Track 2 – Session 6

A Look at Emerging LGBT Issues & Trends in Employment Law
About the Presenters...

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Current Workplace Protections for Transgender & Gender Diverse Employees: Federal, State, and Local

I. Federal Protections

A. Title VII of the Civil Rights Act of 1964

Title VII is a federal law that prohibits most workplace harassment and discrimination, covering all private employers, state and local governments, and educational institutions with 15 or more employees. In addition to prohibiting discrimination against workers because of race, color, national origin, religion, and sex, those protections were extended to include barring against discrimination on the basis of pregnancy, sex stereotyping, and sexual harassment of employees.¹

In 2012, the EEOC extended its interpretation of this law to provide protection for trans-individuals, and as of July 16, 2015, the EEOC now interprets this law to provide protection for all LGBT individuals.²

i. Before 2000, LGBT employees routinely lost Title VII sex discrimination claims. Once a plaintiff was identified as homosexual or transgender, claims were discounted as attempts to bootstrap sexual orientation or gender identity as additional classes protected under Title VII.³

a. Ulane v. Eastern Airlines, Inc.⁴

   i. Initially, the District Court held Judge that a pilot’s termination subsequent to having “transsexual surgery” - also known today as gender-confirming or gender reassignment surgery - transitioning from male to female, violated Title VII.

   ii. On Appeal, the 7th Circuit reversed, finding that sex discrimination prohibited discrimination against women because they are women and men because they are men.⁵ The Appeals Panel chose to limit the definition of “sex” to the traditional concept of sex which was accepted at the time Title VII was enacted, which correlates to a person’s

² See, Complainant v. Anthony Foxx, Secretary, Dep’t. of Transportation, Appeal No. 0120133080, Agency No. 2012-24738-FAA-03 (July 16, 2015); See also; Macy v Holder, 2012 WL 1435995 (EEOC Apr. 20, 2012).
³ For example, see DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979), overruled on other grounds, and Nichols v. Azteca Rest. Enters., 256 F.3d 864, 875 (9th Cir. 2001).
⁵ 742 F. 2d 1081, 1085.
chromosomal pattern, ignoring the multi-faceted nature of a person’s sex. Under such logic, a person who is born inter-sex could never bring a sex discrimination claim under Title VII.

ii. The following cases have been instrumental in shaping case law under Title VII for transgender and gender non-conforming individuals.


i. In 1989, the Supreme Court expanded the concept of what constitutes sex discrimination beyond discrimination based solely on one’s biological sex, holding that Title VII prohibition against sex includes sex-stereotyping and discrimination based on gender.

ii. Post *Price Waterhouse*, an employer who discriminates against a woman because she does not act feminine, i.e. does not wear dresses or makeup or acts too aggressively, is engaging in sex discrimination. But for the woman’s sex, the discrimination would not be occurring. However, courts have not always followed this logic when it comes to a man who is similarly perceived as not acting like a man, i.e. who wears dresses or make up, or who acts effeminately. Instead, courts have held that the discrimination is linked to the man’s identity as a transsexual or homosexual, and therefore the discrimination is found not to be “because of sex.” However, this logic cannot be reconciled with *Price Waterhouse*.

Similar to the discrimination faced by Ann Hopkins in *Price Waterhouse*, who was not conforming to stereotypes of what a woman should act like, discrimination against an LGBT employee, who fails to act and/or identify with his or her gender is also prohibited under Title VII. Simply stated, discrimination based on a person’s gender non-conforming behavior is impermissible, irrespective of the cause of that behavior. ⁷ A person’s identity as transsexual or even homosexual is not fatal to a sex discrimination claim. ⁸

b. *Schroer* ⁹

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⁶ 490 U.S. 228, 49 FEP 954 (1989).
⁷ *Smith v. City of Salem*, 378 F. 3d. 566, 574-575
⁸ *Id.*
In *Schroer v. Billington*, the applicant/plaintiff, Schroer, who had an extensive military background, was offered a terrorism-related policy analyst position with the Library of Congress. Before starting work, the applicant informed a supervisor that the applicant, who had applied for the job as a male, intended to start presenting as a female and to ultimately undergo transgender surgery. The supervisor rescinded the offer the next day. The court held that the applicant was discriminated against on the basis of sex. This discrimination occurred in the form of sex stereotyping, as evidenced by the supervisor's difficulty understanding why a man with a military background would undergo a gender transition, as well as the supervisor's statement that when she saw the applicant in female attire, all she could see was a man in women's clothing. The discrimination also occurred in the form of discrimination because of sex, as the evidence showed that the supervisor was enthusiastic about hiring the applicant until the applicant disclosed his trans-sexuality. Finally, the supervisor's alleged concerns with the applicant's security clearance status were pretext for discrimination, as the concerns were speculative and unfounded.

c. *Glenn v. Brumby* ¹⁰

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.

