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# SAME-SEX MARRIAGE

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WHAT THE *OBERGEFELL* DECISION MEANS FOR SCHOOL DISTRICTS

JULY 2015 | VERSION 1.0

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## WHAT THE *OBERGEFELL* DECISION MEANS FOR SCHOOL DISTRICTS

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**O**n June 26, 2015, the United States Supreme Court issued a landmark ruling in *Obergefell v. Hodges*, legalizing same-sex marriage across the country.<sup>1</sup> Intrinsic to the decision was the Court's determination that marriage, regardless of whether it is between persons of the same or opposite sex, is a fundamental constitutional right protected by the Fourteenth Amendment of the U.S. Constitution. It follows that under **both federal and state laws**,<sup>2</sup> lawfully married same-sex spouses are now entitled to the same rights and benefits as opposite-sex partners. This is consistent with the position taken by the Obama administration, as announced by U.S. Attorney General Loretta Lynch, who stated that federal marriage benefits will be available to same-sex couples nationwide, beginning with social security and veterans benefits.<sup>3</sup> Because of its breadth, the *Obergefell* ruling will affect school districts in their roles as public employers. Collectively, school districts form the largest employer in the country, with over 6.9 million employees.



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1 In the *Obergefell* decision, the Court held that “[t]he Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when the marriage was lawfully licensed and performed out-of-State.” As a result of this decision, the bans on same-sex marriages that remained prior to *Obergefell* are now invalid, and same-sex individuals have the right to marry and have their marriage recognized in every state within the United States. *Obergefell v. Hodges*, 576 U.S. \_\_\_, 2015 WL 2473451 (June 26, 2015). This document provides an overview of the *Obergefell* decision and its potential impacts on school district operations. This document does not constitute legal advice or the rendering of a legal opinion on any particular document or individual situation. School boards are encouraged to seek the legal advice of a member of the NSBA’s Council of School Attorneys (COSA.)

2 The term “state” as used in this guide also refers to U.S. territories.

3 U.S. DEP’T OF JUSTICE, *Attorney General Lynch Announces Federal Marriage Benefits Available to Same-Sex Couples Nationwide*, JUSTICE NEWS (July 9, 2015), <http://www.justice.gov/opa/pr/attorney-general-lynch-announces-federal-marriage-benefits-available-same-sex-couples>.

The last time the Court issued such a significant ruling relating to same-sex marriage was its June 2013 ruling in *United States v. Windsor*,<sup>4</sup> when it held that Congress could not limit the application of marital benefits available **under federal law** to unions between a man and a woman. The Supreme Court's decision in *Windsor* struck down that section of the Defense of Marriage Act (DOMA), passed by Congress in 1996. As a result of the *Windsor* decision, individuals already in same-sex marriages became entitled to the same federal benefits as individuals in opposite-sex marriages. At the time of the *Windsor* ruling, the issue of whether same-sex marriage was a fundamental constitutional right had not yet been decided by the United States Supreme Court. As a result, some states allowed same-sex marriages, while others did not. The *Obergefell* decision now gives same-sex couples in any state the right to marry, thereby giving them the right to receive the same benefits that opposite-sex spouses receive under federal, state, and local government laws or policies.

This guide builds on the publication “*The Dos and Don'ts of DOMA: FAQs for School Systems and Employees on the United States Supreme Court Ruling on Same-Sex Marriage*” (October 2013),<sup>5</sup> and continues the efforts of the National School Boards Association (NSBA) to provide resources to help school board members and district staff understand their responsibilities for policy and administration under both the *Obergefell* and *Windsor* decisions. The guide also is intended to help employees understand how both these decisions affect their benefits and rights. In this effort, NSBA again is joined by the National Education Association and the School Superintendents Association.

4 *U.S. v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

5 NSBA's DOMA FAQs document is available at [http://www.nsba.org/sites/default/files/1013NSBA\\_DomaFAQ\\_v1-Updated.pdf](http://www.nsba.org/sites/default/files/1013NSBA_DomaFAQ_v1-Updated.pdf).

### Who should be interested in the *Obergefell* ruling?

➔ School boards, school superintendents, school district human resource departments, payroll departments, benefit administrators, employees, employee associations, and third-party plan or benefits administrators also should be interested in the decision in *Obergefell*.

### Do school districts need to provide benefits to same-sex spouses?

➔ Yes. School districts should provide employees with same-sex spouses the same benefits provided to other employees who have opposite-sex spouses, which may include federal benefits, state benefits, and any benefit conferred pursuant to a district policy or a collective bargaining agreement. Additionally, states that did not recognize same-sex marriages prior to *Obergefell* now are required to provide marital benefits to same-sex married couples who were married in states that licensed and recognized same-sex marriages prior to the Court's ruling.

