriage recognition has been and will continue to be the most efficient for plan administrators. It also avoids confusion arising from a discrepancy between nationally uniform marriage law with respect to same-sex couples, and contrary plan terms for some purposes. However, inefficiency and confusion can continue to arise from the federal refusal to recognize states' marriage-equivalent relationships – for example, where state law requires that domestic partners be treated as spouses for purposes of an insured welfare benefit plan, but federal law requires differential taxation.

C. Legacy Issues Arising From Pre-*Windsor* and *Obergefell* Events.

Legacy issues remaining concerning DOMA's unconstitutionality and the application of *Windsor*, and from changing state laws on same-sex marriage, up to and including the impact of *Obergefell*.

1. Invalidity of DOMA § 3; Rev. Rul. 2013-17, Technical Release 2013-04, Notice 2014-19, and Notice 2015-86.

The invalidity of DOMA § 3 raises the question whether same-sex spouses are entitled to be treated as married under federal law retroactive to the dates of their marriages. Revenue Ruling 2013-17 and Notice 2014-19 make clear that for federal tax purposes, employee benefit plans must recognize many same-sex marriages beginning June 26, 2013, and all same-sex marriages beginning September 16, 2013. Thus, a plan does not fail to comply with tax-qualification requirements of the Code because it fails to recognize a same-sex marriage prior to that date.

However, federal tax law does not control claims by participants and beneficiaries under ERISA's civil enforcement provision. *See* ERISA § 502(a), 29 U.S.C. § 1132(a). *See Crawford v. Roane*, 53 F.3d 750, 756-57 (6th Cir. 1995) (holding that court has no power to resolve tax qualification issues in an action under ERISA § 502, but "[e]ven if this Court would determine that the Plan is disqualified for tax-deferred treatment, the written terms of the Plan would continue to be effective as a written contract between the participant, his beneficiaries, and the Plan sponsor"). In addition, federal tax law does not control claims by participants under Title VII or Section 1557 of the Affordable Care Act. *See* § III.E, below.

In particular, if a participant or beneficiary has a claim for benefits under the terms of a plan, and the plan can be read to provide spousal benefits to same-sex spouses, that claim can still be brought even if it is based on events that happened

before *Windsor*. *See, e.g., Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D. Pa. July 29, 2013) (holding that surviving same-sex spouse was entitled to spousal benefit where plan did not exclude same-sex spouses from definition of spouse). The determination of beneficiary status must be made in accordance with the plan documents. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009) (former spouse's waiver of benefits ineffective); *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (beneficiary designation of former spouse controlled).

In sum, although a plan can comply with federal tax law prior to June 26 or September 16, 2013 without recognizing same-sex marriages, participants and beneficiaries may still bring claims for spousal benefits and claims for violations of ERISA or the terms of a plan, even if the claims are based on events that happened before that date. Such claims raise issues such as:

- Available forms of benefit under defined benefit pension plans: if a same-sex married participant retired prior to *Windsor* and was treated as ineligible to elect a joint and survivor annuity, is that participant now entitled to make that election? Is a new election retroactive to the date of pension commencement, or only prospectively? If the new election has retroactive effect, must the participant repay benefits to the plan if the benefit amount has been higher than the joint-and-survivor annuity amount or, if the benefit amount has been lower than the joint-and-survivor annuity amount, must the plan make the participant whole for the difference between the joint-and-survivor amount and the lesser benefit amount? What if the participant died after retiring – is the surviving spouse entitled to a survivor annuity?[11] *See* § IV.C.3, below.

- Qualified preretirement survivor annuities: if a same-sex married participant in a defined benefit pension plan died pre-retirement before *Windsor* and the surviving spouse was deemed ineligible for a preretirement survivor annuity, is the surviving spouse now eligible? *See* § IV.C.3, below; *see Schuett v. FedEx Corp.*, 2016 WL 104267 (N.D. Cal. Jan. 4, 2016).

[11] Courts have encountered similar issues in the context of opposite-sex spouses who misrepresented themselves as single when they were in fact married. *See, e.g.*, *Hearn v. W. Conf. of Teamsters Pension Trust Fund*, 68 F.3d 301 (9th Cir. 1995). In *Hearn*, the court held that payment of a survivor annuity was mandatory, but because there was no breach of fiduciary duty by the plan administrator in paying a single-life annuity during the participant's lifetime, the survivor annuity could be reduced by the amount of the overpayment.

- Default beneficiary provisions under defined contribution or life insurance plans: if a same-sex married participant died before *Windsor* without designating a beneficiary, who gets the benefit under the plan's order of priority? *See Cozen O'Connor*, 2013 WL 3878688.

- Available forms of benefit under defined contribution plans: if a same-sex married participant died prior to *Windsor*, leaving his or her spouse as the beneficiary, may the spouse now retroactively elect a spousal form of distribution? *See* § IV.C.3, below.

- Spousal consent under defined contribution plans: if a same-sex married participant died prior to *Windsor*, having named a nonspouse beneficiary without spousal consent, can the spouse now challenge the distribution to the nonspouse? *See* 29 U.S.C. § 1155.[12]

Participants and beneficiaries have a strong argument that *Windsor* and subsequent federal guidance must now be applied even to facts predating *Windsor*, and that state marriage bans in effect before *Obergefell* can no longer be applied even with respect to events that occurred before *Obergefell*. In civil cases, the Supreme Court's "application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 89 (1993). In particular, the Supreme Court's application of federal law to the parties before it is the controlling interpretation of federal law and "*must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule*." *Id.* at 97 (emphasis added).

In *Windsor*, the Supreme Court struck down as unconstitutional Section 3 of DOMA and applied its ruling to the parties in that case. It affirmed the lower court's judgment requiring the United States to refund Ms. Windsor the estate taxes that she had paid to the IRS (as well as interest) following the death of her wife in 2009. *See* 133 S. Ct. at 2682, 2684. This was the case even though at the time Ms. Windsor's spouse died, DOMA precluded the IRS from recognizing Ms. Windsor as the surviving spouse. Likewise, in *Obergefell*, the lead case of four

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[12] Courts have dealt with competing claimants for mandatory spousal benefits in other contexts. For example, in *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 414 F.3d 918 (6th Cir. 2013), an interpleader action, the court applied conflict of law principles to determine which of two spouses would receive a survivor annuity under a pension plan. Similarly, in *IBEW Pacific Coast Pension Fund v. Lee*, 462 Fed. App'x 546 (6th Cir. 2012), the plan started paying a monthly spousal survivor benefit to a Mrs. Lee, but then another Mrs. Lee claimed that she had previously been married to the decedent employee, that her marriage was never dissolved, and that she never consented to the second Mrs. Lee receiving a benefit.

consolidated cases was brought by the widow of a same-sex marriage whose state of residence refused to issue a death certificate for showing him as his husband's surviving spouse. Again, the Supreme Court's ruling required reissuance of the death certificate.

Windsor is not the first case to remove unconstitutional bars to benefits, and courts have applied Supreme Court decisions retroactively in the benefit context. For example, in *Hurvich v. Califano*, 457 F. Supp. 760 (N.D. Cal. 1978), the court held that Mr. Hurvich, a widower, was entitled to receive Social Security "father's benefits" retroactive to the date of his wife's death in 1969. This was the case even though the Social Security statute had limited such benefits to mothers until 1975, when the Supreme Court found the statute's gender classification unconstitutional.

To date, few cases have raised retroactivity issues concerning employee benefits after *Windsor*. In *Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D. Pa. July 29, 2013), a same-sex couple, Ms. Tobits and Ms. Farley, were married in Canada in 2006. *Id.* at *1. Ms. Farley worked for a Philadelphia-based law firm and participated in its pension plan. *Id.*; *see id.* at *4, n.28. Ms. Farley died in 2010, three years before the *Windsor* decision. Following *Windsor*, the *Cozen O'Connor* court ordered that the pension plan correct its previous benefit denial and pay a survivor benefit to Ms. Tobits, as Ms. Farley's surviving spouse. *Id.* at 5. In the health plan context, although not directly addressing retroactivity, after *Windsor* a Ninth Circuit panel awarded back pay for the costs of health insurance to a former federal employee in Oregon who had not been permitted to enroll her same-sex domestic partner in the federal employees' health plan prior to *Windsor*.[13] *In re Fonberg*, 736 F.3d 901 (9th Cir. Judicial Council 2013).

A recent decision directly addressed the application of *Windsor* to an ERISA plan based on events that happened before the decision. In *Schuett v. FedEx Corporation et al.*, 2016 WL 104267 (N.D. Cal. Jan. 4, 2016), the surviving same-sex spouse of a pension plan participant who died six days prior to *Windsor* brought a claim after *Windsor* for a spousal survivor benefit. The defendant employer denied the claim on the ground that its pension plan, at the time of the participant's death, defined "spouse" by explicitly incorporating Section 3 of DOMA. The court denied FedEx's motion to dismiss the plaintiff's claim that regardless of plan's definition of "spouse," FedEx violated Title I of ERISA by failing to provide the plaintiff with a

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[13] Another case raising retroactivity issues involved sex discrimination claims based on the denial of federal employee health benefits to same-sex spouses before *Windsor*. *See Hudson v. OPM et al.*, No. 15-cv-01539 (N.D. Cal.) (filed Apr. 3, 2015). The case settled in September 2015. As a result of the settlement, the plaintiff was reimbursed for amounts she spent on premiums for alternate health care for the period when she was unable to enroll her spouse in the Federal Employee Health Benefits Program.

mandatory benefit under ERISA. *Id.* at *10. The court was "not persuaded at this stage of the case . . . that there is any basis for denying retroactive application of *Windsor*." *Id.*

Another recent case raised such issues. In *Pritchard v. IUOE Stationary Engineers Local 39 Pension Plan*, No. 16-cv-355-LB (N.D. Cal. filed Jan. 22, 2016), a widower whose same-sex spouse died in 2012 alleged that the plan relied on DOMA in 2015 for its continued refusal to pay a joint and survivor annuity. The complaint alleged that the plaintiff's spouse was approved on the date of his death for a retroactive disability pension, which was paid as seven months of a single life annuity, although the plan defined "spouse" at all times as "the person to whom a participant is legally married." The case settled, and the plan is now paying a survivor annuity to the plaintiff.

In the context of pension benefits for federal employees, the U.S. Office of Personnel Management (OPM) granted an administrative claim in April 2014 for retroactive survivor benefits brought by the surviving same-sex spouse of a federal employee who died in 2011. The couple married in California in 2008. When the employee passed away in 2011, the surviving spouse was told she would not be eligible for any survivor benefits under the Federal Employees Retirement System because DOMA precluded recognition of the marriage. The surviving spouse filed a timely claim for survivor benefits in 2014, arguing that OPM should apply the current law, not the prior unconstitutional law, in evaluating the claim. OPM granted the claim, and the surviving spouse received a lump-sum death benefit and a monthly annuity retroactive to the date of her spouse's death. In June 2014, the Attorney General issued a memo stating that "OPM has begun the process of working with surviving spouses of federal employees and annuitants who died prior to the Windsor decision to ensure that these widows and widowers receive the benefits to which they would have otherwise been entitled had DOMA not prohibited OPM from recognizing their marriages." *See* Mem. from Att'y Gen. Eric Holder Re: Implementation of *United States v. Windsor* (June 20, 2014).

These legacy issues are likely to be rare. While the exact number of same-sex couples in the United States who were married at the time of *Windsor* is unknown, estimates run in the 100,000 range. *See* Williams Institute, Supreme Court Rulings Strike Down DOMA and Prevent Enforcement of California's Proposition 8 (June 26, 2014). For a retroactivity issue to arise under an employee benefit plan, there must be: (1) a same-sex couple validly married under the law of a state or foreign jurisdiction before *Windsor*; (2) with a spouse participating in an employee benefit plan; and (3) a triggering event occurring before *Windsor* (for example, for pension plans, the spouse retired or died, or the couple divorced); and (4) because of non-recognition of the marriage by the plan, the couple or spouse was deprived of a spousal benefit that would have been provided had the marriage been recognized.

For any particular plan, retroactivity issues are likely to be unique, individualized, and best addressed on a case-by-case basis.

2. Changes in State Law.

Retroactivity issues may also arise where, prior to *Obergefell*, a plan incorporated a state's same-sex marriage ban into its terms or otherwise refused to recognize a marriage on the basis that the marriage was not valid in a particular state. Additionally, retroactivity issues may arise for couples whose marriage-equivalent relationships are converted under state law from domestic partnerships into marriages. As noted above, in Delaware, for example, all civil unions were converted to marriages effective the date of the original civil union. *See* 13 Del. C. § 218. Thus, retroactivity issues may arise as to the marriages with effective dates before *Windsor* or *Obergefell*, even though a state's recognition of same-sex marriages began after one or both of the cases.

D. Marriage Duration Requirements in Pension Plans.

Private- and public-employer pension plans generally include certain requirements for the timing and duration of a marriage as prerequisites to eligibility for a surviving spouse benefit. For example, ERISA-governed plans are permitted to, and typically do, require that the couple have been married for at least one year as of the earlier of the participant's retirement or death in order for a survivor benefit to be paid. *See* ERISA § 205(b)(4), 29 U.S.C. § 1055(b)(4). For couples whose civil marriages fail to meet a plan's durational requirement, but who previously occupied a status such as domestic partnership or common-law marriage, questions have arisen as to whether the prior status tacks onto the civil marriage for purposes of the durational requirement.