i. A 2011, Eleventh Circuit Court of Appeals sex discrimination case, applying Title VII principles to Plaintiff Glenn’s right to equal protection of the law, held that discrimination against a transgender individual because of her gender non-conformity is sex discrimination, whether it’s described as being on the basis of sex or gender.

d. *Macy v. Holder* ¹¹

In 2012, the U.S. Equal Employment Opportunity Commission overruled nearly 40 years of EEOC decisions that had continuously rejected sex discrimination claims by transgender employees, now holding that discrimination claims rooted in “gender identity, change of sex, and/or transgender status are cognizable under Title VII’s sex discrimination prohibition.”¹²

1. EEOC’s district, field, and areas offices have been instructed to take and investigate (where appropriate) charged from individuals who believe they have been

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⁹ 663 F.3d 1312, 113 FEP 1543 (11th Cir. 2011)
¹⁰ 2012 WL 1435995 (EEOC Apr. 20, 2012)
¹¹ Id. at *1, 4
discriminated against because of transgender status, gender identity, or a gender transition.  

2. EEOC investigators and attorneys have also been instructed that LGBT individuals may bring valid sex discrimination claims, and that the EEOC should accept charges alleging sexual orientation-related discrimination.

e. Beyond Macy


  Intentional misuse of the employee’s new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.


  A sex discrimination allegation involving the failure to revise agency records pursuant to changes

- *Complainant v. Dep’t of Trans.*, EEOC Appeal No. 0120133080 (July 16, 2015).

  The EEOC now interprets Title VII to prohibit sexual orientation discrimination under the umbrage of sex discrimination.

f. EEOC Enforcement Strategy

1. Coverage of LGBT individuals under Title VII’s sex discrimination provisions, as they may apply, is listed as a priority in the Commission’s Strategic Enforcement Plan (SEP), which was adopted December 2012.

   a. The SEP has been implemented in a variety of ways with regard to LGBT individuals.

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14 Id.
i. Tracking Gender Identity and Sexual Orientation appeals in the Federal Sector.

ii. Issuing Federal Sector Decisions that hold gender identity and sexual orientation related complaints can be brought under Title VII through the Federal EEO Complaint Process, where the EEOC has appellate adjudicatory authority.

iii. Issuing guidance and instructions for processing complaints of discrimination by LGBT federal employees and applicants.

iv. Providing technical assistance to federal agencies in developing gender transition policies and plans.

v. Providing trainings and outreach to the public (350+ events in the first three quarters of 2014, where LGBT sex discrimination issues were discussed).

g. EEOC Statistics

“In January 2013, the EEOC began tracking information on charges filed alleging discrimination related to gender identity and/or sexual orientation.

- In the final three quarters of FY 2013 (January through September), EEOC received 643 charges that included allegations of sex discrimination related to sexual orientation and 147 charges that included allegations of sex discrimination based on gender identity/transgender status.

- In FY 2014, the EEOC received 918 charges that included allegations of sex discrimination related to sexual orientation and 202 charges that included allegations of sex discrimination based on gender identity/transgender status.

- For the first two quarters of FY 2015 (1/1/14-3/31/15), EEOC received 505 charges that included allegations of sex discrimination related to sexual orientation and 112 charges that included allegations of sex
discrimination based on gender identity/transgender status.”

iii. Federal Litigation

A. On September 25, 2014, the Commission filed its first two lawsuits alleging sex discrimination on behalf of transgender individuals.

i. **EEOC v. Lakeland Eye Clinic, P.A.**

The EEOC sued Lakeland Eye Clinic, a Florida-based organization of health care professionals, alleging that it discriminated based on sex in violation of Title VII by firing an employee because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes. The EEOC's lawsuit alleges the employee performed her duties satisfactorily throughout her employment. However, after she began to present as a woman and informed the clinic she was transgender, Lakeland fired her.

1. Case Status- This case was ultimately settled outside of court in April 2015.

ii. **EEOC v. R.G. & G.R. Harris Funeral Homes Inc.**

The EEOC sued Detroit-based R.G. & G.R. Harris Funeral Homes Inc., alleging that it discriminated based on sex in violation of Title VII by firing a Garden City, Mich., funeral director/embalmer because she is transgender, because she was transitioning from male to female, and/or because she did not conform to the employer's gender-based expectations, preferences, or stereotypes.

The lawsuit alleges that an individual had been employed by Harris as a funeral Director/Embalmer since October 2007 and

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16 *Id.* In FY 2013, 93,727 total national charges were filed with the EEOC, of which approximately 30% (27,687 charges) were sex based discrimination claims. In FY 2014, the EEOC received 88,778 total charges, approximately 30% (26,027) of which were sex based discrimination claims. (http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm) (last accessed July 30, 2015).


had always adequately performed the duties of that position. In 2013, the worker gave Harris a letter explaining she was undergoing a gender transition from male to female, and would soon start to present (e.g., dress) in appropriate business attire at work, consistent with her gender identity as a woman. Two weeks later, Harris's owner fired the transgender employee, telling her that what she was "proposing to do" was unacceptable.

