SAME-SEX MARRIAGE

Are rules for same-sex marriage about to change in Texas?

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The Texas Supreme Court recently announced that it will review an argument that Texas employers shouldn't be required to spend taxpayer funds to provide benefits to spouses of employees in same-sex marriages, even if they do offer benefits to spouses of employees in opposite-sex marriages. Depending on the outcome of the case, the ruling could lead to plenty of confusion over what Texas employers are required to do (and are prohibited from doing) when it comes to employee benefits.

Background

Texans Jack Pidgeon and Larry Hicks filed the lawsuit, arguing that although the U.S. Supreme Court's landmark 2015 ruling on same-sex marriage in *Obergefell v. Hodges* requires states to license and recognize same-sex marriage, it doesn't require Texas employers—in this case, the city of Houston—to "subsidize" these marriages by providing same-sex couples with the same employment-related benefits that are provided to couples in opposite-sex marriages. Pidgeon and Hicks contend that Texas law enacted before *Obergefell* actually prohibits requiring these benefits.

But Pidgeon and Hicks are in for an uphill battle since their argument is contrary to an order upheld by a federal appeals court shortly after *Obergefell* stating that officials in Texas and other states are forbidden from enforcing any state law "prohibiting a person from marrying another person of the same sex or recognizing same-sex marriage" (*De Leon v. Abbot*).

State vs. federal laws

So, if the Texas Supreme Court agrees with Pidgeon and Hicks and rules that Texas officials can enforce state law prohibiting the benefits, affected Texas employers are off the hook as far as providing benefits to their employees' same-sex spouses, right? Not so fast. Although the Texas Supreme Court has the last word on Texas law, there are other authorities employers need to consider.

For example, the Equal Employment Opportunity Commission (EEOC) considers discrimination based on gender identity or sexual orientation to be "sex" discrimination, which is forbidden by Title VII of the Civil Rights Act of 1964 (a federal antidiscrimination law applicable to employers with 15 or more employees). So denying benefits to same-sex spouses while offering them to opposite sex-spouses is an absolute "no-no" as far as the EEOC is concerned, no matter what a contrary state law might say.

And if you're a federal government contractor, you better read the fine print in those contracts. Contractors are generally held to federal antidiscrimination standards, and language prohibiting discrimination "based on sex" usually appears in the contract itself.

There are also numerous federal laws that govern other benefits, such as retirement plans and COBRA rights, and a Texas Supreme Court ruling would have no effect when the feds come knocking to enforce those laws.

Unanswered questions

If the court does rule for Pidgeon and Hicks and finds that Texas officials can enforce the state law prohibiting benefits for same-sex spouses, it may leave Texas employers with more questions than answers. What is an employer to do if it thinks it's required to offer a benefit under federal law but prohibited from doing so by the Texas Supreme Court? And what about state tax treatment of same-sex spouses? Employers may be left scratching their heads unless an appeal goes up to federal court. Pidgeon and Hicks' Texas Supreme Court case is scheduled for oral argument in March.

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