In *Kapple v. OPM*, 2015 WL 241655 (MSPB Jan. 16, 2015), an administrative law judge of the Merit Systems Protection Board overturned the denial of a spousal benefit to the widower of federal employee. The couple had been registered domestic partners in California since 2005. In July 2013, less than two weeks after the Supreme Court reinstated same-sex marriage in California, they married. After the employee passed away in January 2014, OPM denied the widower a spousal survivor benefit because the couple had been married for fewer than nine months at the time of the employee's death, as required by the statute governing the Federal Employees Retirement System (FERS). The Administrative Judge overturned OPM's denial of benefits, concluding that the period when the couple were registered domestic partners before they married "counts towards the nine months of marriage required for spousal benefits" in the statute. The decision noted that "California treats domestic partnership as equivalent to marriage for all purposes," and concluded that to interpret the term "marriage" in the federal statute as

including "only the label the state gave the relationship rather than its substance would raise serious constitutional questions."

Similarly, in Washington state, the state issued an amended death certificate listing a man who passed away in 2008 as married, when he and his spouse had entered into a registered domestic partnership in 2003. *See* http://www.king5.com/story/news/local/2015/11/04/gay-widower-victory-va-benefit/75147680. This enabled the surviving spouse to obtain his spouse's federal veterans' benefits, when eligibility for benefits was conditioned on whether the state of residency recognized the marriage. *See id.*

Common-law marriage may also supply a basis for meeting a marriage durational requirement. Recognition of common-law marriage under state law is increasingly rare. However, in July 2015, a trial court in Pennsylvania recognized a common-law same-sex marriage following the death of one spouse before Pennsylvania began issuing marriage licenses to same-sex couples. *See* http://www.law360.com/articles/684970/judge-retroactively-recognizes-common-law-gay-marriage. Although Pennsylvania abolished common-law marriage in 2005, pre-existing common-law marriages were grandfathered. Also, in December 2015, a court in Utah recognized a retroactive common-law marriage where one spouse died before the couple could formally marry, which resulted in an amended birth certificate for the couple's child listing both spouses as parents. *See* http://www.sltrib.com/news/3352688-155/groundbreaking-ruling-recognizes-same-sex-common-law-marriage.

In addition, plan sponsors may amend plans retroactively to modify a marriage-duration requirement, since such requirements may impose significant hardships on surviving spouses who were barred for many years from marrying. Such an amendment is consistent with ERISA, and is consistent with the IRS's guidance recognizing the potential need for changes to retirement plans better to include same-sex spouses, including amendments "to provide new rights or benefits with respect to participants with same-sex spouses."[14] Some plan sponsors have amended their plans or have separately agreed to pay surviving same-sex spouses who could not meet the marriage duration requirement the amount of the benefit.[15]

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[14] IRS, Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Plans FAQs, at FAQ-4, *available at* http://www.irs.gov/Retirement-Plans/Application-of-the-Windsor-Decision-and-Post-Windsor-Published-Guidance-to-Qualified-Retirement-Plans-FAQs.

[15] *See*, *e.g.*, *CNA Begins Policy Supporting Employees' Surviving Same-Sex Spouses*, Windy City Times (Jan. 9, 2015), at http://www.windycitymediagroup.com/lgbt/.

E. Title VII and Related Federal Anti-Discrimination Law.

After *Windsor* and *Obergefell*, Revenue Ruling 2013-17, and Technical Release 2013-04, plans will remain free to define "spouse" as "opposite-sex spouse" for some purposes. In particular, a health plan that provides benefits to opposite-sex spouses but excludes same-sex spouses does not violate ERISA. Recent developments in Title VII law and federal healthcare law, however, support sex discrimination claims based on denial of spousal benefits to employees' same-sex spouses.

1. Title VII.

Title VII prohibits discrimination "because of sex." Historically, courts have classified sex discrimination claims by gay and lesbian employees as claims of sexual orientation discrimination not cognizable under Title VII, on the theory that sexual orientation was an unprotected classification distinct from sex. But more recently, the Equal Employment Opportunity Commission and some courts have taken a different view of whether claims that have been classified as sexual orientation and/or gender identity discrimination claims state claims of discrimination "because of sex."

In July 2015, the EEOC issued a decision in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080, explicitly holding that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." 2015 WL 4397641, at *5 (EEOC) (July 15, 2015). The Commission also noted, among other things, that "[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex" and that "Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex." *Id.* at *5, *7. Some district courts have endorsed the reasoning of *Baldwin*. *See, e.g.*, *Isaacs v. Felder Servs., LLC*, 2015 WL 6560655 (M.D. Ala. 2015). Other EEOC decisions involving Title VII claims by gay, lesbian, or transgender federal employees include *Veretto v. U.S. Postal Serv.*, 2011 WL 2663401 (EEOC) (July 1, 2011); *Castello v. U.S. Postal Serv.*, 2011 WL 6960810 (EEOC) (Dec. 20, 2011); and *Macy v. Dep't of Justice*, 2012 WL 1435995 (EEOC) (Apr. 20, 2012).

Most recently, on March 1, 2016, the EEOC filed two Title VII sex discrimination lawsuits against private employers on behalf of gay or lesbian individuals. The EEOC's lawsuits seek, in addition to other monetary and injunctive relief for the aggrieved individuals, damages for emotional distress and punitive damages. *See U.S. EEOC v. Pallet Companies*, No. 16-cv-00595-RDB (D.

Md.) (filed Mar. 1, 2016); *U.S. EEOC v. Scott Medical Health Ctr., P.C.*, No. 16-cv-00225-CB (W.D. Pa.) (filed Mar. 1, 2016).

While results are mixed, federal district courts are increasingly recognizing discrimination claims brought by gay and lesbian employees as alleging sex discrimination under Title VII. For example, a federal court held that a gay employee sufficiently pled a claim for sex discrimination under Title VII because as a gay man, the employee's "sexual orientation was not consistent with the defendant's perception of acceptable gender roles." *Terveer v. Billington*, 34 F. Supp. 3d 100, 2014 WL 1280301, at *9 (D.D.C. Mar. 31, 2014); *see also Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (permitting plaintiff to go to trial on Title VII sex discrimination claim alleging mistreatment because he "chose to take his [male] spouse's surname – a 'traditionally' feminine practice"); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (noting that "[s]exual orientation discrimination can take the form of sex discrimination"); *but see Evans v. Georgia Reg'l Hosp.*, 2015 WL 5316694, at *3 (S.D. Ga. Sept. 10, 2015) ("[I]t is simply *not* unlawful under Title VII to discriminate against homosexuals or based on sexual orientation."), *report and recommendation adopted*, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015); *Currie v. Cleveland Metro. Sch. Dist.*, 2015 WL 4080159, at *3 (N.D. Ohio July 6, 2015) ("[C]laims of harassment on the basis of sexual orientation cannot give rise to a Title VII retaliation claim.").

These developments have major implications for employee benefits. On January 29, 2015, the EEOC issued a probable cause finding that Wal-Mart's refusal to provide spousal health benefits to the charging party's same-sex spouse constituted sex discrimination. In particular, the EEOC noted that the charging party "was subject to employment discrimination in that she was treated differently and denied benefits *because* of her sex, since such coverage would be provided if she were a woman married to a man." *See Cote v. Wal-Mart Stores East, LP* (Jan. 29, 2015), *available at* http://www.glad.org/uploads/docs/cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.pdf. Ms. Cote filed suit on July 14, 2015, alleging sex discrimination claims under Title VII, the Equal Pay Act, and the Massachusetts Fair Employment Practices Law. *Cote v. Wal-Mart Stores, Inc.*, No. 1:15-cv-12945-WGY (D. Mass.). The suit alleges claims on behalf of a national class of current and former Wal-Mart employees in same-sex marriages, as well as a Massachusetts sub-class. The suit challenges both Wal-Mart's refusal to provide spousal healthcare benefits prior to January 1, 2014, and its ongoing refusal, expressed in the EEOC investigation, to acknowledge any obligation to provide benefits on an equal basis to employees in opposite-sex and same-sex marriages. Approximately 1,200 employees enrolled same-sex spouses in Wal-Mart's health plan on or after January 1, 2014.

In a similar context, a district court denied a motion to dismiss a Title VII claim brought by gay and lesbian employees against a company that provided

health benefits to same-sex spouses but not to opposite-sex spouses. *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014). The court determined that the plaintiff "allege[d] disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id.* at *3.

In addition, on July 21, 2014, President Obama signed an executive order amending Executive Orders 11478 and 11246, which bans federal contractors from discrimination based on sexual orientation and gender identity. *See* Executive Order, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity. The order also makes clear that federal employees, who were already explicitly protected from discrimination on the basis of sexual orientation, are also protected from gender identity discrimination. *Obergefell* strengthens potential sex-discrimination claims by eliminating any defense that a plan relies on a particular state's marriage law in refusing to recognize same-sex marriages.

2. Affordable Care Act § 1557.

Section 1557 of the Affordable Care Act prohibits discrimination in healthcare on the basis of sex and other classifications protected by federal civil rights laws, including Title VII, which are incorporated by reference into the ACA. 42 U.S.C. § 18116. These protections are enforceable by private action. *See Rumble v. Fairview Health Servs.,* 2015 WL 1197415 (D. Minn. 2015). The Department of Health and Human Services, which is charged with enforcing § 1557, has issued a proposed regulation stating that this prohibition on sex discrimination includes discrimination on the basis of sex stereotyping and gender identity. 80 FR 54172-01 (Sept. 8, 2015). While the proposed regulation does not explicitly include sexual orientation, the HHS Office of Civil Rights' supplementary information to the proposed rule notes that "[a]s a matter of policy, we support banning discrimination in health programs or activities . . . on the basis of sexual orientation." 80 FR 54172, at 54176. It discusses the EEOC's *Baldwin* decision and states that "[t]he final rule should reflect the current state of nondiscrimination law, including with respect to prohibited bases of discrimination." *Id.* at 54177. It further seeks comments on "the best way of ensuring that this rule includes the most robust set of protections supported by the courts on an ongoing basis." *Id.* The nondiscrimination section also "complements" the nondiscrimination regulations that apply to the ACA Marketplaces, which explicitly prohibit discrimination on the basis of sex, gender identity or sexual orientation. *Id.* at 54189. A final regulation is expected in 2016.

The extent to which § 1557 reaches employer-sponsored plans is not yet entirely clear. The proposed regulation states that § 1557 does not apply to an

employer's provision of employee health benefits where provision of those benefits is only health program or activity operated by the employer – that is, the regulation reaches an employer-sponsored plan directly where the employer is, for example, a hospital or a health insurer, but not where the employer is not otherwise involved in the healthcare system. *See* 80 FR 54172-01 (Sept. 8, 2015).

However, the proposed regulation also states that § 1557 applies to any health program or activity that receives federal funding, including credits, subsidies, or contracts of insurance. *Id.* If a health program or activity receives federal funding, the civil rights provision applies to the entire program or activity, not just to the portion that receives federal funding. *Id.* For example, in a case decided before publication of the proposed regulation, where a hospital received Medicaid funding, § 1557 protected a transgender patient against sex discrimination in treatment, even though the hospital received no federal funding in connection with his admission. *Rumble*, 2015 WL 1197415.

Thus, it appears that under the proposed regulation, an employer-sponsored plan that is funded by the purchase of insurance from an insurer that participates in the ACA Marketplace would be subject to § 1557, although the plan itself is not sold on an exchange, receives no federal funding, and is not sponsored by an employer that is otherwise involved in healthcare. As another example, a self-funded plan that is administered by an insurer that participates in the Marketplace apparently would be covered by § 1557.

To the extent that § 1557 applies to employee benefit plans, they are prohibited from discriminating on the basis of sex, and the proposed regulation, developing caselaw, and EEOC decisions support the conclusion that this prohibition includes discrimination on the basis of sexual orientation. Therefore, in addition to being potentially liable for sex discrimination under Title VII directly, an employer-sponsored plan that discriminates against same-sex couples could be liable under § 1557.

3. Plan Administration Burdens.

In addition to the potential for sex-discrimination claims, plans that exclude same-sex spouses from benefits while including opposite-sex spouses will face an administrative burden from the need to ascertain the sex of each spouse that an employee seeks to enroll. Moreover, most employers are not likely to want to inquire in to the sex of their employees' spouses as a condition of enrolling those spouses in a health plan. An example of a highly intrusive and likely infeasible approach appears in one reported decision, where a health plan was amended to provide as follows: "[T]he Plan defines a spouse as a male or female member of a legally recognized marriage between a man and a woman. . . . For purposes of deciding

whether a marriage is between a man and a woman, in all cases, the Board will only recognize the anatomical sex of the individual at the time of birth." *Radtke v.* Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1028 (D. Minn. 2012). The intent of this provision is clear: to exclude not only same-sex spouses, but also any spouse in an opposite-sex marriage where a party has undergone a gender transition – both of which would be likely to give rise to a sex-discrimination suit. But even for an employer or plan willing to run that risk, the obligation to determine the "anatomical sex . . . at the time of birth" of each participant and potential beneficiary would create a substantial plan administration burden and likely give rise to significant employee relations problems.

E. Selected Recent Employee Benefits Decisions.

1. Same-Sex Widow Entitled to Pension Benefit.

As noted above, in the first post-*Windsor* ERISA decision, a district court awarded a surviving spouse benefit under a profit-sharing plan to a participant's same-sex widow. *Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D. Pa. July 29, 2013). The couple married in Canada in 2007 and lived in Illinois. One spouse worked in the Chicago office of a Philadelphia-based law firm, which sponsored a profit-sharing plan. The participant spouse died in 2010, without having executed a valid beneficiary designation for her plan account. Both the widow and the participant's parents filed claims for the benefit, and the plan filed an interpleader action. The plan terms did not define "spouse," other than incorporating the ERISA-permitted requirement that the couple have been married for at least a year as of the earlier of the annuity starting date or death. After *Windsor*, the court held that the widow was entitled to the benefit under the plan's default order of priority. The court explained that ERISA and the IRC establish the "floor" for spousal rights in pension plans, and that Windsor "leveled the floor," requiring equal treatment of legally married couples. Because the couple were validly married in Canada, and the Illinois probate court had recognized the widow as a surviving civil union partner, which is equivalent to a surviving spouse under Illinois law, the widow was entitled to be treated as the surviving spouse under the plan. The plan's Pennsylvania choice-of-law provision – Pennsylvania being a non-marriage state – did not control the outcome because ERISA preempted Pennsylvania law.[16]

2. Former Federal Employee in Oregon Entitled to Reimbursement for Her Domestic Partner's Health Benefits.

[16] Although the parents initially appealed, they dismissed the appeal following issuance of Rev. Rul. 2013-17.