1. Case Status- Defendant filed a motion to dismiss the complaint on November 19, 2014. The EEOC opposed the motion on December 10, 2014. The motion to dismiss was denied by the Court, and the Complaint was amended in June 2015 and answered in July 2015.\textsuperscript{20}

B. Attorney General, Eric Holder, issued a memo on December 15, 2014, to all U.S. Attorneys and Department heads, stating that the DOJ would no longer assert that Title VII’s prohibition of discrimination based on sex does not encompass gender identity \textit{per se}, (including transgender discrimination).

C. \textit{Jamal v. Sak’s & Co.} \textsuperscript{21}

Leyth O. Jamal, a transgender woman, was hired at a retail store in Houston, Texas. She was subjected to offensive comments about her gender, and denied the use of a gender-conforming restroom. She complained to management, but the hostile work environment continued.

On July 2, 2012, a complaint was filed with the U.S. Equal Employment Opportunity Commission, Houston District Office. On July 12, 2012, Ms. Jamal was terminated because she allegedly engaged in an inappropriate conversation. On February 12, 2014, the EEOC issued a Letter of Determination finding reasonable cause on the issue of hostile workplace environment based on her gender. Conciliation failed, and the EEOC issued to Ms. Jamal a notice of her right to sue in court.

A complaint was filed with the United States District Court, Southern District of Texas, on September 30, 2014. The complaint alleged violation of Title VII of the federal Civil Rights Act, and breach of contract based on Saks’ policy prohibiting discrimination based on gender.

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} U.S District Court, Southern District of Texas, No. 4-14-cv-02782.
Saks filed its answer denying the allegations on December 10, 2014. Saks filed a motion to dismiss Ms. Jamal’s complaint on December 29, 2014, alleging that Ms. Jamal’s complaint invoked protection from discrimination as a transgender person, which it argued is not covered under the Civil Rights Act. It also argued that Texas law does not consider language in an employer policy manual to give rise to a breach of contract.

On January 26, 2015 Saks Fifth Avenue withdrew a motion to dismiss Jamal’s lawsuit, in which Saks had argued that Title VII does not protect transgender workers, and the U.S. Department of Justice filed a historic statement of interest in the same case affirmatively stating that Title VII covers transgender people. This was the first court filing in which the Department had made clear that Title VII prohibits any type of discrimination against transgender people, not just discrimination based on gender stereotypes.

On March 4, 2015, Jamal and Saks reached a settlement in the dispute.

D. **Blatt v. Cabela’s Retail Inc.**

i. Kate Lynn Blatt is pursuing charges under both Title VII of the Civil Rights Act - on the grounds that Cabela’s discriminated against her based on her sex - and the ADA - on the grounds that Cabela’s refused her reasonable accommodation in the form of an appropriate nametag and use of an appropriate restroom.

ii. The Americans with Disabilities Act explicitly bars the use of its protections for many transgender people. Blatt asserts that the ADA should cover claims based on gender dysphoria.

“This court should find the ADA’s exclusion of ‘transsexualism … [and] gender identity disorders not resulting from physical impairments’… unconstitutional and inapplicable to plaintiff Blatt, as it stands in clear violation of the equal protection clause of the Fourteenth Amendment, as reverse incorporated and applied to the federal government through the Fifth Amendment,” according to a brief filed by Blatt’s lawyers.

iii. The DOJ filed a Statement of Interest July 21, 2015 asking the court to resolve the Title VII claims before reaching the constitutionality of

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22 United States District Court, E.D. Penn., Case No. 5:14-cv-04822
Plaintiff’s challenge to the ADA’s exclusion of “transexualism… and gender identity disorders”\textsuperscript{23} from its definition of disability.

iv. Following a formal diagnosis of Gender Dysphoria (GD) in 2005, Kate Lynn Blatt took steps to live in accordance with her female gender identity, including changing her name, growing her hair long and wearing female clothing.

Blatt was hired as a Seasonal Stocker at Cabela’s Retail in the fall of 2006. She attended a two-day orientation dressed in female attire, and used the women’s employee restroom without issue.

Once she started working, however, Blatt was prohibited from using the women’s restroom and was forced to wear a nametag depicting her name as “James,” even after she presented the director of human resources with documentation of her legal name change. Blatt was made to use the single-sex “family” restroom at the front of the store, rather than the female employee restroom closer to her work area. She also endured harassment from management and coworkers, and was abruptly terminated in March, 2007.