### Which school board policies and benefits are affected?

➔ Every policy and benefit that defines or refers to marriage or spouses in the application of federal benefits, state benefits, or benefits conferred by school district policy or collective bargaining agreements are affected. The reference to marriage may occur through the use of the term “husband,” “wife,” or “spouse.” Examples of major areas that likely will be affected include, but are not limited to, health benefits, retirement benefits, insurance benefits, leave of absence benefits, FMLA policies, collective bargaining agreements, beneficiary designations, health care spending accounts, dependent child care, COBRA benefits, nepotism statutes, and any rights already provided to opposite-sex spouses under any school district policy or collective bargaining agreement.

### What are a state's obligations now with regard to same-sex marriages?

➔ Under *Obergefell*, states are required to license marriages between people of the same sex. The decision also requires states to fully recognize a marriage between two people of the same sex when the marriage was lawfully licensed and performed in a state that recognized same-sex marriages prior to the Court's ruling in *Obergefell*.<sup>6</sup>

### What if a school district is located in a state that does not recognize same-sex marriage?

➔ Under the holding in *Obergefell*, all school districts lie within states that must now recognize same-sex marriages. All states must license and perform same-sex marriages within the state and must

6 At the time of this document's publication, the media was reporting that officials in some states indicated a reluctance, or in some cases an outright refusal, to issue marriage licenses to same-sex couples. Maya Lau, *Spokesman for Baton Rouge Clerks office explains delay in issuing of same-sex marriage licenses*, THE NEW ORLEANS ADVOCATE (June 28, 2015), <http://theadvocate.com/news/12757368-123/many-clerks-of-court-could-the-louisiana-clerks-of-court-association-has-advised-clerk-offices-that-there-is-a-25-day-waiting-period-during-which-the-u.s-supreme-court-can-be-asked-to-rehear-a-case-advising-clerks-not-to-issue-licenses-during-the-period>.

It is important for school districts to understand that the *Obergefell* decision clearly states that the right of same-sex couples to marry is a fundamental constitutional right under the Fourteenth Amendment. Thus, even if a state refuses to license same-sex marriages, and regardless of any local governments' decisions to issue marriage licenses, an employee in a lawful same-sex marriage is likely to assert a federal constitutional violation against a school district for refusing to recognize his or her marriage. As a result, the failure to recognize a same-sex marriage or to deny rights on the basis of same-sex marriage could result in legal liability for a school district.

recognize a same-sex marriage licensed and performed in another state. In other words, legal bans on same-sex marriages are invalid as a matter of law.

What if a state is suing in court to challenge the Supreme Court's ruling?

➔ Some state or local officials may attempt to resist the Supreme Court's decision,<sup>7</sup> but the *Obergefell* decision is the law of the land.<sup>8</sup> If school districts fail to extend equal protection to employees on the basis of same-sex marriage, they may face legal liability. If your school district is in a state that is currently challenging the application of the *Obergefell* ruling, it is recommend that your district consult with a COSA school attorney to assess any areas of risk of liability.

Are civil unions/domestic partnerships affected by the ruling?

➔ *Obergefell* does not address civil unions or domestic partnerships. It should be noted that civil unions and domestic partnerships are not legally defined as marriages. States that recognize civil unions or domestic partnerships may make some changes in their laws in response to the holding in *Obergefell*, so it will be very important for school district employees to keep abreast of such changes.

7 At press time, some state officials suggested they would seek relief from the *Obergefell* ruling in court. Brian Lyman, *Alabama Supreme Court asks for same-sex marriage briefs*, MONTGOMERY ADVERTISER (June 30, 2015), <http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2015/06/29/ala-supreme-court-asks-ssm-briefs/29473403>.

8 As a result of the *Obergefell* decision, existing legal challenges to state laws on same-sex marriage in Louisiana, Mississippi, and Texas were disposed of, making marriage rulings in line with the U.S. Supreme Court. Jeff Amy, *5th Circuit Tells Courts to Issue Same-Sex Rulings*, ABC News (July 6, 2015), <http://abcnews.go.com/US/print?id=32170979>.

## Under *Obergefell*, however, all states must now recognize same-sex marriages



Must school district benefit plans cover same-sex marriages?

➔ Yes. To the extent school districts provide spousal benefits, they must now provide the same benefits to same-sex spouses as they provide to opposite-sex spouses.

Does the ruling affect collective bargaining agreements?

➔ Yes. If the collective bargaining agreements have provisions that address spousal benefits, they must now be provided without regard to whether the spouses are the same or opposite sex.

Should school districts inform employees of the change in benefits?

➔ Yes. The failure to inform employees of potential changes to benefits could be viewed as a form of discrimination or as a violation of the equal protection clause.

What are the tax consequences of the *Obergefell* ruling?