A Ninth Circuit panel awarded back pay for the costs of health insurance to a former federal employee in Oregon who had not been permitted to enroll her same-sex domestic partner in the federal employees' health plan. *In re Fonberg*, 736 F.3d 901 (9th Cir. Judicial Council 2013); *see* § V.B, below. The court concluded that Ms. Fonberg and her partner were treated differently in two ways. First, they were treated differently from opposite-sex couples who could marry and gain spousal benefits under federal law, which the court found was discrimination on the basis of sexual orientation in violation of the District of Oregon's Employment Dispute Resolution plan. Second, they were treated differently compared to other same-sex couples in other states in the Ninth Circuit, who could marry and gain federal benefits under *Windsor*, and this violated "the principle that federal employees must not be treated unequally in the entitlements and benefits of federal employment based on the vagaries of state law." *See id.* It further found that OPM's "distinction based on the sex of the participants in the union" constituted sex discrimination and a deprivation of due process and equal protection. *See id.*

3. No ERISA Section 510 Claim for Health Plan's Exclusion of Same-Sex Spouses.

A district court in the Southern District of New York dismissed a case alleging that an ERISA-governed health plan's exclusion of same-sex spouses and domestic partners violates Section 510 of ERISA, which prohibits employers from discriminating against participants for exercising rights to which they are entitled under an employee benefit plan. *Roe v. Empire Blue Cross Blue Shield*, No. 12-cv-04788 (NSR), 2014 WL 1760343 (S.D.N.Y. May 1, 2014), *aff'd*, 589 Fed. App'x 8 (Dec. 23, 2014). The plaintiffs also alleged that the defendants breached their fiduciary duties by enforcing a plan term that violated ERISA. The plan at issue did not define "spouse," but contained an exclusion stating, "Same sex spouses and domestic partners are NOT covered under this plan." 2014 WL 1760343 at *1. The plaintiff filed a proposed class action in 2012 on behalf of participants or beneficiaries of Blue Cross Blue Shield insurance plans in New York and participants and beneficiaries of the particular plan at issue who are affected by the policy of denying coverage to same-sex spouses. The court dismissed the case, noting that ERISA does not require a health plan to provide benefits to spouses at all, that the Plan did not violate ERISA, and that Section 510 of ERISA did not apply.

The plaintiffs had not raised, and the court did not address, "whether the Exclusion is lawful under other federal laws." *Id.* at *8. While it is clear that health plans are not required by ERISA to provide coverage for any spouses, opposite- or same-sex, *see* § IV.B.1 below, those seeking to challenge plan terms that are discriminatory on their face can argue that such discrimination violates federal anti-discrimination laws such as Title VII. *See* § III.E, above.

4. Judge Allows Claim to Proceed for Same-Sex Widow Denied Pension Benefit Where Plan Incorporated DOMA § 3 and Participant Died Before *Windsor*.

As noted above, in *Schuett v. FedEx Corporation et al.*, 119 F. Supp. 3d 1155 (N.D. Cal. 2016), the surviving same-sex spouse of a pension plan participant who died six days prior to *Windsor* brought a claim after *Windsor* for a spousal survivor benefit. FedEx denied the claim on the ground that its pension plan, at the time of the participant's death, defined "spouse" by explicitly incorporating Section 3 of DOMA. The plaintiff brought suit, raising several claims in the alternative. The court denied FedEx's motion to dismiss the plaintiff's claim that regardless of plan's definition of "spouse," FedEx violated Title I of ERISA by failing to provide the plaintiff with a mandatory benefit under ERISA. *Id.* at 1166. The court was "not persuaded at this stage of the case . . . that there is any basis for denying retroactive application of *Windsor*." *Id.* The court granted FedEx's motion to dismiss the claim for benefits under the terms of the plan, since the plan terms excluded same-sex spouses. The court also dismissed the plaintiff's claim for breach of fiduciary duty alleging misinformation given to the participant spouse before her death.

IV. Effect of *Windsor* and Related Federal Guidance on ERISA-Governed Employee Benefit Plans.

A. Background.

1. Scope of ERISA Coverage.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), governs most employee benefits provided by private employers and unions. Specifically, ERISA governs two distinct kinds of plans: "employee pension benefit plans" and "employee welfare benefit plans." The term "employee pension benefit plan" or "pension plan" includes any plan that provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of employment or beyond. 29 U.S.C. § 1002(2). The term "employee welfare benefit plan" or "welfare plan" includes any plan that provides, "through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c)" of the LMRA. 29 U.S.C. § 1002(1).[17]

[17] ERISA does not govern plans that provide benefits not enumerated in its definitional sections. It also does not govern benefits provided by federal, state, or

ERISA contains a wide-reaching preemption clause providing that it supersedes "any and all state laws" that relate to employee benefit plans, except state laws that regulate insurance, banking or securities. 29 U.S.C. § 1144. This "insurance savings clause" allows states to regulate insured ERISA plans indirectly by regulating the terms of insurance policies, as discussed below.

2. Section 3 of DOMA.

Under Section 3 of DOMA, where ERISA referred to "marriage" or "spouse," these terms excluded same-sex spouses and civil union partners/domestic partners. The same applied to other benefits-related federal laws such as the Internal Revenue Code and the statutes governing federal employees' health and pension benefits.

While DOMA governed the interpretation of the terms "marriage" and "spouse" in the statute itself, DOMA did not prescribe the meanings of these terms as they appeared in ERISA-governed plans. With possible limited exceptions, even before *Windsor*, private employers were free to define these terms in their benefit plans to include same-sex couples, or to use other terms to extend eligibility to same-sex spouses or civil union partners/domestic partners, as the plan chose to define those terms. *See Union Sec. Ins. Co. v. Blakeley*, 656 F3d 275 (6th Cir. 2011) (holding that whether an opposite-sex cohabitant was a domestic partner within the meaning of an ERISA-governed life insurance plan should be determined by reference to the plan language, not by reference to a federal common-law definition of "domestic partner"); *see also Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69 (3d Cir. 2011) (holding that meaning of "children" in a welfare plan was to be determined by reference to the intent of the parties and not to state law).

B. Welfare Plan Issues.

1. Availability of Coverage and Mandated Benefits Under Insurance Law.

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local governments ("government plans"), or by churches or associations or conventions of churches ("church plans"). 29 U.S.C. § 1003(b). Church plans may elect ERISA coverage as to their pension plans. 29 U.S.C. § 1003(b)(2). Whether pension plans established by church-affiliated entities, such as healthcare organizations, are exempt from ERISA is in question. Some courts have also found that churches may elect ERISA coverage for their welfare plans, though the law remains unsettled.

As noted above, ERISA does not require a group health plan to provide health benefits to any spouses – opposite- or same-sex – of employees. Thus, neither *Windsor* nor *Obergefell* requires that ERISA-governed health plans provide benefits to same-sex spouses.[18] State and federal laws governing insured health plans, however, may mandate that plans providing benefits to opposite-sex spouses also provide benefits to same-sex spouses and domestic partners.

States are free to regulate insured ERISA plans through regulation of insurance. California's Insurance Equality Act ("IEA"), for example, requires that HMOs and insurance policies provide coverage for registered domestic partners equal to any coverage provided for married spouses. Cal. Health & Safety Code § 1374.58(a); Cal. Ins. Code §§ 381.5(a), 10121.7(a). As a result, an insured employer health plan marketed, issued, or delivered to a resident of California must provide benefits to registered domestic partners if, and to the extent that, it provides benefits for married spouses. However, an ERISA-governed health plan in California that is not funded through the purchase of insurance – that is "self-funded" – need not provide benefits to registered domestic partners.

Other states have also enacted legislation mandating that insured benefits be extended to same-sex spouses and domestic partners to the same extent as opposite-sex spouses, or mandating that insurance policies offer such benefits. Some state insurance commissioners have also mandated that insurers provide spousal benefits to same-sex spouses.[19] In June 2014, Washington state officials issued a letter to benefit plan administrators, insurance companies, and employers stating that providing health care coverage to opposite-sex spouses but not same-sex spouses violates Washington state law. *See* Letter from Wash. Atty. Gen., Wash. Ins. Comm'r, & Wash. Human Rights Comm'n (June 5, 2014). The Washington state agencies have taken the position that this applies not only to insured plans, but to self-funded plans as well, stating that "[t]he federal preemption provisions in ERISA . . . cannot be used to carve out same-sex marriages recognized in Washington state for unequal treatment by excluding them from healthcare benefits that are otherwise provided to other married couples in this state." Frequently Asked Questions, Washington State Joint Letter on Health Coverage for Same-Sex Spouses (June 5, 2014) (available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/FAQ%20Insurance%20Equality%20FINAL.pdf).

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[18] Plan participants in same-sex marriages might have potential ERISA claims for spousal health benefits under the terms of their particular plan, however, depending on whether and how the plan defines "spouse."

[19] *See* State of Conn. Ins. Dep't, Bulletin IC-21 (rev. July 10, 2009); State of New York Ins. Dep't, Circular Letter No. 27 (2008).

The federal government also regulates insurance, including qualified health plans offered through Affordable Insurance Exchanges (as part of the Patient Protection and Affordable Care Act). On March 14, 2014, the Centers for Medicare & Medicaid Services (of the Department of Health & Human Services) issued guidance to clarify the regulations' prohibition against discrimination based on sexual orientation. *See* CMS, Frequently Asked Question[s] on Coverage of Same-Sex Spouses (Mar. 14, 2014). The regulations preclude a health insurance issuer in the group or individual market that offers coverage of an opposite-sex spouse from refusing to offer coverage of a same-sex spouse. The regulations do not require a group health plan "to provide coverage that is inconsistent with the terms of eligibility for coverage under the plan, or otherwise interfere with the ability of a dependent spouse for purposes of eligibility of coverage under the plan." *See id.* at 1-2. Rather, the regulations prohibit an issuer from choosing to decline to offer to a plan sponsor (or individual in the individual market) the *option* to cover same-sex spouses under the coverage on the same terms and conditions as opposite-sex spouses. *Id.* at 2.

2. Continuation Coverage.

a. Federal Law (COBRA).

Amendments to ERISA by the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") added the requirement that ERISA-governed group health plans provide continuation coverage to employees and their "qualified beneficiaries" in the case of a loss or reduction of coverage due to various "qualifying events," including termination of employment, reduction of hours, divorce, death of the employee, and bankruptcy of the employer. 29 U.S.C. §§ 1161-67. However, the term "qualified beneficiary" includes only a spouse or a dependent child. 29 U.S.C. § 1167(3). As a result of *Windsor*, an ERISA-governed health plan is required to provide continuation coverage to employees' same-sex spouses if the plan provides active coverage to same-sex spouses, because a beneficiary must be enrolled in the plan prior to the qualifying event – such as termination of employment, divorce, or death – to be eligible for continuation coverage. Thus, a group health plan could theoretically exclude same-sex spouses from coverage and thereby avoid the requirement to provide continuation coverage. As discussed above in Section III.E, such an exclusion could expose the employer to Title VII claims.

An ERISA-governed health plan is not required to provide continuation coverage to domestic partners, even if it provides regular coverage to domestic partners. Nothing precludes a plan from providing continuation coverage to persons who are not qualified beneficiaries, including domestic partners.

b. State Law.

State insurance law may mandate continuation coverage for same-sex spouses and domestic partners in insured plans that cover opposite-sex spouses.

3. Welfare Plan Tax Issues.

a. Eligibility for FSAs, HSAs, and HRAs.

Under DOMA, domestic partners and same-sex spouses who were not tax dependents could not receive benefits under a Flexible Spending Account, Health Reimbursement Arrangement, or Health Savings Account. *See* Rev. Rul. 2006-36. Now, same-sex spouses are eligible for such benefits, but domestic partners are not. In addition, shortly after *Windsor*, employers that sponsor cafeteria plans were permitted to allow employees in same-sex marriages to change their elections mid-year so long as they were married as of June 26, 2013, because the *Windsor* decision itself constituted a change in legal marital status. IRS Notice 2014-1.

b. Whether Employer Contributions Are Includible in Gross Income.

Employer contributions for medical or life insurance benefits for an employee's spouse are not includible in the employee's taxable income for federal tax purposes, and the employee may make contributions toward such benefits on a pre-tax basis. IRC §§ 105(b), 106(a); Treas. Reg. § 1.106-1. Under DOMA, for a non-dependent domestic partner or same-sex spouse, however, employer contributions were taxable to the employee, and employee contributions were required to be made on an after-tax basis. Priv. Ltr. Rul. 9717018 (Apr. 25, 1997).

Unequal tax treatment of welfare plan benefits for same-sex spouses, as well as the administrative burden on employers of compliance with the requirement to impute income to employees, were a focus of the court in *Massachusetts v. United States Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887. Assessing the state's standing to challenge the application of DOMA § 3, the court agreed that the state had been injured by DOMA in several ways, including payment of increased Medicare taxes for state employees due to imputed income on health benefits for same-sex spouses.

Numerous states enacted legislation excluding the value of coverage for a non-dependent domestic partner from gross income for state tax purposes and permitting employees to make contributions for such coverage on a pre-tax basis for state tax purposes. *See, e.g.*, Oregon Dep't of Rev., Registered Domestic Partners in Oregon. In addition, in an effort to ameliorate the tax inequality, some employers "grossed up" employees' earnings to cover the federal tax on employer contributions for same-sex spouses (prior to DOMA) and domestic partner benefits. *See* "For Gay

Employees, an Equalizer," The New York Times (May 21, 2011). In October 2013, California enacted legislation making an employer's "gross-up" payment non-taxable at the state level. Cal. Rev. & Tax Code § 17141(a).