E. \textit{USA v. Southeastern Oklahoma State University et. al.} \textsuperscript{24}

a. The U.S. Justice Department filed its first lawsuit alleging discrimination on behalf of a transgender individual. The suit alleges that Southeastern Oklahoma State University (“Southeastern”) and the Regional University System of Oklahoma violated Title VII of the Civil Rights Act of 1964 by discriminating against a transgender employee on the basis of sex and retaliating against the employee when she complained about the discrimination.

Robert Tudor began working for Southeastern as an Assistant Professor in 2004. At the time of her hire, Tudor presented as a man. In 2007, Tudor, consistent with his gender identity, began to present as a woman, Rachel, at work. Throughout her employment, Tudor performed her job well, and in 2009, she applied for a promotion to the tenured position of Associate Professor. Southeastern’s administration denied her application, overruling the recommendations of her department chair and other tenured faculty.

\textsuperscript{23} In the summer of 1989, U.S. senators debating the Americans with Disabilities Act excluded behavior they deemed immoral from the ADA’s protections, including “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders,” according to the text of the law. This is the first case to challenge the constitutionality of this exclusion.

\textsuperscript{24} United States District Court, W.D. Okla., Case No. 5:15-cv-00324, Filed March 2015.
from her department. Tudor was then terminated at the end of the 2010-2011 school year because she did not make tenure.

The complaint alleges that Southeastern discriminated against Tudor when it denied her application because of her gender identity, gender transition and non-conformance with gender stereotypes.

b. Tudor filed an intervenor complaint in May 2015, seeking to add a hostile work environment claim.

Tudor’s intervenor complaint alleged additional discrimination in the day-to-day operations of the university, including her being told by the human resources office not to wear short skirts and being forced to use a single-stall restroom for disabled people. The university-provided health insurance plan also explicitly prohibited health benefits for transgender persons leaving Tudor unable to get her insurance to cover various treatments associated with her medical transition to female.

c. Southeastern filed a 12(b)(1) motion to dismiss, for a lack of subject matter jurisdiction (due to Plaintiff’s failure to exhaust her administrative remedies) and a 12(b)(6) failure to state a claim for relief, due to insufficient factual allegations. But, U.S. District Judge Robin J. Cauthron on July 10, 2015, said the hostile work environment claim could go forward, finding Tudor was a member of a legally protected group and had sufficiently alleged harassment that had created an “abusive work environment.” 25 Trial is scheduled for October 2015.

B. Executive Order 13762 26

i. On July 21, 2014, President Barack Obama signed an executive order that bars discrimination against transgender federal employees, and adds people who identify as LGBT to the list of those against whom federal contractors cannot discriminate.

ii. There is a religious exemption. 27

1. The Executive Order … “shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to

26 This Executive Order further amended Executive Order 11478, Equal Employment Opportunity in the Federal Government (August 8, 1969), and Executive Order 11246 (September 24, 1965), Equal Employment Opportunity
perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

iii. The Office of Federal Contract Compliance Programs (OFCCP) is charged with enforcement of Executive Order 11246, which was amended by 11478, and now 13672, prohibiting various forms of discrimination against workers employed by companies doing business with the Federal Government.  

C. Constitutional Claims

i. Equal Protection Claims

a. LGBT Public Employees have also had success bringing equal protection claims based on sexual orientation discrimination.

b. A public employee can establish an equal protection violation if the employee can show that he or she was subjected to adverse treatment as compared with other similarly situated employees and that the treatment was motivated by an intention to discriminate on the basis of improper considerations.

c. Many courts have held that a public employee has a claim under federal equal protection guarantees if he or she is discriminated against because of sexual orientation.

28 Id.

ii. First Amendment Claims

a. Public employees also have invoked the First Amendment to protect a right to “come out” publicly.\(^{31}\)

i. It has been held that a public school violates the First Amendment in ordering a teacher not to make comments about her sexual orientation.\(^{32}\)

II. State Protections

A. The Wisconsin Fair Employment Act\(^{33}\)

The WFEA prohibits a person from refusing to hire an individual, terminating an individual's employment, or discriminating against an individual in promotion, compensation, or in terms, conditions, or privileges of employment based on the individual's age, race, creed, color, disability, marital status, sex, sexual orientation, national origin, ancestry, arrest or conviction record, military service, use or nonuse of a lawful product off the employer's premises during non-working hours, or based on the use of unfair honesty or genetic testing.

i. Wisconsin was the first state to ban sexual orientation discrimination in employment in 1982.\(^{34}\)

ii. "Sexual orientation" means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.\(^{35}\)

iii. There are no state level laws against discrimination based on gender identity or gender expression.

iv. In 2014, the Labor and Industry Review Commission reviewed 107 Equal Rights Division cases. Of these cases, 3 were sexual orientation discrimination cases and 24 were sex discrimination cases.\(^{36}\)

a. While LIRC did not report on whether any of the above cases involved allegations of discrimination based on gender identity or gender expression, it is possible to argue that similar to federal precedent,
such discrimination constitutes discrimination on the basis of sex and falls within the jurisdiction of the WFEA and thus, the ERD.