➔ The *Obergefell* ruling should eliminate some of the issues that employers and same-sex couples previously faced with regard to taxes. After *Windsor*, the federal government's Internal Revenue Service implemented a federal regulation

stating that couples who were married for state law purposes would be treated as married for federal tax purposes.<sup>9</sup> After *Windsor*, school districts in states that did not recognize same-sex marriage were not required to treat employees in legally unrecognized same-sex marriages as married for state tax purposes. Under *Obergefell*, however, all states must now recognize same-sex marriages, so it follows that the federal government will likely be required to permit joint filing by all same-sex couples, and states will be required to permit joint filing if they permit opposite-sex couples to file jointly under state law.<sup>10</sup> These changes may have consequences for school districts. It would be advisable for district personnel to seek the advice of a COSA attorney for responses to specific questions and circumstances. This publication will be updated electronically in the future, as federal agencies issue applicable policies and/or regulations.

9 Rev. Rul. 2013-17, 2013-38 IRB 201.

10 Tax law is a specialized area, and it is highly recommended that school districts contact a COSA attorney for legal advice, and that individual employees seek counsel from tax professionals in attempting to determine how they will be impacted by the *Obergefell* ruling.

Will federal agencies or state agencies be issuing new regulations?

➔ Currently, we are unaware of any specific plans that any federal agency intends to issue new regulations. It is more likely that agencies in those states that did not previously recognize same-sex marriages may develop some regulations to help them comply with the Court's ruling in *Obergefell*. School districts would be advised to have their COSA attorneys keep them informed of any new federal and/or state regulations that might be developed as a result of the Court's ruling.

Are an employee's COBRA rights affected?

➔ Prior to the *Windsor* decision, employers could, but were not required to, offer COBRA benefits to individuals in a same-sex marriage. After *Windsor*, however, employers are likely required to offer an employee's same-sex spouse (and their children) independent COBRA election rights to continue coverage. *Obergefell* should not change this. As federal agencies take time to catch up with the regulatory implications of the *Obergefell* decision, it is recommended that you consult with your COSA attorney to assess and balance the risks of possible litigation in this area.

Do same-sex couples need to wait for an open enrollment period to add spousal coverage?

➔ Probably not. Marriage generally is a "qualifying event" under employer-provided health plans that allow changes in insurance coverage between open enrollment periods. For those persons who are newly married after the *Obergefell* ruling, marriage still will be a "qualifying event," such that a same-sex spouse can be added to their spouse's health insurance coverage.

Though the *Obergefell* ruling requires all states to recognize same-sex marriages regardless of where they are performed or licensed, what is still in question is whether the recognition of an existing same-sex marriage entered into before *Obergefell* is a "qualifying event" such that enrollment of the same-sex spouse is now permissible. While this area of inquiry is being decided, a school district might consider having a special open enrollment period for same-sex spouses. For additional information, it is recommended that you contact your COSA attorney, and also approach your school district's insurance carrier, or if you are self-insured, then approach your appropriate benefits and tax advisor.

Does the *Obergefell* ruling affect health savings accounts (HSA)?

➔ Under the *Windsor* decision, same-sex spouses must share the HSA family contribution limit. *Obergefell* should not change this.

Does the *Obergefell* ruling affect dependent care accounts?

➔ Before the Supreme Court's ruling in *Windsor*, individuals in same-sex marriages could not use a dependent care account for expenses related to the care of a spouse's child. Now, the expenses for the care of a same-sex spouse's child should be eligible for reimbursement. The *Obergefell* decision should extend the benefit to employees who have dependent care accounts that are run by school districts, states, or third parties on behalf of school districts or states.

How will *Obergefell* affect a school district's FMLA policy?

➔ Under *Obergefell*, school districts in all states likely will need to provide FMLA benefits to employees in same-sex marriages in the same way that they provide them to employees who are in opposite-sex marriages.

What terminology should be used in referring to marriage in school district policies and plans?

➔ It is advisable to refer simply to "marriage" and "spouse." There is no distinction under the law between same-sex and opposite-sex spouses.

When does the *Obergefell* ruling take effect, and what should school districts do to implement the ruling?

➔ The ruling is effective immediately. There are several actions school districts should take in implementing this ruling:

1. Consult with a COSA attorney and tax counsel to determine what implications the case has with regard to employee taxes and FICA taxes.
2. As needed, review and revise all policies, benefit plans, summaries, and forms, etc., that apply to or affect married employees.
3. Consider the need for sponsoring a limited enrollment window for benefits.
4. Notify employees of the *Obergefell* ruling and their possible eligibility for benefits, including retroactive application.
5. Review all collective bargaining agreements and confer with union representatives to see if changes are needed.
6. Revise your FMLA policy to provide benefits for same-sex spouses.
7. Review the civil rights laws in your state and local jurisdiction for anti-discrimination or benefit provisions that apply to same-sex marriages.
8. Although the Supreme Court was clear that same-sex marriage is a federal constitutional right, monitor legislation and court rulings in your local jurisdiction to make sure that you stay abreast of any procedural issues with regard to same-sex marriage.



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