Revenue Ruling 2013-17 ended federal taxation of imputed income for benefits for same-sex spouses, including authorizing refund claims by employees and employers. However, the imputed income issue persists for non-tax-dependent domestic partners.

C. Pension Plan Issues.

1. Division of Qualified Plan Benefits on Dissolution.

ERISA preempts state marital property law and generally prohibits alienation or assignment of pension plan benefits, although it provides for the division of pension benefits after termination of a marriage. *See* ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). In particular, the prohibition on alienation of benefits does not apply to "the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order" ("DRO"), if the DRO is determined by the plan administrator to meet the requirements for a qualified domestic relations order ("QDRO"). ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

ERISA defines a DRO to include only a judgment, decree, or order that "relates to the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B). Under DOMA, "spouse" could not include a domestic partner or same-sex spouse. Thus, it appeared that a judgment, decree, or order entered by a state court in connection with the dissolution of a domestic partnership or same-sex marriage would not be a DRO – and therefore could not be determined to be a QDRO – unless it related to a tax-dependent domestic partner or same-sex spouse. A plan administrator that qualified a DRO arising out of such a dissolution while DOMA was in effect risked violating the anti-alienation provision.

After DOMA and Technical Release 2013-04, these barriers to qualification of a DRO no longer exist for DROs issued in dissolutions of same-sex marriages, but continue to exist for dissolutions of domestic partnerships.

A second question arises as to the requirement that a DRO "relate[] to . . . marital property rights." It is possible that a DRO relating to marital property rights of a domestic partner could meet this requirement. *See Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009) (holding that a state court order related to "marital property rights" when it directed payment of pension benefits to a tax dependent who had lived for 30 years in a "quasi-marital" opposite-

sex relationship with the employee; DOMA did not control the meaning of "marital property" in ERISA § 206). Since 2010, the IRS has recognized the community property obligations of same-sex married couples and domestic partners in community property states, and requires that they file their federal income tax returns accordingly, supporting the argument that the meaning of "marital property" is a question of state law. *See* IRS Chief Counsel Advisory 201021050.

2. Taxation of Distributions to an Alternate Payee.

When a qualified retirement plan makes a distribution to an alternate payee who is the spouse or former spouse of the plan participant, the alternate payee is treated as the distributee. IRC § 402(e)(1). However, where an alternate payee is not a spouse or former spouse, the distribution is reported as income to the plan participant. Thus, the distribution will be reported on a Form 1099-R issued to the participant. *See* Internal Revenue Service, 2012 Instructions for Forms 1099-R and 5498.

For alternate payees in dissolutions of same-sex marriages, issuance of a 1099-R to the alternate payee is authorized by the Code after Rev. Rul. 2013-17. However, the reporting issue persists as to domestic partnership dissolutions.

3. Survivor Benefits.

ERISA also protects spousal interests in pension benefits under qualified plans by requiring that the default benefit for a married participant in a defined benefit plan be a qualified joint and survivor annuity and that plans provide a qualified preretirement survivor annuity for the surviving spouse of a married participant who dies before retiring. 29 U.S.C. § 1055. While DOMA was in effect, these requirements likely did not extend to a participant in a domestic partnership or a same-sex marriage – although, as noted, IRS recognized community property rights of same-sex spouses and domestic partners in community property states.

However, plans have always been free to provide survivor benefits to same-sex spouses and domestic partners, although such survivor benefits would not have been qualified joint and survivor annuities (QJSAs) or qualified pre-retirement survivor annuities (QPSAs) while DOMA was in effect (now, such benefits are qualified for same-sex spouses but not domestic partners). As the United States wrote in a case challenging the constitutionality of DOMA, "Section 3 of DOMA imposes no blanket prohibition against a private retirement plan's provision of benefits to the same-sex spouse of a plan participant." Brief of the United States Regarding the Constitutionality of DOMA Section 3, *Cozen O'Connor, P.C. v. Tobits*, No. 2:11-cv-00045, Dkt. No. 97, p. 2.

Survivor benefits provided to a domestic partner may carry different tax consequences for the beneficiary than survivor benefits paid to a spouse. For example, the "5-year rule" and the "life expectancy rule," which relate to required timing of distributions of benefits under qualified plans, include a special rule for distributions to the surviving spouse of an employee, which allows a surviving spouse to postpone receiving distributions until the end of the year in which the participant would have attained age 70½. IRC § 401(a)(9)(B)(iv). Because a domestic partner is not a federally recognized spouse, he or she may not have this option. Before *Windsor* and subsequent guidance, many plans also treated same-sex spouses as ineligible for these forms of distribution.

After *Windsor* and subsequent guidance, qualified defined benefit plans are required to provide QJSAs and QPSAs to participants in same-sex marriages, but not to domestic partners. In addition, as noted above, retired participants and surviving same-sex spouses may have retroactive claims for these benefits.

4. Rollovers.

The Internal Revenue Code authorizes rollover distributions to non-spouse beneficiaries of defined contribution pension plans (such as 401(k) plans), regardless of whether such rollovers are provided for by the plan terms. IRC §§ 402(c)(11) 402(f)(2)(A). The resulting IRA is treated as an inherited IRA, and therefore does not offer the full range of benefits extended to surviving spouses, but it does offer non-spouse beneficiaries, including domestic partners, the opportunity to shelter such benefits from taxation.

After *Windsor* and related agency guidance, same-sex spouse beneficiaries can avail themselves of the full range of distribution options provided to opposite-sex spouses, and participants and surviving spouses may have claims for retroactive benefits. However, domestic partners remain ineligible for spousal treatment under federal tax law.

5. Non-Qualified Pension Plans.

Many employers provide benefits to highly compensated employees in the form of nonqualified deferred compensation or "top hat" plans. Such plans may provide benefits in excess of those permitted under IRC § 415. Such plans are subject to the preemption and civil enforcement provisions of ERISA, but not to the funding, vesting, participation, and spousal protection provisions, among others. *See* ERISA §§ 201(2), 301(a)(3), 401(a)(1), 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1); U.S. Dep't of Labor ERISA Op. 90–14A; *Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1491 (N.D. Cal. 1993).

As non-qualified plans, top hat plans are not required to provide spousal benefits under the IRC, and they are exempted from ERISA's spousal protection provisions. However, the terms of such plans are enforceable under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Therefore, if the terms of a top hat plan provide either that the form of benefit under the plan follows the form of benefit under a related qualified plan, or independently provides a spousal benefit, those terms should be enforceable as to same-sex spouses. In addition, if a nonqualified plan explicitly provides spousal benefits to opposite-sex spouses, but not to same-sex spouses, it may be subject to liability under Title VII.

Nonqualified deferred compensation benefits earned and vested after 2004 may be subject to additional requirements under IRC § 409A. 118 Stat. 1640, Pub. L. 108-357, Title VIII, § 885(d) (Oct. 22, 2004). Section 409A(a)(4)(C) provides rules for changes in the time and form of distribution under plans that permit such changes to be made at the election of a participant. *See also* 26 C.F.R. § 1.409A-2. These rules may impact changes to form-of-benefit elections by nonqualified plan participants under some plans.

V. Government Employee Benefits Issues.

A. State Employees.

1. Generally.

As noted above, ERISA does not govern benefits provided by state or local governments to their employees. Accordingly, state and local governments are generally free to provide benefits to same-sex spouses and domestic partners of their employees, and may be required by law to do so.[20] In particular, because *Obergefell* requires all states to permit and recognize same-sex marriages, all states must provide benefits to state employees in same-sex marriages on the same basis

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[20] State and local governments have faced litigation over their provision of such benefits, particularly in states that had constitutional amendments banning same-sex marriage. *See National Pride at Work, Inc. v. Governor of Mich.*, 481 Mich. 86 (2008) (state's constitutional amendment banning same-sex marriage precludes public employers from providing same-sex domestic partner benefits); *Knight v. Superior Ct.*, 128 Cal. App. 4th 14 (2005) (state's domestic partnership law did not violate constitutional amendment banning same-sex marriage); *S.D. Myers, Inc. v. City & County of S.F.*, 336 F.3d 1174 (9th Cir. 2003) (city's requirement that city contractors provide domestic partner benefits not preempted by state's domestic partnership law); *see also Irizarry v. Bd. of Educ. of City of Chicago*, 251 F.3d 604 (7th Cir. 2001) (no equal protection or due process violation in extending benefits to same-sex but not opposite-sex domestic partners).

that they provide benefits to state employees in opposite-sex marriages. In Texas, for example, which has more than 311,000 state employees, *Obergefell* thus results in a significant expansion of the number of employees eligible for spousal benefits.[21]

2. Federal Tax Issues for Governmental Welfare Benefit Plans.

State and local government employees will face the same issues with taxation of welfare benefits as do private-sector employees. Such benefits are no longer taxable for same-sex married employees, but are taxable for employees with domestic partners.

In addition, before *Windsor*, the Internal Revenue Code specifically denied tax-qualified status to state-sponsored long-term care plans that covered same-sex domestic partners or same-sex spouses. IRC § 7702B(f). As a result, states have carved their long-term care plans out of requirements that state government provide benefits to same-sex domestic partners. *See* Cal. Fam. Code § 297.5(g). States will presumably remove these exclusions as to same-sex spouses, but not domestic partners, following *Windsor, Obergefell*, and Rev. Rul. 2013-17.

3. Tax Qualification Issues for Governmental Pension Plans.

While governmental pension plans are not subject to ERISA, they are subject to the Internal Revenue Code. Thus, issues such as tax reporting of distributions to non-spouse alternate payees apply equally to governmental pension plans.

Shortly after the enactment of California's Domestic Partner Rights and Responsibilities Act, the IRS ruled that a county's IRC § 457(b) deferred compensation plan would fail tax qualification requirements if it interpreted the term "spouse" in the plan to include domestic partners. Priv. Ltr. Ruls. 200524016, 200524017 (June 17, 2005). However, it does not appear that tax qualification would be jeopardized if a plan were amended to extend benefits to domestic partners by its terms rather than by interpretation of the term "spouse." *See Helgeland v. Wis. Municipalities*, 307 Wis. 2d 1 (2008).

B. Federal Employees.

Interpretation of the term "spouse" or "marriage" in federal law to extend benefits to the same-sex domestic partners or same-sex spouses of federal employees was precluded by DOMA before *Windsor*. On June 19, 2009, President

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[21] *See, e.g.*, "Benefits to be extended to spouses of Texas' gay state workers," The Dallas Morning News (June 29, 2015), at http://www.dallasnews.com/news/state/headlines/20150629-benefits-to-be-extended-to-spouses-of-gay-state-of-texas-workers.ece.

Obama signed an executive memorandum extending certain benefits to domestic partners of federal employees. However, the statutes governing the primary federal employee benefits programs, the Federal Employees Health Benefits (FEHB) Program and Federal Employees Retirement System (FERS) both limit benefits to spouses. *See* 5 U.S.C. Chs. 84, 89. Thus, DOMA § 3 restricted these spousal benefits to opposite-sex spouses.

As discussed above, OPM issued guidance stating that all legally married same-sex spouses of federal employees are eligible for benefits under these and other programs in the wake of *Windsor*.[22] *See* OPM, Benefits Administration Letter No. 13-203 (Jul. 3, 2013). As noted above, OPM granted a claim for retroactive survivor benefits under FERS for the widow of a federal employee in a same-sex marriage who died several years before *Windsor,* and is working with other same-sex spouses of federal employees who died before *Windsor. See* § III.C, above. In addition, OPM provided notice of a two-year opportunity for annuitants in same-sex marriages to elect survivor annuities for their spouses under the Civil Service Retirement System and FERS. *See* 78 Fed. Reg. 47018 (Aug. 2, 2013).

OPM has noted that same-sex couples in a domestic partnership or form of relationship other than marriage will "remain ineligible for most Federal benefit programs." *Id.* While domestic partners are not eligible for benefits under the relevant statute for the FEHB program and FERS, a Ninth Circuit panel awarded a former federal employee in a domestic partnership received back pay for the cost of health insurance for her partner on the basis that the former employee was subjected to sex discrimination. *See In re Fonberg*, § III.E.3, above. In addition, an administrative law judge recently held that, when evaluating a same-sex widow's eligibility for survivor benefits under FERS, the period when the couple was registered domestic partners before they married "counts towards the nine months of marriage required for spousal benefits" in the FERS statute. *See* III.E.5, above.

VI. Other Employment-Related Federal Benefits Affecting Same-Sex Couples.

A. Family and Medical Leave Act.

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[22] As noted above, in April 2015, a federal employee whose same-sex spouse was denied health benefits under the FEHB Program before *Windsor* filed suit against OPM and her employing agency. *Hudson v. OPM et al.*, No. 15-cv-01539 (N.D. Cal.). The lawsuit alleges that the agencies' denial of the benefits pre-*Windsor* and the failure after *Windsor* to grant the employee's request for reimbursement for the alternate coverage she obtained for her wife are sex discrimination in violation of the Equal Pay Act (a federal statute prohibiting sex discrimination in compensation) and unjustified personnel actions warranting back pay. The case settled in September 2015.

Until March 27, 2015, the regulations implementing the Family and Medical Leave Act (FMLA) defined "spouse" by reference to the law of the state where an employee lived: "Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized." 29 C.F.R. § 825.122 (prior version). After *Windsor*, the Department of Labor stated that the state-of-residence requirement applied to same-sex marriages. U.S. Dep't of Labor, Fact Sheet #28F (Aug. 2013). Thus, an employee in a same-sex marriage who lived in a state that did not recognize the marriage was not entitled to FMLA leave to care for his or her spouse, even though the marriage was recognized for many other federal law purposes.