III. Local Ordinances

These local jurisdictions provide the following protections in addition to state law 37:

1. Dane County—sexual orientation and gender identity discrimination in housing, county government (public) employment, and for companies that contract with the county.
2. Milwaukee County—sexual orientation and gender identity discrimination for companies that contract with the county and county (public) employment, public accommodations, and housing. 38
4. City of Milwaukee—sexual orientation and gender identity discrimination in private and public employment, housing, and some public accommodations (companies that need city licenses to operate). Enforced by the Equal Rights Commission.
7. Cudahy—sexual orientation and gender identity discrimination in housing, education, public accommodation, and employment. 39

Local enforcement agencies generally follow the same time limits as the state agency for when you can file a complaint.


IV. What the Future Looks Like for LGBT Employees?

A. Changing Societal Views Towards the LGBT Community

a. In 2011, “Don’t Ask, Don’t Tell”, a military policy banning gays and lesbians from openly serving in the military was repealed.  

b. 2013- Both President Obama and Former President Clinton publically supported the right to Same-Sex Marriage.  

c. In 2013- SCOTUS struck down a section of DOMA which denied equality of federal benefits to same-sex married couples.  

d. Before 2011, only 5 states allowed same-sex marriage. Prior to the Supreme Court’s ruling this June 2015, in Obergefell v. Hodges, same sex marriage was only legal in 37 states plus Washington D.C. Now, all states are required to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions.  

e. A recent poll found that the number of people who were satisfied with the current state of acceptance of the LGBT community is 53%, up from 32% in 2005. While the “number of those dissatisfied with how gays are treated and believe society should be less accepting has plummeted over the last decade, from a high of 30% in 2006 to just 14%” in 2015.  

f. Two thirds of Fortune 500 Companies and 89% of the Corporate Equality Index (CEI) universe of businesses offer explicit gender identity non-discrimination protections to employees, while one-third of Fortune 500 companies and over half of the CEI universe of businesses offer transgender inclusive health care coverage, up from 0 in 2002.  

42 United States v. Windsor, 570 U.S. 12, 133 S. Ct 2675, 118 FEP 1417 (2013)
B. Employment Non Discrimination Act (ENDA)

a. The Employment Non-Discrimination Act would ban employers from firing, refusing to hire or discriminating against workers or job applicants based on their sexual orientation or gender identity.47

b. There are roughly 8.2 million gay and lesbian employees nationwide, according to estimates released by the Williams Institute at UCLA. 48

c. ENDA, or some form of it, has been introduced in Congress almost every year since 1974. For the first time in 2013, The Senate passed a version of ENDA, which included protections for sexual orientation and gender identity, but the bill died in the House. 49


a. On July 23, 2015, members of Congress introduced legislation to amend the landmark Civil Rights Act of 1964. The bill would establish explicit, permanent protections against sexual orientation and gender identity discrimination in areas of employment, housing, public accommodations, federal funding, credit, education and jury service. In addition, it would prohibit discrimination on the basis of sex in federal funding and public accommodations.50

D. LGBT Employment Protections Nationwide (See Handout)

a. 19 states and the District of Columbia have passed laws prohibiting employment discrimination based on sexual orientation and gender identity, while 3 additional states prohibit discrimination based on sexual orientation only. Although these laws provide important protections,


48 Id.

49 “On July 10, 2013, the Senate HELP Committee favorably reported the bill by a vote of 15-7. ENDA was approved by the Senate on November 7, 2013, by a bipartisan vote of 64-32.” http://www.hrc.org/resources.entry/employment-non-discrimination-act (last accessed Feb. 12, 2015)

50 Senators Jeff Merkley, Tammy Baldwin, and Cory Booker, and Representatives David Cicilline and John Lewis introduced the Equality Act. “Before the Equality Act’s introduction, HRC released new polling that shows support for federal non-discrimination protections exceeds even marriage equality. Likely voters support workplace non-discrimination protections by a massive 78 percent to 16 percent margin. This includes support from 90 percent of likely Democratic voters, two-thirds (64 percent) of likely Republican voters, and 70 percent of observant Christians. Moreover, nearly 60 percent of voters are less likely to support a candidate who doesn’t support such protections for LGBT people, including 61 percent of Independent voters and 58 percent of Catholic voters.” http://www.hrc.org//resources/entry/why-the-equality-act (last accessed July 28, 2015); http://www.huffingtonpost.com/louise-melling/the-equality-act-is-a-vis_b_7866264.html (last accessed July 28, 2015)
according to a 2013 General Accounting Office (GAO) report, relatively few complaints of discrimination based on sexual orientation have been filed in these states.’’

i. However, proponents of LGBT employment rights must be on the lookout for legislative backlash

1. For example, the Religious Freedom Restoration Act, which passed 40-10 in Indiana on March 26, 2015.

2. A similar bill passed in the Arkansas Senate, and recently one was proposed in Texas. However, both Indiana and Arkansas quickly revised their bills after a national uproar ensued over the lack of protection against discrimination for LGBT individuals, following passage of Indiana’s law.

