A Seismic Shift: Understanding the Changing Legal Landscape on LGBT Issues

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LGBT Issues: In The News

• Defense of Marriage Act Overturned by Supreme Court
• Proliferation of State and Municipal Laws
• Long String of High Profile Athletes and Companies Issuing Public Apologies
• Folks, the Issues are Coming to a Desk Near You.
What We Will Accomplish Today?

- This is a “201” Discussion
- Provide a Brief Glossary of Terms that You Should Use (and not use)
- Offer an Overview of Legal Trends that May Impact Your Work
- Delve into Some of the Complications Arising from Supreme Court’s DOMA Decision
- Discuss Practice Points focusing on Transgender Inclusion in the Workplace
- **Note:** There May Be Significant Additional Regulatory Guidance Between the Time these Conference Materials Were Submitted and the Presentation Date
- Provide Tips for Where You Can go For Additional Information
Changing Legal Landscape

• Changes in Federal Law
• Proliferation of State and Municipal Statutes and Ordinances
• Rules May Reach:
  o Employment Non-Discrimination
  o Public Accommodation
  o Bullying
  o Employee Benefits tied to Marriage
• Pressure from Civil Rights Organizations
Key Terms and Terminology: Why Lawyers Need to be Culturally Competent

- Sexual Orientation
- Gay
- Lesbian
- Bisexual
- Queer (increasingly used for self-identification by younger people)
- Intersex
Key Terms and Terminology Regarding Gender

• Sex
• Birth-Assigned Sex
• Gender
• Gender Identity
• Gender Expression
• Transgender
  o Trans-man or Trans-woman (Male to Female individual or Female to Male individual still used, but losing currency)
• Transition
• Sex Reassignment Surgery or Gender Reassignment Surgery
Defense of Marriage Act of 1996 ("DOMA") and \textit{U.S. v. Windsor}

- \textit{U.S. v. Windsor} held that Section 3 of DOMA, which provides that only persons of the opposite sex can be a "spouse" or "married" for purposes of federal law
Defense of Marriage Act of 1996 ("DOMA") and U.S. v. Windsor

- States that recognize same-sex marriage: California, Connecticut, Delaware, Hawaii, Illinois (effective June 1), Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and District of Columbia recognize same-sex marriage. Licenses now being issued in Arkansas.
Defense of Marriage Act of 1996 ("DOMA") and 
U.S. v. Windsor

• Post-Windsor
  o 70 Different Cases Now Working through Federal 
    and State Courts Challenging State Statutory and 
    Constitutional Bans on Same Sex Marriage
  o A Number of Cases Already at the Court of 
    Appeals
  o Will Likely be Resolved by the Supreme Court
  o Strong Trend is Finding these Prohibitions Invalid
Impact of *Windsor*

- Family Medical Leave Act may include same-sex spouse in a state where marriages are legal
  - 12 weeks of unpaid leave for care of employee’s spouse who has serious health condition; any qualifying exigency arising out of the fact the employee’s spouse is a covered military member
  - 26 weeks of unpaid leave to care for covered service member with a service injury or illness if eligible employee is a spouse
  - FMLA Fact Sheet defines spouse as a husband or wife recognized under state law where the employee resides, not the state where the marriage took place
  - DOL has announced that regulatory revisions are forthcoming this spring
Impact of Windsor

• Immigration
  o Federal agencies have been instructed to receive same-sex filings
  o U.S. Citizenship & Immigration Services clarified in April 2014 that it will now process same-sex marriage petitions
Impact of *Windsor*

- **IRS & DOL Guidance**
  - Lawful marriage of same-sex individuals recognized for federal tax and ERISA purposes
  - Recognizes “state of celebration rule”
  - Civil unions and domestic partnerships not included in marriage definition
  - Tax guidance
    - Applies prospectively as of Sept. 16, 2013
    - Procedure for filing amended returns, claiming refunds
Impact of Windsor

- **Health Plans**
  - No more imputed income for health plan coverage for same-sex spouse
  - Can make pre-tax contributions for same-sex spouse coverage
  - FSAs, HSAs, HRAs can reimburse same-sex spouse medical expenses
  - Same-sex spouses eligible for COBRA
  - Special enrollment rights under HIPAA
Impact of Windsor

- Health Plans (continued)
  - Self-insured plans
    - ERISA provides employers broad discretion in drafting plans
    - NY Federal district court (May 2014) - same-sex spousal exclusion challenged under ERISA, but upheld
  - Fully insured plans
    - Must comply with governing state insurance laws
  - Health insurers offering coverage on Exchanges
    - Must provide same-sex spousal coverage if requested
Impact of Windsor

• Dependent Care Flexible Spending Accounts (FSAs)
  o Dependent care expenses for same-sex spouse incapable of self-care eligible for reimbursement
  o $5,000 maximum annual contribution between spouses
Impact of *Windsor*

- Treasury & IRS Guidance – Retirement Plans
  - Effective June 26, 2013, must recognize same-sex spouses
  - Effective Sept. 16, 2013, must recognize state of celebration approach
  - *Windsor* amendment deadline is later of:
    - Otherwise applicable deadline under section 5.05 of Rev. Proc. 2007-44, or its successor, or
    - Dec. 31, 2014
Impact of Windsor

• Retirement Plans
  o Same-sex spouse now entitled to survivor benefits
    ▪ Survivor annuities
    ▪ Default beneficiary unless waived by spouse
  o Plans now recognize same-sex spouse for purposes of hardship distributions
  o Same-sex spouse now able to rollover plan distribution to own IRA or eligible retirement plan
Impact of Windsor