On June 27, 2014, the Department of Labor published a notice of proposed rulemaking to revise the FMLA regulations to adopt a place-of-celebration rule and to expressly include same-sex marriages in addition to common-law marriages. *See* 79 Fed. Register 36455. On February 23, 2015, the DOL issued a final rule consistent with the notice of proposed rulemaking that went into effect on March 27, 2015.[23] 80 Fed. Register 9989.

B. Social Security.

The Social Security Act provides that a marriage will be recognized for purposes of an application for benefits if the courts of the state in which the insured individual is domiciled at the time of the application or, if the insured individual is dead, in which he or she was domiciled at the time of death, would find that the applicant and the insured individual were validly married at the time the application is filed or at the time of death. 42 U.S.C. § 416(h)(1)(A)(i). However, an applicant may also be recognized as a spouse even if the courts would not have recognized the marriage as valid, but under the laws applied by such courts, the applicant would have the same status as a spouse with regard to intestate personal property. 42 U.S.C. § 416(h)(1)(A)(ii).

In interpreting subsection (i), the Social Security Administration issued guidance after *Windsor* in early 2014 on the processing of claims by individuals in same-sex marriages based on where the person who paid into Social Security (the number holder) lived – benefits were not paid if the number holder lived in a state that did not recognize the marriage. Following *Obergefell*, the Social Security Administration updated its guidance in February 2016 for processing claims based

[23] On March 26, 2015, a federal district judge in Texas granted a request from the states of Texas, Arkansas, Louisiana, and Nebraska, which did not recognize same-sex marriages, for a preliminary injunction with respect to the final rule. *See Texas v. United States*, No. 15-cv-00056 (N.D. Tex.). On June 26, 2015, following *Obergefell*, the court dissolved the preliminary injunction. (Dkt. No. 45.)

on same-sex marriages. *See* SSA, POMS GN 00210.000 (Feb. 8, 2016). The guidance states that "SSA is no longer prohibited from recognizing same-sex marriages for the purpose of determining entitlement to or eligibility for benefits." SSA, POMS GN 00210.001 (Feb. 5, 2016). In particular, the SSA will now "recognize a valid same-sex marriage as of the date of the marriage, including during periods when the number holder's (NH's) state of domicile did not recognize same-sex marriages." SSA, POMS GN 00210.002 (Feb. 2, 2016).

In interpreting subsection (ii), on June 20, 2014, the Social Security Administration issued guidance for processing claims involving "non-marital legal relationships," providing that the SSA will recognize a claimant as married if state law allows the claimant to inherit from his or her partner on the same terms as a spouse could inherit. *See* SSA, POMS GN 00210.004 (June 20, 2014, updated Jan. 26, 2015, updated February 10, 2016). The most recent update to the guidance clarifies that if a couple is in a qualifying non-marital legal relationship and then marries, the durations of each status may be combined for purposes of satisfying the Social Security statute's marriage duration requirement. *Id.* (updated Feb., 10, 2016).

VII. Conclusion.

As described above, *Windsor*, *Obergefell*, and guidance from the IRS and Department of Labor have drastically changed the landscape of federal employee benefits law for individuals in same-sex marriages, domestic partnerships, and civil unions. While the Supreme Court decisions create uniformity at the federal level and now the state level for individuals in same-sex marriages with respect to federal tax law and benefits mandated by ERISA, the IRC, and related regulations, certain open questions remain, particularly with respect to transitional issues involving participants who had life events preceding changes in the law, participants in marriage-equivalent relationships, and plans that seek to maintain distinctions between opposite-sex and same-sex married couples.

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Nondiscrimination Protections for LGBT Employees in Health Plans

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This paper addresses access to employer-sponsored medical benefits for two categories of LGBT employees: employees who are transgender, and employees in same-sex marriages or partnerships. While these two groups may overlap – for example, where a transgender individual is in a same-sex relationship, the issues presented for each group are distinct. For example, with respect to transgender employees, a health plan might categorically bar coverage for gender-affirming medical procedures. Or a health plan might deny coverage for a medication prescribed for a transgender employee, but provide coverage for the same medication when prescribed for a non-transgender employee. For employees with same-sex spouses, an employer might provide spousal benefits to employees in different-sex marriages, but not to employees in same-sex marriages or partnerships.

Numerous and sometimes overlapping sources of federal and state law implicate access to benefits in employer health plans for transgender employees and employees in same-sex marriages or partnerships: Title VII of the Civil Rights Act of 1964 and other federal employment discrimination laws, the non-discrimination provisions of Affordable Care Act, federal employee benefits law (ERISA), state regulation of insurance, state employment discrimination law, and others. This paper addresses the evolving legal framework protecting LGBT employees whose employers provide health benefits and highlights the different type of claims that such employees may have.

I. Background

A. Transgender Employees: Medical Care Related to Gender Transition.

The term "transgender" refers to people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth. Gender identity refers to a person's internal sense of being male, female, or something else.[1] A transgender woman, for example, is someone who was assigned male at birth and who identifies as a woman.

Many, but not all, transgender people access medical care in connection with their gender transition. Such care may include hormone therapy or and/or sex reassignment surgery (also called "gender affirming surgery"). Just as not all

[1] National Center for Transgender Equality, "Transgender Terminology" (Jan. 15, 2014), at http://www.transequality.org/issues/resources/transgender-terminology.

transgender people undergo medical care in connection with gender transition, those who do seek care do not all undergo an identical program of health services or procedures.[2] Rather, a transgender person will typically have individualized discussions with treating medical processionals about the care that is necessary and appropriate for that individual. Though not all medical procedures are appropriate for every individual, as a general matter medical care related to gender transition is accepted as medically necessary by the American Medical Association, and is not considered experimental.[3]

In addition to medical care related to gender transition, medical care for transgender people includes access to sex-specific primary care: for example, a transgender woman may require a prostate exam or a transgender man may require a pap smear.

B. Employees in Same-Sex Relationships: Relationship Recognition.

The twenty-first century has seen a rapid expansion relationship recognition and access to civil marriage for same-sex couples, culminating in *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015), which eliminated state-law barriers to civil marriage. *Obergefell* came two years after *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down as unconstitutional Section 3 of the Defense of Marriage Act, which limited the terms "spouse" and "marriage" as used in federal statutes and regulations to opposite-sex spouses and marriages. *Windsor* resulted in federal recognition of same-sex marriages for most purposes under federal law, regardless of whether a couple lived in a state that recognized their marriage. *Obergefell* requires that all states license and recognize same-sex marriages.

While same-sex marriage is available in all 50 states, some states continue to make spousal-equivalent statuses – such as civil unions or registered domestic partnerships – available to same-sex couples (and some opposite-sex couples under certain circumstances). Currently, California, Hawai'i, Illinois, New Jersey, Colorado Nevada, and Oregon continue to make these statuses available.[4]

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[2] *See generally* World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Nonconforming People* (Version 7, 2012).

[3] American Medical Association House of Delegates Resolution 122, H185.950, "Removing Financial Barriers to Care for Transgender Patients" (2008).

[4] Other states that formerly provided civil unions or domestic partnerships no longer do so now that civil marriage is available to same-sex couples, however. *See,*

These statuses carry the same rights and obligations as marriages under state law.[5]

II. ACA Section 1557.

Section 1557 of the Affordable Care Act, which went into effect in 2010, prohibits discrimination in healthcare on the basis of sex and other classifications protected by federal civil rights laws, which are incorporated by reference into the ACA. 42 USC § 18116. *See Rumble v. Fairview Health Servs.*, 2015 WL 1197415 (D. Minn. 2015). The Department of Health and Human Services ("HHS"), which is charged with enforcing § 1557, has issued a proposed regulation stating that this prohibition on sex discrimination includes discrimination on the basis of gender identity, and requesting comment on whether under the current state of the law also protects against discrimination on the basis of sexual orientation. 80 FR 54172-01 (Sept. 8, 2015). The comment period ended in November 2015, and a final regulation is expected in 2016.

A. Covered Plans and Providers.

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e.g., State of Delaware, Delaware Marriage (noting that no new civil union will be created); Rhode Island Dep't of Health, Rhode Island's Marriage Equality Law (noting that civil unions are not available after August 1, 2013). Some states also provide for the conversion of domestic partnerships to marriages, either by operation of law or by action of the couple. In Delaware, for example, same-sex couples in civil unions were permitted to convert their civil unions to marriages, and for those who did not act, on July 1, 2014, all civil unions were automatically converted to marriages. See 13 Del. C. § 218. The effective date of each marriage was deemed to be the date of the original civil union. *See id.* By contrast, in Washington, domestic partnerships for same-sex couples under age 62 were dissolved and converted to marriages, either by action of the parties or by operation of law, effective on the date of the conversion or June 30, 2014, not the date of the original domestic partnership. See Rev. Code of Wash. Ann. § 26.60.100.

[5] In these states, state law specifically provides that civil union parties/domestic partners will be treated as spouses for all purposes under state law, including for purposes of marital property, taxation, intestacy, and parentage. See, e.g., Cal. Fam. Code § 297.5; Colo. Rev. Stat. 14-15-107. Legislative history is often clear that the intent of these state laws is to treat civil union parties/domestic partners as married spouses. See, e.g., Colo. Rev. Stat. 14-15-102 (stating that purpose of Colorado Civil Union Act is "to provide eligible couples the opportunities to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses").

The proposed regulation explains that § 1557 applies to all health programs and activities, any part of which receives federal financial assistance from HHS. A health program or activity includes health services, health coverage, and all operations of an entity principally engaged in health services or health insurance coverage, such as a hospital or insurance company. Federal financial assistance includes grants, tax credits, cost-sharing subsidies under ACA Title I, and Medicare Part D payments. Thus, for example, § 1557 would apply to both an employer-sponsored plan that is funded by the purchase of insurance from an insurer that participates in the ACA Marketplace, and a self-funded plan that is administered by an insurer that participates in the Marketplace. The application of § 1557 flows from the involvement of an entity that receives federal funding, even if the plan itself is not sold on an exchange and receives no federal funding.

B. Prohibited Discrimination.

The proposed regulation defines "on the basis of sex" to include discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom; childbirth or related medical conditions; and sex stereotyping and gender identity. It further defines "gender identity" and related terms, defining "gender identity" to mean an individual's internal sense of gender, which may be different from an individual's sex assigned at birth. The regulation recognizes that the way an individual expresses gender identity may or may not conform to social stereotypes associated with a particular gender. For purposes of Section 1557, an individual has a transgender identity when the individual's gender identity is different from the sex assigned to that person at birth.

The regulation specifies that covered entities must provide individuals equal access to health programs and activities without discrimination on the basis of sex; covered entities must treat individuals consistent with their gender identity, including with respect to access to facilities; and sex-specific care cannot be denied or limited based on the fact that the individual seeking such services identifies as belonging to a different gender than the individual's assigned sex at birth, gender identity, or recorded gender. Thus, for example, a plan or provider presumably would violate § 1557 if it denied coverage for or refused to provide a pap smear or mammogram where medically necessary for a participant who identified as or was perceived as male.

With regard to coverage exclusions, the regulation prohibits explicit, categorical, or automatic exclusion from coverage for health services related to gender transition, but does not affirmatively require covered entities to cover any

particular procedure or treatment for transition-related care. Instead, where coverage is denied for a specific service related to gender transition, HHS will consider whether coverage is provided in other circumstances. Thus, it appears that at least those services and supplies that are routinely covered where medically necessary outside the context of gender transition would be required to be covered, such as hormone supplementation, psychotherapy, mastectomy, or hysterectomy.

If the final regulation addresses sexual orientation discrimination as a form of sex discrimination, it may provide specific guidance on discrimination against LGB people and same-sex couples in health care and health insurance settings. Even absent regulatory guidance on these issues, however, there are a growing number of cases under other federal statutes barring sex discrimination that recognize that sexual orientation discrimination and discrimination against same-sex couples is a form of sex discrimination. These cases are discussed further in the section on Title VII below.

C. Section 1557 Enforcement.

The Department of Health and Human Services is the agency charged with enforcing § 1557, and it reports that its Office of Civil Rights has been pursuing charges of discrimination since enactment of the ACA in 2010. For example, OCR investigated a complaint that a program in Colorado providing funding to health care facilities to provide mammograms and gynecological screenings for low-income women denied a mammogram to a transgender woman because she was not "genetically female." As a result of the complaint and investigation, the program adopted guidelines to clarify that grant recipients must provide mammogram services for transgender women who have taken or are taking hormones.[6]

Section 1557 is also enforceable by private action. Unlike with Title VII, exhaustion of administrative remedies is not required prior to a private plaintiff filing suit.

For example, in *Rumble v. Fairview Health Servs.,* 2015 WL 1197415 (D. Minn. 2015), a transgender man sued a hospital and physician group, alleging violations of § 1557 and the Minnesota Human Rights Act based on

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[6] HHS OCR, OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases, at http://www.hhs.gov/civil-rights/for-individuals/section-1557/ocr-enforcement-section-1557-aca-sex-discrimination/index.html (accessed April 25, 2016).

discriminatory treatment during an emergency room admission and hospital stay. The court denied a motion to dismiss, holding that private enforcement of § 1557 was available, that § 1557 protects individuals who allege discrimination based on gender identity, and that § 1557 applied even though the hospital did not receive federal funding in connection with the plaintiff's treatment – it was sufficient that some operations of the hospital received federal funding. Similarly, in *Taylor v. Lystila,* No. 14-cv-02072 (C.D. Ill. 2014), a transgender woman alleged that a medical provider discriminated against her in violation of § 1557 by refusing to provide hormone monitoring and treatment that it provided outside the context of gender transition.[7]

Several pending cases raise Section 1557 claims involving employer-sponsored health plans and medical benefits for transgender people. For example, *Tovar v. Essentia Health et al.*, No. 16-cv-00100-RJH-LB (D. Minn.), filed in January 2016, brings claims under Section 1557, Title VII, and the Minnesota Human Rights Act. The plaintiff and her transgender son participate in the employee health plan sponsored by the plaintiff's employer, Essentia Health, and administered by HealthPartners. The plaintiff's Section 1557 claim alleges that HealthPartners violated Section 1557 by denying the plaintiff's son medically necessary care by enforcing an unlawful categorical exclusion in the plan barring coverage for "[s]services and/or surgery for gender reassignment." The defendants have moved to dismiss, and the court has not yet resolved the motions.