3. Similar bills were proposed in Georgia and North Carolina, too, but stalled due to a predicted backlash similar to what Indiana experienced.

V. How to Prevent Discrimination Against LGBT Employees

1. Proactively implement & enforce non-discrimination policies

   a. Including the terms “sexual orientation” and “gender identity” in an employment non-discrimination policy underlines an employer’s dedication to workplace equity.

   b. Include coverage for transgender individuals in health care plans and ensure all benefit coverage is inclusive of LGBT individuals and families

2. Provide anti-discrimination training to staff and management with regard to sexual orientation and gender identity.

3. Establish Gender Transitioning Guidelines:

   I. Address employees by the name, gender and pronoun with which the employee identifies and make sure all managers, supervisors and

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52 "Indiana lawmakers approve 'religious freedom' bill." Jurist Paper Chase. March 26, 2015.
54 "Indiana to clarify 'religious freedom' law, Georgia, N.C. bills stall". Reuters. March 30, 2015.
coworkers do the same, particularly if the employee realigned their gender after joining the company. In the latter case, change the employee's work records, including identification cards, email accounts and office directories, to reflect their identification;

II. Allow employees who have permanently realigned their gender access to corresponding gender-specific accommodations, including restrooms and locker rooms. When possible also offer gender non-specific, single-stall or single-occupant accommodations for all employees to use and provide adequate signage to identify that the accommodation is accessible by all genders;

III. Implement a gender non-specific dress code and apply it consistently; where a dress code is not gender non-specific, ensure it is reasonable and can be justified by workplace requirements. Keep in mind that employees have the right to dress in conformance with their gender identity and free of sexual and gender stereotyping;

IV. Ensure the privacy of employees who have realigned their gender before joining the company is adequately protected, and treat those who transition thereafter with sensitivity and confidentiality; and

V. Incorporate transgender and gender non-conforming terms and issues into employee training so other employees are able to relate to gender-diverse coworkers.

4. Why Should Employers Care?

Employer policies that clearly prohibit discrimination based on sexual orientation, gender identity and/or gender expression not only limit liability, but keep a company competitive and help it retain quality talent by showing employees it values workplace equality. And, when employers enforce such policies, employees are able to be authentic in the workplace, ultimately increasing employee performance and productivity. 56

5. Additional Resources


II. HRC also authored a report, “The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers.” Available in pdf. or digital form at:

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IV. On June 21, 2015, OSHA issued guidelines for best practices regarding restroom access for Transgender individuals, which is available at: https://www.osha.gov/Publications/OSHA3795.pdf
Health, Labor & Employment Law Institute

A Look at Emerging LGBT Issues & Trends in Employment Law

Jennifer S. Mirus

August 21, 2015
I. **Employees with Same-sex Spouses and Domestic Partners**

A. **Employment Discrimination.**

1. Wisconsin state law.


   b. Wis. Stat. § 111.32(13m) defines “sexual orientation” as “having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such a preference.”

   c. The WFEA also prevents discrimination on the basis of marital status. Wis. Stat. § 111.321.

   d. There have only been a few cases under the WFEA involving claims of sexual orientation discrimination.

      i. In *Phillips v. Wisconsin Pers. Comm’n*, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992), the court ruled that a rule providing health insurance to spouses of state employees but not for unmarried homosexual partners did not discriminate on the basis of sexual orientation but rather discriminated on the basis of marriage. However, the court also ruled that this was not the type of marital status discrimination that the WFEA protected against because legislative history revealed that the state legislature did not intend for this type of marital status differentiation to be discrimination.

   e. In light of Wisconsin’s legalization of same-sex marriage, an employer could be liable under the WFEA for an action that treats an employee’s same-sex spouse differently than an employee with an opposite-sex spouse.

      i. For example, an employer who offers spousal health insurance coverage would have to offer that coverage to both same-sex and opposite-sex couples.

      ii. *Phillips* is no longer applicable because same-sex marriage is now legal in all states. *Obergefell v. Hodges*, No. 14-556 (US, June 26, 2015). Same-sex married couples and opposite-sex married couples are now similarly situated under the law.
iii. Imposing requirements on same-sex couples but not opposite-sex couples may be a violation of the law. For example, employers should not require same-sex couples to present a marriage certificate as a condition of receiving benefits, if the employer does not also require opposite-sex couples to produce this documentation.

