



Congress Passes Landmark Bill Protecting Same-Sex Marriage: Key Takeaways for Employers

Insights

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In a historic move, both chambers of Congress have approved legislation protecting the right of same-sex couples to get married, and President Biden is expected to quickly sign the bill into law. **[Editor's Note: The president signed the law into effect on December 13.]** The U.S. House of Representatives passed an amended version of the Respect for Marriage Act today in a 258-169 vote — following the Senate's bipartisan approval in November. Notably, the legislation will not require states to grant marriage licenses to same-sex couples, but rather will require states to fully recognize such marriages that are legally formed in other states. It will officially repeal the Defense of Marriage Act (DOMA) – a 1996 law that federally defined marriage as between one man and one woman. Although DOMA is not currently enforceable, it remained on the books after the Supreme Court dismantled it through opinions issued in 2013 and 2015. Once signed into law, however, the new law will replace DOMA and strengthen protections for both interracial and same-sex couples by essentially codifying SCOTUS precedent. For employers, the new law provides clarity that same-sex marriages will continue to be afforded the same protections as opposite-sex marriages. What do you need to know about the act and its impact on the workplace?

Law Addresses Uncertainty After Recent SCOTUS Ruling

In recent months, lawmakers on both sides of the aisle raised concerns about the strength of SCOTUS precedent establishing marriage equality for same-sex and interracial couples. Here's why.

The Court's 2015 decision in *Obergefell v. Hodges* protected same-sex marriage by giving states the green light to issue marriage licenses to same-sex couples and requiring other states to fully recognize such marriages. Although the decision remains the law of the land, LGBTQ advocates fear that a recent ruling allowing states to outlaw abortion could set the stage for SCOTUS to overturn *Obergefell*.

As you likely know by now, the Supreme Court's decision last term in *Dobbs v. Jackson Women's Health Organization* overturned *Roe v. Wade*. While the *Dobbs* ruling did not make abortion illegal nationwide, it lifted the federal right to abortion access and gave states the ability to pass stricter abortion laws.

What does a case about abortion have to do with marriage equality? The ruling put a spotlight on other SCOTUS decisions, such as those finding a constitutional right to interracial and same-sex marriage. In particular, Justice Clarence Thomas wrote a concurring opinion in the *Dobbs* case asserting his opinion that the Fourteenth Amendment's Due Process Clause does not secure any substantive rights, including a right to abortion. For this reason, he said, SCOTUS should reconsider all of its substantive due process precedents, including *Obergefell*, and "correct the error" established by those cases.

Even though the remaining justices might not reach the same conclusion – notably, Justice Brett Kavanaugh wrote in his own concurring opinion that the decision on abortion "does not threaten or cast doubt on those precedents" – the concurrence set into motion the events that led to this new federal law.

Bipartisan Support for Marriage Equality

The uncertainty created by the *Dobbs* opinion and Justice Thomas's concurrence prompted Congress to take action. Some lawmakers noted that if *Obergefell* is ultimately overturned – in the absence of legislation protecting marriage equality – states could refuse to recognize lawful same-sex marriages from other jurisdictions.

"Although the Supreme Court ruled in *Obergefell* that same-sex marriage is legal, this bill remains critical to ensure protections for legal marriages," said Senator Dianne Feinstein, D-Calif.

Additionally, Senator Rob Portman, R-Ohio, noted on the Senate floor that "current legislation allows states and the federal government to refuse to recognize valid same-sex marriages."

Portman cited to a Gallup poll showing that more than 70% of Americans believe same-sex marriage should be recognized as legally valid. "Despite this strong support, the United States Code does not reflect that consensus in America," he said.

Exceptions for Religious Organizations

As we mentioned above, the new law does not require states to issue marriage licenses to same-sex couples. But it does require the federal government and states to recognize lawful marriages established in other jurisdictions.

You should note, however, that an amendment passed by the Senate prohibits recognition of polygamist marriages and adds protections for nonprofit religious organizations to decline to "provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage." The amendment also states that existing legal protections based on religious liberty will remain intact, including rights afforded by the First Amendment and the Religious Freedom Restoration Act.

Additionally, the amendment states that the Respect for Marriage Act cannot be used to “deny or alter any benefit, status, or right of an otherwise eligible entity or person which does not arise from a marriage, including tax-exempt status, tax treatment, educational funding, or a grant, contract, agreement, guarantee, loan, scholarship, license, certification, accreditation, claim, or defense.”

What Does this Mean for the Workplace?

While the Respect for Marriage Act does not afford any additional rights to workers than what is already available under current SCOTUS precedent, employers should take this opportunity to review their benefits offerings – as well as their diversity, equity, and inclusion (DEI) policies – to ensure they align with current federal law and any applicable state and local laws.

Insured group health plans will continue to permit same-sex spouses to elect coverage just as opposite-sex spouses. And, while self-funded group health plans could attempt to exclude same-sex spouses, existing judicial precedent and the EEOC’s interpretation of Title VII of the Civil Rights Act in this context likely means doing so would invite legal challenge.

You should also ensure your DEI policies align with the 2020 SCOTUS decision in *Bostock v. Clayton County*, holding that Title VII shields workers from discrimination based on sexual orientation and gender identity. Likewise, you should note that many states have laws protecting LGBTQ workers that predate the SCOTUS ruling and may provide additional rights.

In light of these developments, you should also consider providing training to employees – particularly managers and human resources staff involved with hiring, promotion, discipline, and discharge – to ensure they are aware that sexual orientation and gender identity are protected categories and cannot be the basis of any employment decisions.

Conclusion

Fisher Phillips will continue to monitor developments in this area and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips’ Alert System to get the most up-to-date information. If you have questions about how to best prepare for compliance with the Respect for Marriage Act, please contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Employee Benefits and Tax Practice Group.

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Employment Discrimination and Harassment

DEI and EEO Compliance