MAYNARD COOPER CLIENT ALERT

APPLESAUCE, INTERPRETIVE JIGGERY-POKERY, AND SUBSTANTIVE CONSTITUTIONAL RIGHTS: THE U.S. SUPREME COURT UPHOLDS ACA FEDERAL EXCHANGE SUBSIDIES AND REQUIRES SAME-SEX MARRIAGE IN ALL STATES

On June 25 and 26, 2015, the U.S. Supreme Court issued two much-anticipated decisions important to employers. The first, *King v. Burwell*, interpreted the Affordable Care Act ("ACA") to provide for subsidies on federal exchanges. The second, *Obergefell v. Hodges*, held that same-sex couples have a constitutional right to marry and that states must provide marriage equality to same-sex couples.

KING V. BURWELL

In a 6-3 decision, the Supreme Court interpreted a key provision in the ACA to allow premium tax credits (referred to throughout as "exchange subsidies") on federal, as well as state-established exchanges. Chief Justice Roberts delivered the opinion for the Court. The case challenged the federal government's current practice of providing exchange subsidies to individuals enrolled in exchanges established by the federal government in states that did not establish their own exchanges. This case was seen by many to be the most likely effort to succeed in defeating the ACA.

The direct impact for employers is the removal of uncertainty regarding employer mandate penalties and the potential for different application in different states. Before the ruling, it was unclear whether employers who only have employees in states with a federally-facilitated exchange would be subject to penalties under the employer mandate for failing to offer coverage to their full-time employees. If the Court had struck down the availability of subsidies on federal exchanges, employer mandate penalties would not have applied to those employers because the penalties are directly related to employees receiving exchange subsidies.

Because the *King v. Burwell* decision essentially maintains the status quo, the more interesting commentary can be found in Justice Scalia's 21-page dissent. Justice Scalia, joined in his dissent by Justice Thomas and Justice Alito, suggested that, due to the majority's "absurd" interpretation, the ACA should be referred to as "SCOTUScare." Scalia criticized the majority's opinion, referring to certain portions as "applesauce" and "interpretive jiggery-pokery."

Justice Scalia explained the majority's approach in this and other decisions interpreting the ACA as one in which the "normal rules of interpretation seem always to yield to the overriding principle of this Court: The Affordable Care Act must be saved."

It is not hard to see Justice Scalia's point. After all, the majority did hold that when Congress says "Exchange established by the State" it means "Exchange established by the State *or the Federal Government.*" (emphasis added).

However, Chief Justice Roberts's majority opinion explains that the context and structure of the statute compelled a departure from what would otherwise be the most natural reading.

While the Court acknowledged that the arguments for a plain-meaning reading of the statute were strong, it found the statutory language limiting the subsidies to exchanges established by a state to be ambiguous in light of the role of ACA exchange subsidies in the ACA as a whole. The Court, therefore, determined that Congress intended to treat federal and state-based exchanges the same—at least for purposes of premium tax credits.

Now that the uncertainty whether the potential penalties for failure to offer coverage to full-time employees will remain in effect in all states has been resolved, employers should continue to move forward with their ACA compliance strategies. To that end, large employers (generally, employers with at least 50 full-time employees or full-time-equivalent employees) should take or continue the following actions:

- Maintain standard measurement and stability periods, or use the monthly measurement method to identify and track full-time employees who must be offered coverage; and
- Offer minimum essential coverage that is affordable and provides minimum value to substantially all of their full-time employees (70% in 2015 and 95% in 2016 and beyond).

Employers with fewer than 100 full-time employees (or full-time-equivalent employees) taking advantage of transition relief to the employer mandate should be sure their compliance systems and strategies are in place when the employer mandate becomes effective for them in 2016.

Additionally, employers with fewer than 50 full-time employees (or full-time-equivalent employees) should keep an eye on employee census data to determine whether they may be at risk for becoming large employers subject to the employer mandate.

Other ACA issues for which employers should be preparing include ACA reporting obligations using the recently-updated Forms 1094-C and 1095-C, and the Cadillac Health Plan Tax on high-cost coverage.

(*Continued*)

OBERGEFELL V. HODGES

Following the trend of perhaps the most sweeping social issue since the civil rights movement, the Supreme Court issued a landmark 5-4 decision holding that same-sex marriage is a fundamental right guaranteed by the 14th Amendment and that all states are required to both license a marriage between two people of the same sex and to recognize a lawful same-sex marriage performed out-of-state.

The Court identified four principles and traditions that demonstrate the reasons marriage is fundamental under the Constitution and found that they apply with equal force to same-sex couples:

(1) The right to personal choice regarding marriage (one of the most intimate decisions that an individual can make) is inherent in the concept of individual autonomy;

(2) The right to marry supports a two-person union unlike any other in its importance to the committed individuals, and same-sex couples have the same right as opposite-sex couples to enjoy intimate association;

(3) The right to marry safeguards children and families and draws in related rights of child rearing, procreation, and education, and denying the recognition, stability, and predictability that marriage offers, causes children to suffer the stigma of knowing their families are somehow lesser; and

(4) Marriage is at the center of many benefits of the legal and social order in the U.S., and there is no difference between same-sex and opposite-sex couples with respect to this principle.