2. Federal law.

a. Title VII does not explicitly protect against discrimination based on sexual orientation. See 42 U.S.C. 2000e, et seq.

b. The EEOC now interprets Title VII to protect employees from discrimination on the basis of sexual orientation. Complainant v. Dep’t of Trans., Appeal No. 0120133080 (EEOC, July 16, 2015). This decision interprets Title VII in the context of federal employees, but the EEOC is likely to interpret the law similarly for other employees.

i. According to the EEOC, consideration of sexual orientation is inherently a “sex-based consideration” prohibited by law. If an employee alleges that an employer took sexual orientation into account, the employee is necessarily alleging that the employer took sex into account.

The agency had three reasons for its decision.

(a) Sexual orientation cannot be defined or understood without reference to sex.

(b) Discrimination based on sexual orientation is also discrimination on the basis of association with a person of the same sex.

(c) Sexual orientation discrimination is also discrimination based on gender stereotypes that extend beyond the expectation of gender norms. Title VII also prohibits the stereotype that individuals should only be attracted to those of the opposite sex.

ii. Plaintiffs may also be able to state claims of discrimination under Title VII for stereotyping based on gender. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Some courts have ruled that homosexuals who do not conform to gender
norms may recover under this theory. See e.g., Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001).

c. The Seventh Circuit Court of Appeals has permitted Title VII recovery on the basis of sex stereotyping but not without evidence that harassment was based on sex rather than sexual orientation. See Hamm v. Weyauwega Milk Prods., 332 F.3d 1058, 1065 (7th Cir. 2003) (holding that an employee could not recover under Title VII for his claims because the harassment was based on work-related disputes and perceptions of his sexuality that were not linked to his sex).

d. The WFEA’s protection against discrimination based on sexual orientation still protects employees from discrimination based on sexual orientation, even when those employees would not be protected under Title VII.

i. However, unlike the WFEA, Title VII provides plaintiffs with compensatory and punitive damages for intentional discrimination up to $300,000 based on the size of the employer.

ii. Some plaintiffs will raise federal sex-stereotyping claims in addition to state sexual-orientation claims because of the potential for compensatory and punitive damages. Plaintiffs raising both types of claims have had their federal claims dismissed as certain courts have ruled this is an attempt to bootstrap sexual orientation protection onto Title VII. See e.g., Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005).

B. Family and Medical Leave Act (FMLA).

1. Prior to United States v. Windsor, the Defense of Marriage Act defined a spouse as a person of the opposite sex who is a husband or a wife. This definition applied to the FMLA, preventing same-sex spouses from utilizing FMLA leave to care for a spouse with a serious health condition. However, Windsor invalidated that definition of spouse. United States v. Windsor, 133 S.Ct. 2675 (2013).

2. Under the new FMLA regulations that took effect on March 27, 2015, “spouse” is defined by looking to state law in the state in which the employee became married, not the state where the employee resides. 29 C.F.R. § 825.122(b) (2015).
3. Now that the Supreme Court has ruled that states can no longer ban same-sex marriage, the FMLA regulation will be easier to interpret and administer. Employers will no longer have to determine the state of the employee’s marriage because since Obergefell, same-sex couples can be legally married in any state.


   b. The same day the Obergefell decision was announced, a federal judge dissolved a preliminary injunction on implementing the new FMLA regulations, citing Obergefell, Texas v. United States, No. 7:15-cv-0056-O, (N.D. Tex, June 26, 2015).

4. Same-sex marriage has been legal in Wisconsin since Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014) upheld Wolf v. Walker, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014). Under the new FMLA regulations, same-sex couples married in Wisconsin after October 6, 2014 (the date that the U.S. Supreme Court denied review of Baskin) would be entitled to FMLA leave.

5. The Wisconsin Family and Medical Leave Act (WFMLA) permits employees to take leave to care for both spouses and domestic partners with a serious health condition. Wis. Stat. § 103.10(3)(b)3. “Domestic partner” is a state-defined relationship. Chapters 770 and 40 of the Wisconsin Statutes describe the procedure whereby same-sex and opposite-sex couples may become state-recognized domestic partners.

C. Health Benefits.

1. Insured plans.

   a. Because same-sex marriage is now legal, insured plans that offer spousal coverage will have to provide that coverage to both same-sex and opposite-sex couples. Wis. Stat. § 632.746(10).


      ii. This decision determined that a legal marriage was a requirement that applied equally to same-sex and opposite-
sex spouses, even though at the time, same-sex partners could not get legally married. However, in the wake of legalized same-sex marriage, both same-sex and opposite-sex partners can get legally married. By the reasoning of this decision, a same-sex spouse would now be entitled to benefits under the plan since same-sex marriage is now legally recognized in the state.

b. Many insurers provided a special, one-time enrollment opportunity for same-sex spouses who were married prior to October 6, 2014 (the date same-sex marriage was legally recognized in Wisconsin). For example, the Department of Employee Trust Funds gave employees a 30-day enrollment opportunity that began on October 15, 2014. See Wisconsin Department of Employee Trust Funds, Legalization of Same-Sex Marriage in Wisconsin; Information for Members and Employers, Oct. 15, 2014, http://etf.wi.gov/news/ht-2014-same-sex-marriage2.htm.