Another pending case, *Baker v. Aetna Life Insurance Co. et al.*, No. 15-cv-03679-D (N.D. Tex.), filed in November 2015, brings claims under Section 1557, Title VII, and ERISA. The Plaintiff in *Baker* is a transgender woman seeking medically necessary breast reconstruction surgery whose employer-sponsored plan, administered by Aetna, does not cover the surgery. The plaintiff was also denied short-term disability benefits to have the surgery on the basis that her gender dysphoria was not considered an "illness" or "disease" for purposes of the short-term disability plan. Various motions are pending, including Aetna's motion to dismiss the Section 1557 claim (and other claims against it).

III. Title VII.

A. Discrimination Against Transgender People Under Title VII.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in

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[7] The *Taylor* complaint was dismissed without prejudice because the plaintiff died shortly after the filing.

employment "because of sex." 42 U.S.C. § 2000e(2)(a). While early cases classified discrimination claims brought by transgender (and lesbian, gay, and bisexual) people as not cognizable as sex discrimination under Title VII, a growing number of federal courts, as well as the Equal Employment Opportunity Commission (EEOC), have taken a different view. Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which recognized sex stereotyping as a form of sex discrimination, many courts have recognized that transgender employees could bring Title VII claims when they experienced discrimination based on an employer's perception that they did not comport with stereotyped notions of how men or women ought to look and act. For example, in *Smith v. City of Salem*, the court found that the plaintiff could bring a Title VII sex stereotyping claim when, after announcing that she would be transitioning to female, she had faced harassment from co-workers because they felt that her "appearance and mannerisms were not 'masculine enough.'" 378 F.3d 566, 568 (6th Cir. 2004).

Following this rationale, courts in the majority of circuits have recognized that transgender people could bring viable sex discrimination claims under Title VII or other federal statutes barring sex discrimination. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 2016 WL 1567467 (4th Cir. Apr. 19, 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000); *EEOC c. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Creed v. Family Express Corp.,* No. 306-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007); *Mitchell v. Axcan Scandipharm, Inc.*, No. CIV.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

In addition to the sex stereotyping theory recognized in *Smith*, some courts have recognized that discrimination based on a person's transgender status is per se sex discrimination, as the discrimination stems from the transgender person's change of sex. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012). As one district court recently observed, "[d]iscrimination 'because of sex' . . . is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Connecticut*, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *12 (D. Conn. Mar.

18, 2016) (denying employer's motion for summary judgment and holding that discrimination on the basis of transgender identity is cognizable under Title VII).

To date, there have been few court decisions addressing whether categorical exclusions of transition-related care constitute sex discrimination, though increased advocacy and attention around this issue will likely result in more such challenges. In 2003, the Second Circuit rejected ERISA and Title VII claims challenging a plan's denial of transition related care. *Mario v. P&C Markets, Inc.*, 313 F.3d 758 (2d Cir. 2003). The court based its holding in part on a finding that there was insufficient evidence that the care was medically necessary. As discussed below, however, recent decisions suggest an emerging scientific consensus to the contrary, calling into question the continued validity of this holding.

In the fall of 2014, a California district court considering constitutional Equal Protection claims brought by a transgender prisoner found that the plaintiff had stated a colorable claim for sex discrimination where she alleged that she was denied certain medical care that her doctors had deemed a medically necessary part of her gender transition, when the prison would have covered the same procedure for a non-transgender woman. *Norsworthy v. Beard*, No. 14CV00695JST, 2014 WL 6842935, at *11 (N.D. Cal. Nov. 18, 2014), opinion amended and superseded on other grounds, No. 14CV00695JST, 2015 WL 1478264 (N.D. Cal. Mar. 31, 2015). While a subsequent order in this case did not reach the Equal Protection issue, granting a preliminary injunction based solely on a determination that denying this care constituted deliberate indifference to a serious medical need in violation of the Eighth Amendment, this decision suggests that sex discrimination claims challenging exclusion clauses are viable.

The pending *Tovar* and *Baker* cases mentioned above raise Title VII claims against the defendant employers that sponsor the health plans at issue. In *Tovar,* according to the litigation complaint, the EEOC issued a determination letter in January 2016 finding that the defendant employer, Essentia, discriminated against the plaintiff based on sex when she was denied medical-related services for her child under the defendant's sponsored health insurance plan based on the the child's gender identity. In *Baker*, the litigation complaint brings Title VII claims against both the employer and against Aetna as the employer's agent. As noted above, motions to dismiss are pending in both cases. An additional pending case, *United States v. Southeastern Oklahoma State University*, involves Title VII claims alleged against an employer based in part on an exclusion in the employer's health plan. In that case, the employee-intervenor raised a hostile work environment claim under Title VII based in part on the plan exclusion. The court denied the employer's motion to dismiss the hostile work environment

claim, though it did not directly comment on the allegations related to the health plan. No. CIV-15-324-C, 2015 WL 4606079, at *1 (W.D. Okla. July 10, 2015).

B. Sexual Orientation Discrimination Under Title VII.

As with Title VII claims based on gender identity, the EEOC and an increasing number of federal courts have found that claims brought by lesbian and gay employees for discrimination based on sexual orientation can constitute discrimination "because of sex." Beginning with *Price Waterhouse* and continuing with *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), which unanimously held that same-sex harassment is actionable under Title VII, the Supreme Court has recognized that Title VII's prohibition on sex discrimination "must extend to [sex-based] discrimination of any kind that meets the statutory requirements." *Id.* at 80.

While the case law is less uniform in the context of sexual orientation than for gender identity, decisions explicitly protecting lesbian and gay employees go back to at least 2002, when a district court denied summary judgment to the employer where the lesbian plaintiff alleged that she was harassed (and ultimately discharged) for not conforming to the employer's stereotype of how a woman "ought to behave," since she was "attracted to and dates other women, whereas [the employer] believes that a woman should only be attracted to and date only men." *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

In July 2015, the EEOC issued a decision in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080, explicitly holding that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." 2015 WL 4397641, at *5 (EEOC) (July 15, 2015). The Commission also noted, among other things, that "[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex" and that "Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex." *Id.* at *5, *7. Some district courts have endorsed the reasoning of *Baldwin*. *See, e.g.*, *Isaacs v. Felder Servs., LLC*, 2015 WL 6560655 (M.D. Ala. 2015) (endorsing reasoning but dismissing on the merits); *Videckis v. Pepperdine Univ.*, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015) (Title IX sex discrimination case citing *Baldwin* with approval). EEOC decisions involving Title VII claims by gay or lesbian federal employees include *Veretto v. U.S. Postal Serv.*, 2011 WL

2663401 (EEOC) (July 1, 2011), and *Castello v. U.S. Postal Serv.*, 2011 WL 6960810 (EEOC) (Dec. 20, 2011).

Most recently, on March 1, 2016, the EEOC filed two Title VII sex discrimination lawsuits against private employers on behalf of gay or lesbian individuals. The EEOC's lawsuits seek, in addition to other monetary and injunctive relief for the aggrieved individuals, damages for emotional distress and punitive damages. See *U.S. EEOC v. Pallet Companies*, No. 16-cv-00595-RDB (D. Md.) (filed Mar. 1, 2016); *U.S. EEOC v. Scott Medical Health Ctr.*, P.C., No. 16-cv-00225-CB (W.D. Pa.) (filed Mar. 1, 2016).

While results are mixed, federal district courts are increasingly recognizing discrimination claims brought by gay and lesbian employees as alleging sex discrimination under Title VII. For example, a federal court held that a gay employee sufficiently pled a claim for sex discrimination under Title VII because as a gay man, the employee's "sexual orientation was not consistent with the defendant's perception of acceptable gender roles." *Terveer v. Billington*, 34 F. Supp. 3d 100, 2014 WL 1280301, at *9 (D.D.C. Mar. 31, 2014); *see also Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (permitting plaintiff to go to trial on Title VII sex discrimination claim alleging mistreatment because he "chose to take his [male] spouse's surname – a 'traditionally' feminine practice"); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (noting that "[s]exual orientation discrimination can take the form of sex discrimination"); *but see Evans v. Georgia Reg'l Hosp.*, 2015 WL 5316694, at *3 (S.D. Ga. Sept. 10, 2015) ("[I]t is simply *not* unlawful under Title VII to discriminate against homosexuals or based on sexual orientation."), *report and recommendation adopted*, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015); *Currie v. Cleveland Metro. Sch. Dist.*, 2015 WL 4080159, at *3 (N.D. Ohio July 6, 2015).

There is a strong argument that excluding same-sex spouses from eligibility for enrollment in a medical benefit plan may violate Title VII and/or Section 1557's prohibition on sex discrimination. The Supreme Court's recent marriage decisions strengthen potential sex-discrimination claims in this context by eliminating any defense that a plan relies on a particular state's marriage law in refusing to recognize same-sex marriages.

On January 29, 2015, the EEOC issued a probable cause finding that Wal-Mart's refusal to provide spousal health benefits to the charging party's same-sex spouse constituted sex discrimination. In particular, the EEOC noted that the charging party "was subject to employment discrimination in that she was treated differently and denied benefits *because* of her sex, since such coverage

would be provided if she were a woman married to a man." *See Cote v. Wal-Mart Stores East, LP* (Jan. 29, 2015), *available at* http://www.glad.org/uploads/docs/cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.pdf. Ms. Cote filed suit on July 14, 2015, alleging sex discrimination claims under Title VII, the Equal Pay Act, and the Massachusetts Fair Employment Practices Law. *Cote v. Wal-Mart Stores, Inc.*, No. 1:15-cv-12945-WGY (D. Mass.). The suit alleges claims on behalf of a national class of current and former Wal-Mart employees in same-sex marriages, as well as a Massachusetts sub-class. The suit challenges both Wal-Mart's refusal to provide spousal healthcare benefits prior to January 1, 2014, and its ongoing refusal, expressed in the EEOC investigation, to acknowledge any obligation to provide benefits on an equal basis to employees in opposite-sex and same-sex marriages.

In a similar context, a district court denied a motion to dismiss a Title VII claim brought by gay and lesbian employees against a company that provided health benefits to same-sex spouses but not to opposite-sex spouses. *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014). The court determined that the plaintiff "allege[d] disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id.* at *3.

IV. ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most pension and health plans sponsored by private employers, to provide protection for individuals in these plans.[8] Among other things, ERISA requires plans to provide participants with plan information and to establish a grievance and appeals process for participants to get benefits from their plans, and gives participants the right to sue for benefits and breaches of fiduciary duty.[9]

A. Benefits for Transgender People.

1. Medical Necessity.

Medical benefits plans typically cover only services and supplies that are determined to be "medically necessary." Medical necessity is commonly defined

[8] *See* Dep't of Labor, Employee Retirement Income Security Act ERISA, at https://www.dol.gov/general/topic/health-plans/erisa (accessed April 25, 2016).

[9] *See id.*

with reference to generally accepted medical standards. For example, a plan may define "medically necessary" as "the frequency, extent, and the types of medical services or supplies that represent appropriate medical care and that are generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury, or pregnancy."

Courts have held in a variety of contexts that transition-related services and supplies are the accepted medical treatment for gender dysphoria or gender identity disorder ("GID"). For example, in *O'Donnabhain v. Commissioner of Internal Revenue*, 134 T.C. 34 (2010), the United States Tax Court held that amounts paid for hormone therapy and sex reassignment surgery for treatment of GID were deductible medical care expenses under IRC § 213. The majority opinion cited the DSM-IV diagnostic criteria for GID, World Professional Association for Transgender Health Standards of Care, and expert testimony in concluding that the petitioner's expenses were for deductible "medical care" under the Code, not nondeductible "cosmetic surgery." The majority concluded that GID is a "disease" for purposes of section 213 and that "cross gender hormone therapy and sex reassignment surgery are well recognized and accepted treatments for severe GID." The court recognized that breast reconstruction surgery was at least sometimes considered medically necessary treatment for GIG, but found that the petitioner had not provided sufficient evidence of necessity in her case to demonstrate that this surgery did not fall within the Code's exclusion for "cosmetic surgery." Finally, the majority held that the petitioner's sex reassignment surgery was medically necessary. Concurring judges would have held that sex reassignment surgery is a "good faith treatment," without reaching the question of medical necessity, while dissenting judges would not have allowed the deduction.

The *O'Donnabhain* majority cited circuit court decisions holding that severe GID or transsexualism constitutes a "serious medical need" for purposes of the Eighth Amendment. *See O'Donnabhain*, 134 T.C. at 62; *De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001); *Phillips v. Mich. Dep't of Corr.*, 932 F.2d 969 (6th Cir. 1991); *Meriwether v. Faulkner*, 821 F.2d 408, 411-13 (7th Cir. 1987). The majority also cited cases holding that sex reassignment surgery is not "cosmetic surgery" for purposes of state Medicaid statutes. *See O'Donnabhain*, 134 T.C. at 71.[10]

[10] More recently, an en banc court of appeals, with two judges dissenting, held in the Eighth Amendment context that while GID is a serious medical need that mandates treatment, sex reassignment surgery was not the only appropriate treatment, and therefore denial of sex reassignment surgery did not rise to the

In contrast, in an ERISA case, the Second Circuit upheld a medical plan administrator's decision to deny coverage for hormone therapy and mastectomy as not medically necessary. *Mario v. P&C Food Markets, Inc.*, 313 F.3d 758 (2d Cir. 2002). The court held that the plaintiff had failed to rebut the plan administrator's conclusion that "there was substantial disagreement in the medical community about whether gender dysphoria was a legitimate illness and uncertainty as to the efficacy of reassignment surgery."

