



united states supreme court decides significant cases impacting employers

MSK Client Alert

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Closing out its term, the Supreme Court of the United States recently issued several important decisions that have a direct impact on employers. These decisions extend federal rights to same-sex married couples, provide further support for class action waivers in arbitration agreements, and interpret important provisions of Title VII of the Civil Rights Act.

DOMA and Same-Sex Marriage

In two sharply divided decisions, the Court ruled in favor of same-sex couples.

In *United States v. Windsor*, the Supreme Court struck down a provision of the federal Defense of Marriage Act (DOMA), which for purposes of all federal laws excluded state-recognized, same-sex marriages from the definition of "marriage" and explicitly defined marriage as only between a man and a woman. The Court held that, by defining marriage to exclude same-sex unions recognized by one of the states, these provisions of DOMA violate the equal protections afforded by the Fifth Amendment of the Constitution. Further, in *Hollingsworth v. Perry*, on procedural grounds, the Supreme Court left in place a lower federal court's holding that California's Proposition 8 (which rescinded the right of same-sex couples to marry) was unconstitutional. This decision effectively restores the right of same-sex couples to marry in California.

In those fourteen jurisdictions where same-sex marriages are now recognized (the states of California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington, along with the District of Columbia), all federal rights, benefits, and privileges granted to spouses also must be extended to employees in same-sex marriages. These include a number of important employment rights including:

practice areas

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FMLA Rights – Employers must protect an employee's job while the employee cares for a same-sex spouse under the terms of the Family and Medical Leave Act.

Enrollment in Health Plans – Under the Health Insurance Portability and Accountability Act, marriage is a "qualifying event" that allows an employee to enroll a new spouse immediately in a company-sponsored health insurance plan. The Court's decision extends this right to same-sex marriages.

Tax Treatment of Spousal Health Insurance and Expenses – The Internal Revenue Service must now extend tax-free treatment to company-paid premiums for health insurance for an employee's same-sex spouse and pretax status to an employee's payments for spousal health costs via vehicles such as flexible spending accounts.

Continuation of Spousal Insurance Under COBRA – Under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), upon employment termination, most employees have a right to continued medical coverage for themselves, their dependents, and their spouses under an employer's plan. This continuation right will extend to a same-sex spouse's coverage as well.

Pensions and Social Security – Same-sex spouses will have the same survivor rights as opposite-sex partners under private pension plans regulated by ERISA and under social security.

Arbitration Agreements Should Be Rigorously Enforced

The Federal Arbitration Act (FAA) was passed by Congress to uphold the enforceability of contracts that bind parties to arbitration. In *American Express Co. v. Italian Colors Restaurant*, the Supreme Court reaffirmed that, under the FAA, arbitration agreements should be rigorously enforced according to their terms. The Court held this to be true even if the plaintiff's costs in individually arbitrating a federal claim would exceed any potential recovery. This latest pro-arbitration case from the Supreme Court provides support for the enforcement of class action waivers in the employment context.

In *Italian Colors*, American Express and several merchants who accept American Express cards entered into an agreement that required all of their disputes to be resolved by individual arbitration. Nonetheless, the merchants filed a class action claiming American Express violated the Sherman Act by using its monopoly power to force the merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.

The merchants submitted a declaration that the cost of expert analysis necessary to prove the antitrust claims would far exceed the maximum recovery for an individual plaintiff. The merchants argued that enforcing the waiver of class arbitration bars "effective vindication" of a federal statutory right because they would have no economic incentive to pursue their antitrust claims individually in arbitration.

The Supreme Court held that the merchants must bring individual claims in arbitration because the FAA does not permit a court to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's costs in individually arbitrating a federal statutory claim would exceed any potential recovery. The Court also stated that it had already "specifically rejected the argument that class arbitration was necessary to prosecute claims" in its *AT&T Mobility LLC v. Concepcion* decision.



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Title VII Decisions

Late last month, the Supreme Court also issued two decisions interpreting Title VII of the Civil Rights Act of 1964.

In *UTSW v. Nassar*, the plaintiff, a faculty member at the University of Texas Southwestern Medical Center (UTSW), complained of alleged racial harassment and discrimination. When UTSW's Chair of Internal Medicine later refused to give his approval for Nassar to transfer to a related hospital, Nassar brought a lawsuit alleging retaliation. At issue before the Supreme Court was the question of whether Title VII's anti-retaliation provision requires a plaintiff to prove "but-for" causation or, instead, requires only proof that retaliation was one of multiple motivating factors for the employment action. The Court held that, rather than establishing that retaliation was merely a motivating factor, the plaintiff must prove that "but for" the retaliation the harm never would have happened. The Court concluded that the plain language of Title VII's anti-retaliation provision, which requires a plaintiff to prove that the adverse action occurred "because of" the plaintiff's protected activity, means that a plaintiff must show that the adverse action would not have occurred "but for" retaliation. The Court acknowledged that, although Congress amended Title VII's anti-discrimination provision to allow for so called "mixed motive" liability, it did not amend the Act's anti-retaliation provision.

In the second Title VII case, the Court narrowly defined who qualifies as a "supervisor" under Title VII. Under the Act, an employer is strictly liable for harassment by a supervisor that culminates in a tangible employment action (such as a termination or a failure to promote). However, if the harasser is only a coworker, the employer is liable only if the victim complains to her employer and the employer is negligent in responding to the complaint. In *Vance v. Ball State University*, the Court held that under Title VII supervisors are not simply individuals who direct the day-to-day activities of an employee. Rather, a supervisor must have the power to implement "tangible employment actions" and must be able to "effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"

ASK MSK

Q: If a same-sex couple marries in a state where such unions are recognized, will that couple enjoy federal marriage recognition if they live in or move to a state that does not recognize same-sex marriage?

A: This is one of the many questions left unresolved in *Windsor*. While it is clear that a same-sex couple residing in a state where their union is recognized is entitled to all rights and benefits afforded to spouses under federal law, the decision does not address whether federal rights would be extended to a same-sex couple legally married in one state, but residing in another that does not recognize their marriage. Employers should expect both regulatory guidance and further litigation on this important issue.

Q: How do the United States Supreme Court's same-sex marriage decisions impact the rights of California registered domestic partners?



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A: Despite the renewed recognition of same-sex marriage in the state, the California Domestic Partners Rights and Responsibilities Act of 2003 remains in effect. This means registered domestic partners continue to enjoy the same rights and responsibilities as spouses under state law. For example, domestic partners still have rights to leave under the California Family Rights Act. At this time, employers should not make adjustments to policies and benefits extended to domestic partners and should examine state and federal leave entitlements and benefits independently. It is unclear whether the federal government will recognize domestic partners as spouses, particularly where (as in California) same-sex marriage is now available.