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Title: *Obergefell* and FMLA Benefits for Same-Sex Couples

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Most recall Rowan County Clerk Kim Davis and her refusal to issue marriage licenses to same-sex couples in the face of the U.S. Supreme Court's decision in *Obergefell v. Hodges* holding the right to marry is a fundamental right under the 14th Amendment Due Process and Equal Protection Clauses. 135 S.Ct. 2584 (Jun. 26, 2015). The legal ideology for same-sex marriage is just beginning to take shape, as States struggle between individual constitutional rights and federalism.

The Family Medical Leave Act leaves room for interpretation that its safeguards apply equally across the board, defining "spouse" as "a husband or wife, as the case may be." 29 U.S.C. 2611(13). Under the FMLA, a spouse "refers to the other person with whom an individual entered into marriage…" without any gender specification. 29 C.F.R. 825.122 (as amended at 80 FR 10001, Feb. 25, 2015). The limitation comes with how marriage is defined, with state law controlling for the most part. However for marriages occurring outside of that state, the marriage is still valid if it "is valid in the place where entered into and could have been entered into" in at least one state. *Id.*

What happens in states that do not recognize same sex marriage when an employee married in a state that recognizes same-sex marriages has requested FMLA benefits for a same-sex spouse? Must the employer provide the benefits? At least one court has said no and granted an injunction staying application of the Federal Rule by the Department of Labor on the basis of states' rights. *Texas v. U.S.*, 95 F.Supp.3d 965 (N.D. Tex. Mar. 26, 2015). That Court's rationale was that although part of the Defense of Marriage Act had been overturned by a separate U.S. Supreme Court decision, the Full Faith and Credit provision within DOMA that allowed a state to refuse to give effect to any judicial proceeding "respecting a relationship between persons of the same sex that is treated as marriage" still stood. *Id.* at 972.

Despite that argument, the *Obergefell* Court subsequently considered DOMA as having been "struck down", presumably *in toto*. 135 S.Ct. at 2589. It continued, holding there to be "no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." *Id.* at 2591. Despite this holding, a separate dissent authored by Justice Scalia argued that constitutional "constraints" such as the Full Faith and Credit clause required people of one State to respect decisions made by people of another State, and that domestic relations had long been left to the States outside of Federal concern. *Id.* at 2627-28.

How do these conflicting arguments, coupled with Justice Scalia's passing, leave the prudent employer? Wary, to say the least. Although there do not appear to be any opinions following *Obergefell* specifically addressing FMLA benefits as applied to same-sex couples, in Kentucky at least there is suggestion that employers would be expected to provide them if push comes to shove. Kentucky's federal courts have held that provisions prohibiting same-sex marriage violate the Equal Protection Clause, and have refused to deny same-sex couples marriage licenses despite First Amendment arguments. *Love v. Beshear*, 989 F.Supp.2d 536, 549 (W.D. Ky. 2014) (rejecting a prohibition on same-sex marriage as unrelated to the so-called state interest "in procreation and long-term economic stability"); *Miller v. Davis*, 123 F.Supp.3d 924 (E.D. Ky. 2015) (balancing right of same-sex couples to marry with First Amendment protections). More likely than not Kentucky courts will require employers to provide FMLA benefits to the same-sex spouse, and employers are best suited to plan accordingly.