• Retirement Plans (continued)
  o Same-sex spouse must consent to plan loan
  o Same-sex spouse now entitled to portion of plan benefits upon divorce if submit QDRO to plan administrators
  o Same-sex spouse of a participant who dies before age 70½ may now be able to defer distributions until participant would have reached age 70½
Post-Windsor To-Do List

• **Health Plans**
  - Revisit spousal coverage under plan
    - Need language clearly reflecting intent in SPDs, plan, etc.
    - If cover same-sex spouse, identify same-sex spouses
      - Contact employees with domestic partners covered on health plans
      - Required documentation should match procedure used with opposite-sex marriages
    - Notify participants of changes to eligibility rules, if applicable
      - Under ERISA, usually 210 days to end of plan year to provide notices of changes to SPD
      - Notify all participants (all eligible employees)
Post-Windsor To-Do List

• Health Plans (continued)
  o Should no longer be imputing income
    ▪ Federal tax laws – treat as married even if move from state to state
    ▪ State tax laws – review state laws
  o Work with service providers (TPAs)
  o Start providing COBRA notices, etc. to same-sex spouses
Post-Windsor To-Do List

• Retirement Plans
  o Amend plan definition of spouse as necessary by deadline
  o Beneficiary Rights
    ▪ Request updated beneficiary elections
    ▪ Coordinate with third-party providers
  o Coordinate with record-keeper
    ▪ Determine who is married
    ▪ Operate plan properly
      — Hardship distributions
      — Loans
Post-Windsor To-Do List

• FMLA and State Leave Laws
  o Check eligibility under state law
  o Review policies, processes, letters, forms
Civil Rights Act of 1964

• **Title VII**
  
  o Same-sex sexual harassment actionable
  
    
    ▪ Proof conduct because of sex (harasser gay and motivated by sexual desire; harasser same-sex and motivated by general hostility to that sex; or comparable evidence about how harasser treats members of both sexes)
Civil Rights Act of 1964

• **Title VII (continued)**
  
  o Transgender and Gender Non-Conforming Discrimination

  ▪ **EEOC**


    — Evidence may include: (1) gender stereotyping (act and appear according to expectations of gender); (2) hostility towards transgender; (3) desire to protect people of certain gender; (4) accommodation of others’ preferences; and (5) assumptions that disadvantage a particular gender
Civil Rights Act of 1964

- Transgender and Gender Non-Conforming Discrimination (continued)

  **Courts**
  - *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) (transgender and gender non-conforming persons protected class subject to heightened scrutiny under Equal Protection Clause of 14th Amendment based on gender stereotyping theory).
  - *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (held transgender city fire department employee stated valid sex discrimination claim under Title VII).
  - *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Gender Motivated Violence Act applies to transgender).
Civil Rights Act of 1964

- **Courts (continued)**
  - *Kastl v. Maricopa County Community College District*, 325 Fed. Appx. 492, 494 (9th Cir. 2009) (unlawful to discriminate under Title VII against a transgender person because he or she does not behave according to employer’s expectations for men and women)
  - *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2001) (transgender police officer established Title VII claim alleging discrimination for failure to conform to sex stereotyping)
Civil Rights Act of 1964

• **Title II** (prohibits discrimination in places of public accommodations)
State and Local Laws

• 21 states and District of Columbia prohibit workplace and housing discrimination on basis of sexual orientation

• Certain states, including New York and Florida, construe existing laws to prohibit discrimination against LGBT individuals

• More than 200 municipalities have ordinances relating to the treatment (particularly in employment context) of LGBT persons
Federal Hate Crimes Prevention Act of 2009

• Includes crime motivated by victim’s actual or perceived gender, sexual orientation, gender identity or disability

• First federal act to extend legal protection to transgender people

• Willfully causing bodily harm or attempts to inflict bodily harm
Employment Non-Discrimination Act ("ENDA")

• Pending federal legislation to protect workers from discrimination based on sexual orientation and transgender

• Introduced again on April 25, 2013; passed by Senate, November 8, 2013, 64-32
Implications and Best Practices

• Considerations for Transitioning Employees
  o Be familiar with state & local laws; make sure policies comply
  o Human Resources as key partner
    ▪ HR representative as main contact
    ▪ Show support
  o Discuss the transition
  o Work with the employee on a plan
  o Be flexible
• Considerations for Transitioning Employees (continued)
  o Think through & discuss the following topics:
    ▪ Individual’s timeline
    ▪ Presenting gender
    ▪ Name change & pronouns
    ▪ Bathroom use
      — Presenting gender
      — Zoning issues
• Considerations for Transitioning Employees (*continued*)
  o Time off
    ▪ Medical leave required?
    ▪ Time off during education process?
    ▪ No lost hours or penalties
  o Informing co-workers
    ▪ Works best as a team effort
    ▪ Personal message or FAQs?
Considerations for Transitioning Employees (continued)

- Educate co-workers
  - General & specific
    - Concept of transitioning may be unfamiliar
    - Level of detail depends on transitioning associate
    - Talking points helpful
  - Emphasize Company policies
    - Set expectations
- Where applicable, use new pronoun & name
- Bathroom choice
- Message from the transitioning associate?
- Allow co-workers to ask questions
Some Resources

• http://www.hrc.org/issues/pages/employer-resources
  o Transition Guidelines
  o Restroom Access for Transgender Employees
  o Sample Equal Employment Policies
  o Issues on Employee Self-Identification