Each of the four dissenting Justices (Chief Justice Roberts and Justices Scalia, Thomas, and Alito) filed their own dissenting opinion.

Although just how far reaching the implications of the Court's decision will be is still unclear, the following are important areas that are likely to be affected or that have been affected by the Court's prior decision in U.S. v. Windsor, and for which we have received the most questions:

ERISA IMPLICATIONS

The constitution only applies to relationships between governments and their citizens. It does not apply between non-governmental employers and their employees. Furthermore, the Supreme Court's opinion did not address ERISA and there is no indication that it will directly affect ERISA's requirements with respect to welfare benefit plans. Therefore, because ERISA does not require employers to offer any spousal coverage and allows employers that do offer spousal coverage to define spousal eligibility ("spouse" is not defined in ERISA for purposes of health and welfare benefits), ERISA preemption generally precludes state law from requiring same-sex spousal coverage for ERISA-covered welfare benefit plans, at least with respect to self-funded plans. State law may indirectly regulate employers' fully-insured plans by regulating the insurance carriers that offer them.

Nevertheless, employers should be mindful of their existing plan documents and the way in which they define spouse. If the intention is not to provide same-sex spousal coverage, the plan document should say so or, at minimum, should clearly define spouse to only include a spouse of the opposite sex. If the definition of spouse is ambiguous, there may now be a stronger argument that it should be construed to include same-sex spouses.

PUBLIC EMPLOYER IMPLICATIONS

As explained above, the constitution applies to relationships between governments and their citizens, including when the government acts as an employer. As a result, while public employers are not required to offer spousal benefits under welfare plans (unless otherwise required by applicable state law), if spousal benefits are offered, they likely must be offered on an equal basis to legally-married same-sex couples.

COBRA IMPLICATIONS

If same-sex spouses are covered under an employer's plan, the employer must treat same-sex spouses the same as opposite-sex spouses for purposes of COBRA (i.e., the employer must offer same-sex spouses COBRA coverage upon a qualifying event).

PRE-TAX PREMIUMS UNDER SECTION 125 PLANS

If an employer chooses to allow coverage of same-sex spouses under its health plan (or other elective benefit programs under the section 125 plan), it must allow premiums for the same-sex spouse to be paid pre-tax.

Whether a state's now required recognition of existing same-sex marriages is a qualifying event allowing election changes under a section 125 plan still depends on the spousal eligibility provisions of the underlying elective benefit programs. For example, if spousal eligibility is based on a marriage lawful under state law and the state previously did not recognize same-sex marriages, the state's recognition of same-sex marriage likely should be considered a qualifying event.

FMLA IMPLICATIONS

The Department of Labor ("DOL") has already issued a final rule adopting a "state of celebration" approach under which FMLA rights apply to same-sex spouses in the same manner as they do to opposite-sex spouses (i.e., eligible employees may take FMLA leave to care for a same-sex or opposite-sex spouse). Because after the Supreme Court's ruling, states may no longer refuse to recognize lawful same-sex marriages, any questions regarding the DOL's final rule have been all but eliminated. (*Continued)*

STATE TAX IMPLICATIONS

The decision should bring conformity to state tax treatment of same-sex benefits. Recognition of same-sex marriage in all states will affect the taxes of same-sex married couples and how employers report and pay state employment taxes. Many same-sex couples have been subject to conflicting treatment of their marital status by the state and federal government because, although the Supreme Court's Windsor decision in 2013 mandated federal recognition of same-sex marriage, it did not compel that states do the same.

Maynard Cooper Comment

Now is the time for employers to address their strategies with regard to benefits for same-sex married couples. Although there is still no requirement under ERISA to offer same-sex spousal coverage, there are potential risks in limiting spousal coverage to only opposite-sex spouses. In particular, employers taking such an approach may be at risk for litigation alleging discrimination.

Plaintiffs bringing such claims have mostly been unsuccessful, so employers would certainly have a defensible position. Given the Supreme Court's emphasis on the "benefits" bestowed upon married couples in finding protected fundamental rights for same-sex married couples, however, the legal framework has been put in place to attack any actions by employers that may be viewed as a limitation of those benefits for same-sex married couples (*e.g.*, eligibility for employee benefits). Of course, even if an employer successfully defends against such claims, it should consider the litigation expenses and negative publicity that could result.

Furthermore, employers should stay tuned for federal, state, and local agency action as the push for protections for the LGBT community and same-sex couples continues.

Additionally, although the rights of same-sex spouses under retirement plans are beyond the scope of this Client Alert, employers should be aware that the Supreme Court's Windsor decision and subsequent IRS guidance requires action in order for their retirement plans to remain in compliance.

The Author

MATTHEW CANNOVA
mcannova@maynardcooper.com
205.254.1193

Employee Benefits & Executive Compensation

ELIZABETH BEAUBE
bbeaube@maynardcooper.com
205.254.1082

JAMES KING
jking@maynardcooper.com
205.254.1181

MATTHEW STILES
mstiles@maynardcooper.com
205.254.1071

FRANCES KING QUICK
fquick@maynardcooper.com
205.254.1235

JESSICA EVEREST
jeverest@maynardcooper.com
205.254.1237