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A DOUBLE TAKE: SAME-SEX MARRIAGE BEFORE THE SUPREME COURT AGAIN?

Diversity Committee

Chairs: Amanda B. Buffinton - Bush Ross, P.A.; and Jessica Goodwin Costello - Florida Attorney General's Office of Statewide Prosecution

You may think this issue is old news given Florida's January 6 recognition of same-sex marriages following the U.S. Supreme Court's refusal to extend the stay of a federal district court decision finding the state's ban on same-sex marriages unconstitutional, but it's not over. The U.S. Supreme Court was planning to hear arguments in four same-sex marriage cases in April, potentially settling the divisive issue by the end of the current term. The justices were planning to consider an appeal from the Sixth Circuit decision that upheld state same-sex marriage bans in Michigan, Ohio, Kentucky, and Tennessee. Arguments are limited to the following two questions: 1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

The decision to hear these cases follows on the heels of Florida's recognition and the Fifth Circuit's extremely critical questioning of state bans in Texas, Louisiana, and Mississippi. Only three federal courts have upheld state marriage bans since 2013 — the Sixth Circuit and federal district courts in Louisiana and Puerto Rico.

The Supreme Court had set oral argument for the cases on April 28, 2015, and had stated that it would release the audio recording of the arguments on the same day.

The Supreme Court's decision will not change the current federal law that requires that all federal benefits be administered as if the state law and benefits plan recognize same-sex marriage. No medical plan can impute income, for federal income tax purposes, to an employee for covering their same-sex spouse under the plan. The cost of benefits provided to same-sex spouses covered under the plan (regardless of whether they live in a recognition state) would not be imputed to the employee but would be treated on a pre-tax basis. The benefits plan must recognize same-sex spouses for the purpose of administering federal statutory benefits, such as HSAs, FSAs, and COBRA, regardless of whether the plan recognizes same-sex spouses.

The Supreme Court's decision could impact whether fully insured plans are required to extend coverage to same-sex spouses.

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Although self-insured plans may continue to use a plan-specific definition of spouse, they may be subject to federal and state antidiscrimination claims. In fact, employees have begun successfully litigating the exclusion of same-sex spouses from self-insured plans under federal and state anti-discrimination laws. Recent case law has found that ERISA's preemption provisions may no longer provide protection for the design flexibility once afforded to employers providing self-insured plans. As a result, enacting a definition of "spouse" that is at odds with the state and federal definition may considerably increase a plan's potential exposure to lawsuits under state and federal antidiscrimination statutes, such as Title VII and the Equal Pay Act.

Keep your eyes peeled for the upcoming decisions.

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CORRECTION: The Diversity Committee's article in the March/April issue of the *Lawyer* magazine, "Charging Juveniles as Adults and its Disproportionate Effect on Minority Children," was written by Stevie Swanson of Western Michigan University–Cooley Law School.