As *Mario* illustrates, plan participants and beneficiaries challenging medical necessity denials should understand that in ERISA cases, the requirement to exhaust the plan's claim process makes it particularly important for the plan participant to make a complete record in front of the plan administrator. ERISA benefit claims are generally subject to a requirement to exhaust the claim process provided for by ERISA § 503, 29 U.S.C. § 1133, and the Department of Labor's regulation thereunder, 29 C.F.R. § 2560.503-1. A decision to deny benefits challenged under § 502(a)(1)(B) will sometimes be reviewed by a court only for abuse of discretion, and the record on judicial review is generally limited to that before the plan administrator. *See Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc). Likewise, for plans that are subject to the ACA's internal and external review requirements, plan participants and beneficiaries should be familiar with the rights and responsibilities under 29 C.F.R. § 2590.715-2719, and ensure that a complete record is compiled during these proceedings.

2. Categorical Exclusions.

For health plans with categorical exclusions for transition-related care, transgender employees (or transgender dependents of employees) likely do not have strong claims under ERISA to enforce the terms of the benefit plan, as such a plan by its terms does not provide the benefit sought. There is also a strong argument that a transgender plan participant does not need to exhaust a plan's administrative claim process, if the specific benefit sought is not provided by the plan terms. That said, these questions are unsettled, and the law is likely to develop as more cases are litigated. In addition, some plans may have exclusion clauses that on their face exclude only some transition-related care. An exclusion

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level of a deprivation of constitutional rights. *Kosilek v. Spencer*, 774 F.3d 63, 106 (1st Cir. 2014) (en banc), *cert. denied sub nom. Kosilek v. O'Brien*, 135 S. Ct. 2059, 191 L. Ed. 2d 958 (2015).

for "sex change surgery," for example, would not exclude coverage for hormone therapy.

B. Same-Sex Marriages and Partnerships

ERISA does not require that health plans cover any spouses, opposite-sex or same-sex. Thus, a participant in a private-employer health plan that explicitly states it provides coverage for opposite-sex spouses, and not same-sex spouses or domestic partners, does not have an ERISA claim. *See Roe v. Empire Blue Cross Blue Shield*, No. 12-cv-04788 (NSR), 2014 WL 1760343 (S.D.N.Y. May 1, 2014) (dismissing ERISA case, noting that ERISA does not require a health plan to provide benefits to spouses at all, that the plan at issue did not violate ERISA, and that Section 510 of ERISA, which prohibits employers from discriminating against participants for exercising rights to which they are entitled under an employee benefit plan), *aff'd*, 589 Fed. App'x 8 (Dec. 23, 2014). In *Roe*, the district court noted that the plaintiffs in that case did not raise, and the court did not address, "whether the [e]xclusion is lawful under other federal laws." *Id.* at *8. As noted above, a participant in a same-sex marriage whose employer-sponsored plan explicitly excludes same-sex spouses from enrolling in the plan will likely have a strong discrimination claim under other laws such as Title VII.

V. Federal and State Mental Health Parity Acts

The federal Mental Health Parity and Addiction Act of 2008 prohibits health plans from imposing more restrictive financial requirements or treatment limitations on mental health and substance abuse benefits than are imposed on substantially all medical and surgical benefits. Many states have similar mental health parity laws. While being transgender itself is not considered a mental illness, many transgender people are diagnosed with gender dysphoria (formerly gender identity disorder, or GID), a mental health diagnosis that refers to the psychological discomfort or distress that is caused by a discrepancy between a person's gender identity and the sex they are assigned at birth. While there has been little to no litigation under mental health parity laws related to coverage for transition-related medical care, several state insurance agencies have prohibited categorical coverage exclusions based in part on state and federal mental health parity laws.[12]

[12] *See, e.g.*, State of Connecticut Insurance Department, Bulletin IC34, "Gender Identity Nondiscrimination Requirements," (Dec. 19, 2013) (prohibiting categorical exclusions of transition-related medical care based in part on Connecticut stature requiring insurance coverage for treatment of mental health conditions).

VI. State Insurance Law.

ERISA contains a wide-reaching preemption clause providing that it supersedes "any and all state laws" that relate to employee benefit plans, except state laws that regulate insurance. 29 U.S.C. § 1144. This "insurance savings clause" allows states to regulate insured ERISA plans indirectly by regulating the terms of insurance policies, as discussed below.

Not all ERISA-governed health plans are funded by the purchase of insurance: some are "self-funded," meaning that the plan provides health benefits to employees and dependents using its own funds (funds of the employer or trust fund) rather than through the purchase of insurance. These plans sometimes hire third-party administrators to decide claims and issue payments, and many large insurance companies provide plan administration services (but assume no risk for claims payment) for these self-funded plans. State insurance laws and regulations generally do not apply to "self-funded" plans.

A. State-Law Guidance on Transition-Related-Care Coverage.

In addition to potentially violating federal law, exclusions for transition-related care and gender-based benefit denials in insured medical benefit plans may violate state insurance law gender nondiscrimination provisions. For example, Cal. Ins. Code § 10140, the Insurance Gender Nondiscrimination Act, prohibits discrimination on the basis of "sex," defined as "includ[ing] a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with a person's assigned sex at birth." As another example, Washington, D.C.'s Department of Insurance, Securities and Banking issued a bulletin clarifying Washington, D.C.'s statute prohibiting discrimination in health insurance based on gender identity or expression.[13] Connecticut similarly requires that "medically necessary services related to gender dysphoria should not be handled differently from medically necessary services for other medical and behavioral health conditions."[14] States with similar prohibitions include Colorado, Delaware, Illinois, Massachusetts, Minnesota, New York, Nevada, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington.

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[13] *See* Bulletin 13-IB-01-30/15 (Revised) (Feb. 27, 2014), at http://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf.

[14] State of Conn. Ins. Dep't, Bulletin IC-34, "Gender Identity Nondiscrimination Requirements," (Dec. 19, 2013).

B. State-Law Protections for Same-Sex Couples.

Some states, through regulation of insurance, require insured plans that provide spousal coverage to provide coverage on the same basis for domestic partners or civil union parties. California's Insurance Equality Act ("IEA"), for example, requires that HMOs and insurance policies provide coverage for registered domestic partners equal to any coverage provided for married spouses. Cal. Health & Safety Code § 1374.58(a); Cal. Ins. Code §§ 381.5(a), 10121.7(a). As a result, an insured employer health plan marketed, issued, or delivered to a resident of California must provide benefits to registered domestic partners if, and to the extent that, it provides benefits for married spouses. However, an ERISA-governed health plan in California that is not funded through the purchase of insurance – that is "self-funded" – need not provide benefits to registered domestic partners.

Other states have also enacted legislation mandating that insured benefits be extended to same-sex spouses and domestic partners to the same extent as opposite-sex spouses, or mandating that insurance policies offer such benefits. Some state insurance commissioners have also mandated that insurers provide spousal benefits to same-sex spouses.[15] In June 2014, Washington state officials issued a letter to benefit plan administrators, insurance companies, and employers stating that providing health care coverage to opposite-sex spouses but not same-sex spouses violates Washington state law. *See* Letter from Wash. Atty. Gen., Wash. Ins. Comm'r, & Wash. Human Rights Comm'n (June 5, 2014). The Washington state agencies have taken the position that this applies not only to insured plans, but to self-funded plans as well, stating that "[t]he federal preemption provisions in ERISA . . . cannot be used to carve out same-sex marriages recognized in Washington state for unequal treatment by excluding them from healthcare benefits that are otherwise provided to other married couples in this state." Frequently Asked Questions, Washington State Joint Letter on Health Coverage for Same-Sex Spouses (June 5, 2014) (available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/FAQ%20Insurance%20Equality%20FINAL.pdf).

The federal government also qualified health plans offered through Affordable Insurance Exchanges (as part of the Patient Protection and Affordable Care Act). On March 14, 2014, the Centers for Medicare & Medicaid Services (of the Department of Health & Human Services) issued guidance to clarify the regulations' prohibition against discrimination based on sexual orientation. *See*

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[15] *See* State of Conn. Ins. Dep't, Bulletin IC-21 (rev. July 10, 2009); State of New York Ins. Dep't, Circular Letter No. 27 (2008).

CMS, Frequently Asked Question[s] on Coverage of Same-Sex Spouses (Mar. 14, 2014). The regulations preclude a health insurance issuer in the group or individual market that offers coverage of an opposite-sex spouse from refusing to offer coverage of a same-sex spouse. The regulations do not require a group health plan "to provide coverage that is inconsistent with the terms of eligibility for coverage under the plan, or otherwise interfere with the ability of a dependent spouse for purposes of eligibility of coverage under the plan." *See id.* at 1-2. Rather, the regulations prohibit an issuer from choosing to decline to offer to a plan sponsor (or individual in the individual market) the *option* to cover same-sex spouses under the coverage on the same terms and conditions as opposite-sex spouses. *Id.* at 2.

VII. Federal Employees and Employees of Federal Contractors.

On July 21, 2014, President Obama signed an executive order amending Executive Orders 11478 and 11246, which bans federal contractors from discrimination based on sexual orientation and gender identity. *See* Executive Order, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity. The order also makes clear that federal employees, who were already explicitly protected from discrimination on the basis of sexual orientation, are also protected from gender identity discrimination. These Executive Orders, which are enforced by the Department of Labor's Office of Federal Contract Compliance Programs, may give rise to sex discrimination claims for health benefit plans that discriminate against transgender people or same-sex couples.

Prior to 2015, the Federal Employees Health Benefits Program ("FEHB") did not offer federal employees health insurance plans that provided coverage for transition-related health care. In mid-2014, the Office of Personnel Management ("OPM") issued a carrier letter stating that coverage for such care would be optional for the plan year beginning January 1, 2015.[16] A follow up carrier letter directed that such coverage was mandatory for all FEHB plans beginning January 1, 2016.[17]

VIII. Conclusion.

Protections for LGBT people enrolled in employer-sponsored health plans

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[16] FEHB Program Carrier Letter No. 2014-17, "Gender Identity Disorder/Gender Dysphoria," June 13, 2014.

[17] FEHB Program Carrier Letter No. 2015-12, "Covered Benefits for Gender Transition Services," June 24, 2015.

are currently uneven and the subject of rapid developments under a variety of federal and state laws. While there is a trend towards prohibiting discrimination in health plans on the basis of gender identity and sexual orientation, the recognition such protections may still vary based on the type of plan and jurisdiction. Practitioners representing LGBT employees should be alert to ongoing developments in this area, and for opportunities to contribute to the further development of the law.

Advocating for the Rights of LGBT Employees

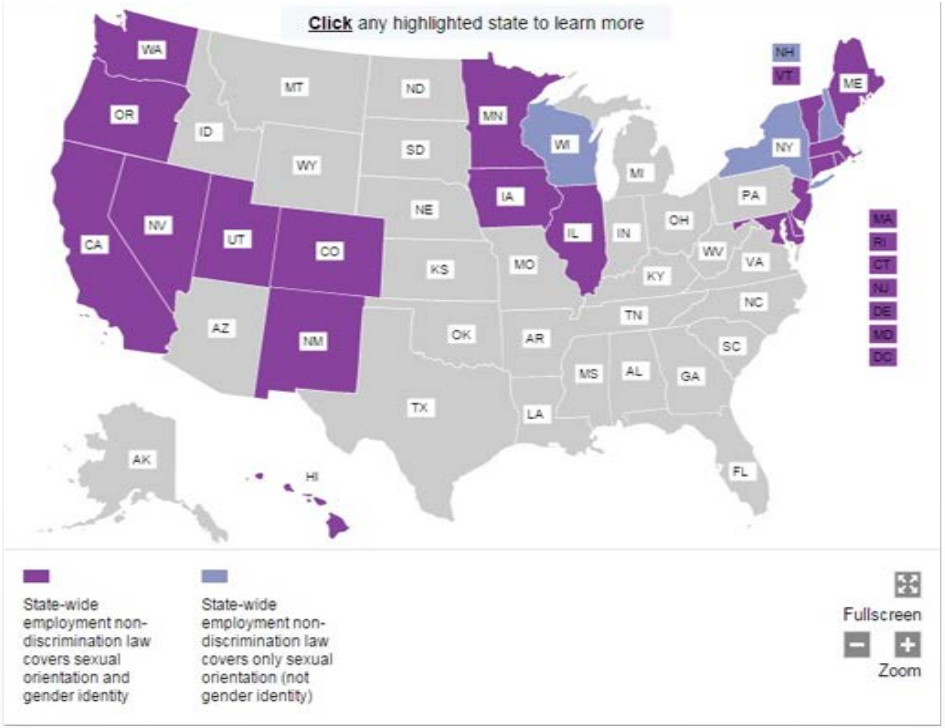
Ría Tabacco Mar, Teresa Renaker, Jacob Richards, Julie Wilensky

Overview

1. Introduction and Background
2. Recent Developments in Title VII Law and Practice Tips for Representing LGBT employees in Title VII cases
3. Other Recent Developments in Federal Employment Law
4. Employee Benefits Issues Affecting Employees with Same-Sex Spouses
5. Employee Benefits Issues Affecting Transgender People: Barriers to Coverage for Medical Care

Recent Developments in Title VII Law and Practice Tips

State Non-Discrimination Laws



Federal Equality Act

- Introduced July 2015
- Amends Title VII as well as Titles II, VI, ECOA, FHA, and Jury Selection and Services Act
- Adds sexual orientation and gender identity to list of protected characteristics
- Also amends the definition of sex to include:
  - Sex stereotype
  - Pregnancy, childbirth, or a related medical condition, and
  - Sexual orientation or gender identity

Where We Came From

- Early Title VII decisions, e.g.:
  - "We agree with the Eighth and Ninth Circuits that if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984)
- Subsequent Supreme Court decisions
  - *Price Waterhouse v. Hopkins* (1989)
  - *Oncale v. Sundowner Offshore Services* (1998)

Gender Identity Discrimination

- EEOC recognizes gender identity discrimination as sex discrimination
  - "When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim." *Macy v. Holder*, EEOC Doc. 0120120821 (Apr. 20, 2012)
- Two theories
  - Discrimination per se
  - Sex stereotyping

Gender Identity: Discrimination Per Se

- *Macy v. Holder* (EEOC)
- DOJ: Title VII prohibits discrimination because of an employee's gender transition (2014 Eric Holder Memo)
- District courts: *Schroer v. Billington* (D.D.C. 2008)
  - "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of ... sex.'"

Gender Identity: Sex Stereotyping

- EEOC
- Circuit courts
  - *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (Title VII)
  - *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (Equal Protection Clause)
  - Plus additional decisions from the First and Ninth Circuits (outside of the employment context)
- Dozens of district courts

Example: *Dawson v. H & H Electric, Inc.*

- "I am not a distraction. I am a woman, and I shouldn't be fired for being who I am." – Plaintiff Patricia Dawson
- Plaintiff entitled to trial on theory "that she was terminated because of her gender transition and her failure to conform to gender stereotypes." 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015)

Gender Identity: Additional Issues

- **Sex-specific facilities**
  - *Lusardi v. Department of the Army*, Office of Special Counsel
  - OSHA Guidelines, available at https://www.osha.gov/Publications/OSHA3795.pdf
  - Non-binary workers should determine which sex-segregated facilities are appropriate for them. Job Corps Program Instruction, Ensuring Equal Access for Transgender Applicants & Students (May 2015)
  - EEOC's fact sheet on bathroom access rights for transgender employees: https://www.eeoc.gov/eeoc/publications/fs-bathroom-access-transgender.cfm
- **Pronouns / Misgendering**
  - *Jameson v. U.S. Postal Serv.*, 2013 WL 2368729 (EEOC 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.")

Title VII: Sexual Orientation

- EEOC recognizes sexual orientation discrimination as sex discrimination
  - *Baldwin v. Foxx*, EEOC Doc. 0120133080 (July 15, 2015)
  - EEOC lawsuits filed March 1, 2016
    - *EEOC v. Pallet Companies*: harassment and termination of, and retaliation against lesbian forklift operator in Maryland
    - *EEOC v. Scott Medical*: hostile work environment and constructive discharge of gay male telemarketer in Pittsburgh
- Three theories
  - Discrimination per se
  - Sex stereotyping
  - Associational discrimination

Sexual Orientation: Discrimination Per Se

- EEOC: "'Sexual orientation' as a concept cannot be defined or understood without reference to sex."
- *Cf.* marriage cases
  - "[S]ame-sex marriage prohibitions facially classify on the basis of sex. Only women may marry men, and only men may marry women." *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (Berzon, J., concurring)
  - *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (DOMA)

Title VII: Sexual Orientation

- **Sex stereotyping**
  - *Veretto v. Donahoe*, EEOC Doc. 0120110843 (Dec. 20, 2011)
  - OFCCP Proposed Rule, Discrimination on the Basis of Sex (Jan. 30, 2015)
  - Handful of district courts – *Terveer v. Billington* (D.D.C. 2014)
- Discrimination against gay men and lesbians often includes sex-based harassment
  - For example, male waiter harassed for carrying tray "like a woman," *Nichols v. Azteca Restaurant Enterprises*, Inc. (9th Cir. 2001)

Title VII: Sexual Orientation

- **Associational discrimination**
  - Analogy in *Baldwin* to cases prohibiting discrimination based on interracial marriage or friendship
  - Courts and the EEOC have “consistently concluded” that Title VII prohibits discrimination based on employee’s association with a person of another race
  - EEOC noted in *Baldwin* that this analysis is not limited to context of race discrimination

Sexual Orientation Post-*Baldwin*

- Is the EEOC's interpretation entitled to deference?
- Following *Baldwin*:
  - *Isaacs v. Felder Services, LLC* (M.D. Ala. Oct. 29, 2015)
  - *Videckis v. Pepperdine University* (C.D. Cal. Dec. 15, 2015) (Title IX)
- Not following *Baldwin*:
  - *Burrows v. College of Central Florida* (M.D. Fla. Sept. 9, 2015) (denying reconsideration)
  - Some earlier decisions not yet overruled. *See Christiansen v. Omnicom Grp., Inc*., 2016 WL 951581, at *12 (S.D.N.Y. Mar. 9, 2016) (holding that Second Circuit precedent required dismissing claims, but critiquing distinction between sex and sexual orientation claims)
- Some federal courts have recently dismissed discrimination claims brought by lesbian or gay employees as based on sexual orientation, not sex, without

EEOC Enforcement

- EEOC Strategic Enforcement Plan FY 2013-2016
  - Litigation
    - EEOC cases
    - Amicus participation
  - Federal-sector decisions and guidance
  - Training and outreach
  - EEOC statements – contrary state law is not a defense to Title VII liability (e.g., North Carolina's HB2)
- Charge processing
  - 2,512 charges received in FY 2014 and 2015
  - EEOC has recovered $6.4 million for LGBT workers

Other Recent Developments in Federal Employment Law

Federal Contractors: Executive Order 13672

- Signed by President Obama July 2014
- Amends Executive Order 11246
- Prohibits gender identity discrimination against applicants to and employees of federal contractors
- Final rule became effective April 2015
  - Applies to contracts entered into or modified on or after effective date

Federal Employees: Office of Special Counsel

- Investigates prohibited personnel practices in federal employment
- Sexual orientation and gender identity discrimination
  - Prohibited personnel practice “on the basis of . . . sex.” 5 U.S.C. 2302(b)(1)
  - Also covered under prohibition against “other discrimination”
- Claims may be brought under OSC process, EEO process, or both
  - OSC investigates and generally does not defer sexual orientation and gender identity claims to the EEO process

Violence Against Women Reauthorization Act of 2013

- Prohibits discrimination on the basis of sexual orientation or gender identity by recipients of certain VAWA and Office of Justice Programs (OJP) grants
  - Many law enforcement agencies receive funds
- Awards made on or after October 1, 2013
- File a complaint with OJP's Office for Civil Rights

Americans with Disabilities Act

- ADA excludes from definition of disability "transsexualism, [and] gender identity disorders not resulting from physical impairments" 42 U.S.C. § 12211(b)(1).
- *Blatt v. Cabela's Retail*, 14-cv-4822 (E.D. Pa.) challenges this exclusion on statutory and constitutional grounds.
- November 2015 DOJ Statement of Interest:
  - "Growing body of scientific evidence suggests that" GID/gender dysphoria may "result[] from [a] physical impairment[]."

Family and Medical Leave Act

- **FMLA** – New rules, took effect on March 27, 2015
  - Amended FMLA definition of spouse to include legally married same-sex spouses
  - FMLA-covered employers cannot deny legally married same-sex spouses FMLA leave even in states that do not recognize same-sex marriages
    - Care for a same-sex spouse with a serious health condition
    - Care for a stepchild who is the child of a same-sex spouse
    - Care for a stepparent who is the same-sex spouse of the employee's parent
    - Care for a covered service member who is a same-sex spouse
    - Qualifying exigency related to the same-sex spouse's covered military service

Employee Benefits Issues Affecting Employees with Same-Sex Spouses

Employee Benefits Issues – Same-Sex Spouses/Partners

- DOMA § 3 controlled definition of “spouse” in federal law – not in private benefit plans
  - Private-employer plans governed by federal law could treat same-sex spouses equally before *Windsor*
- *Windsor* resulted in recognition of same-sex marriages under federal employee benefits law (ERISA), federal tax law, and related regulations
- *Obergefell*: uniformity at the state level
- Some states still have civil unions or equivalent statuses under state law – these are generally not recognized under federal law

Pension Benefits – Same Sex Spouses

- Because of *Windsor*, spousal benefit protections mandated by ERISA and the Internal Revenue Code now ***mandated*** for same-sex spouses
  - Examples: qualified joint and survivor annuities for married participants in traditional defined benefit plans, default beneficiaries for 401(k) and other defined contribution plans
- Federal employees (pension benefits governed by federal statute): *Windsor* resulted in pension benefits for same-sex spouses of federal employees

Pension Benefits – Issues for Same-Sex Couples

- Spouse in a same-sex marriage passed away before *Windsor*
  - *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155 (N.D. Cal. 2016)
  - *Pritchard v. IUOE Stationary Engineers Local 39 Pension Plan*
  - OPM working with surviving spouses of federal employees
- Marriage duration requirements

Health Benefits –Same-Sex Couples

- ERISA doesn't require that private employer health plans cover any spouses, but if a plan covers or covered only different-sex spouses:
  - State insurance law may require coverage
  - Potential discrimination claims under Title VII, Equal Pay Act, or ACA Section 1557
    - *Cote v. Wal-Mart, BNSF v. Hall*
- Coverage for domestic/civil union partners?
  - Some state insurance laws require that insured plans treat marriages and civil unions equally
  - Some companies phasing out domestic partner coverage now that civil marriage is available

Employee Benefits Issues Affecting Transgender People: Barriers to Medical Coverage

Employee Benefits Issues for Transgender People

Barriers to coverage of medical care:

- **Categorical coverage exclusions for transition-related care**
  - Health plans exclude benefits for services or supplies related to gender transition, such as psychological services, hormone therapy, and gender-affirming surgery
  - Plan administrators may attempt to apply exclusions broadly
- **Transition-based medical necessity denials**
  - Benefits for a medical service/supply denied as not medically necessary because related to gender transition
  - "Healthy organ/tissue" argument
  - Cosmetic exclusions
- **Gender-based medical necessity denials**
  - Benefits for a medical service/supply denied as not medically necessary for person of the employee's gender as reflected in the plan administrator's records

Challenging Coverage Exclusions

- State nondiscrimination law and administrative guidance (insured plans)
  - Fourteen states plus D.C. prohibit categorical exclusions of transition-related care (CA, CO, CT, DE, IL, MA, MN, NY, NV, OR, PA, RI, VT, WA (more limited guidance in MD))
  - For example, CT's bulletin requires that "medically necessary services related to gender dysphoria should not be handled differently from medically necessary services for other medical and behavioral health conditions."
- Title VII
- ACA
  - Section 1557
  - Essential Health Benefits
- Other: FEHB, Medicare

Title VII Claims

- Possible Title VII claims where health plan:
  - Contains coverage exclusions for gender transition-related care, particularly where supplies or services such as hormone therapy are excluded for transgender employees, but covered for non-transgender employees; or
  - Denies coverage on medical necessity grounds due to gender.

Affordable Care Act Section 1557

Prohibits discrimination on the basis of sex in health programs or activities receiving federal financial assistance (also covers race, color, national origin, age, disability)

Section 1557 Proposed Regulation

- Comment period ended Nov. 2015, final regulation expected this year
- Wide reaching: plans administered by third-party administrators that offer marketplace plans, Medicare Part D payments
- Ban on sex discrimination includes prohibition on discrimination based on gender identity (requested comments on sexual orientation)
- Covered entities must treat individuals consistent with gender identity, including with respect to access to sex-segregated facilities
- Categorical exclusions of transition-related medical care are prohibited sex discrimination
- Sex-specific care cannot be limited based on assigned sex, gender identity, recorded gender

Section 1557: Enforcement

- U.S. Dep't of Health and Human Services – Office of Civil Rights
- *Rumble v. Fairview Health Servs.*, 2015 WL 1197415 (D. Minn. 2015) (pre-NPRM)
  - Motion to dismiss denied
  - Section 1557 is enforceable by private action
  - Section 1557's prohibition on sex discrimination protects plaintiffs who allege discrimination based on gender identity
  - Section 1557 applies to organization if any part receives federal funding; plaintiff need not allege that he sought care from part of organization that receives federal funding

Potential Title VII/Section 1557 Claims

- *United States v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015)
  - Title VII claim based in part on insurance exclusion survives MTD (no discussion of insurance allegations)
- *Tovar v. Essentia Health*, 16-cv-00100 (D. Minn.) (filed Jan. 2016)
  - Title VII claims against employer
  - Section 1557 claims against health plan's third party administrator
- *Baker v. Aetna Life Ins. Co.*, 15-cv-03679-D (N.D. Tex.) (filed Nov. 2015)
  - Title VII, Section 1557, ERISA claims

Other Federal Guidance

- **Federal Employees Health Benefits Program**
  - Before 2015, OPM mandated that carriers exclude transition-related coverage
  - For 2015, OPM allowed carriers to retain or excise the exclusion
  - For 2016, OPM prohibits carriers from having the exclusion
    - FEHB Program Carrier Letter No. 2015-12, June 23, 2015
    - Effective 1/1/16, no carrier participating in FEHB Program may have a general exclusion of services, drugs or supplies related to gender transition or “sex transformations”
- **Medicare**
  - May 2014: categorical exclusions not valid under “reasonableness standard” governing Medicare coverage. (DHHS Medicare NHD 140.3 re: Transsexual Surgery (Docket No. A-13-87, Dec’n No. 2576, May 30, 2014)).
- **Federal Contractors**
  - Executive Order 13672 prohibits federal contractors from discriminating on the basis of gender identity. Enforced by Department of Labor (OFCCP).

Checklist of Potential Claims

- Title VII / Equal Pay Act
- ADA
- Executive Order 13672
- 5 U.S.C. 2302 (OSC)
- VAWA grant condition
- FMLA
- State / local laws

- Benefits Claims:
  - ACA Section 1557
  - Title VII / Equal Pay Act
  - ERISA (spousal rights, denials contrary to plan terms, misrepresentation)
  - State Insurance Law (insured plans)

Questions?

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