c. Same-sex spouses should be granted the same enrollment rights as opposite-sex spouses to prevent liability under the WFEA. Wis. Stat. § 632.746(7), (10).

d. An employer runs the risk of violating several state and federal laws if an employer does not provide the same insurance benefits to same-sex spouses as it does to opposite-sex spouses, including:

i. ERISA

ii. Title VII of the Civil Rights Act

iii. WFEA (although there is a potential ERISA preemption issue as discussed below)

2. Self-funded plans.

a. The interplay between ERISA and federal and state employment discrimination laws is a gray area with multiple possible interpretations. This outline provides a general overview on the major issues in interpreting these potentially conflicting areas of the law.

i. One purpose of ERISA was to standardize employee benefit plans under federal law and prevent employers, especially multistate employers, from having to navigate multiple, potentially conflicting state law requirements. See Shaw v. Delta Air Lines, 463 U.S. 85, 105 (1983).

ii. To facilitate this purpose, ERISA contains a broad state law preemption clause. 29 U.S.C. § 1144.

c. ERISA generally permits self-funded plans to define their own terms, and self-funded plans do not have to provide spousal coverage.

d. If a self-funded plan subject to ERISA elects to provide spousal coverage, there would be legal risk in limiting the coverage to only opposite sex couples.

i. In Obergefell and Windsor, the Supreme Court struck down distinctions between same-sex and opposite-sex married couples. Although these cases did not interpret the term spouse in the context of health insurance plans, there is legal risk in drafting a plan document that treats same-sex and opposite-sex couples differently.

ii. The EEOC, as discussed above, interprets Title VII to prevent discrimination based on sexual orientation. Complainant v. Dep’t of Trans., Appeal No. 0120133080 (EEOC, July 16, 2015).

iii. WFEA prevents discrimination based on sexual orientation.

iv. ERISA preempts state laws, including state discrimination laws, if those laws dictate what benefits a plan covered by ERISA must offer. Shaw, 463 U.S. at 97.

v. An employer that sponsors a self-funded plan that discriminates on the basis of sexual orientation may argue that ERISA preempts the WFEA’s prohibition on discrimination based on sexual orientation because that state law requires plans covered by ERISA to provide benefits to same-sex couples in excess of what is required by ERISA.

vi. Some courts have held that ERISA preempts state employment discrimination laws because those laws “relate to” plans covered by ERISA. If ERISA did not pre-empt those state laws, the laws would force ERISA plans to
restructure to comply with additional state law requirements. Requiring employers to comply with multiple, potentially conflicting state laws is contrary to the legislative purpose of ERISA’s preemption clause. *Shaw*, 463 U.S. at 105.

**vii.** ERISA does not preempt state laws if those state laws facilitate the joint state/federal enforcement of Title VII. *See Shaw*, 463 U.S. at 102. However, “[i]nsofar as state laws prohibit employment practices that are lawful under Title VII…pre-emption would not impair Title VII.” *See id.* at 103.

(a) *Shaw* rejected the reasoning of several lower court decisions that had held that ERISA did not preempt state discrimination laws because Title VII allowed states to provide greater protections to employees.

(b) The court in *Shaw* established a preemption test. A state law is pre-empted by ERISA if it provides protection in excess of Title VII, but a state law is not pre-empted if the law facilitates the joint state/federal enforcement of Title VII.

Therefore, a determining factor in determining whether ERISA preempts a state law prohibiting same-sex discrimination in employment is determining whether Title VII prohibits employment discrimination based on sexual orientation.

(c) As discussed above, the EEOC and some courts have held that Title VII prohibits discrimination based on sexual orientation.

(d) For example, a federal district court recently denied a defendant’s motion to dismiss a plaintiff’s Title VII claims. The plaintiff claimed that the company improperly denied his same-sex spouse benefits based on sex discrimination. The defendant’s claim of ERISA preemption was dismissed because the plaintiff properly stated a Title VII claim. However, the court expressed skepticism on the plaintiff’s likelihood of success as the proceeding continued. *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 U.S. Dist. LEXIS 132878, *12 (W.D. Wash. Sept. 22, 2014).
viii. If Title VII protects same-sex spouses’ right to employee benefits, then ERISA does not preempt state laws providing equivalent protection. Employees facing this type of discrimination could then bring state claims for sex discrimination, in addition to federal Title VII claims. As recent Title VII cases demonstrate, employers with self-funded plans may not be able to rely on ERISA preemption to protect against liability for discrimination in providing benefits based on same-sex marriages.

3. Governmental plans sponsored by public sector employees are not subject to ERISA. These plans would be subject to discrimination claims under the WFEA (as well as Title VII) if they discriminate between same-sex and opposite-sex marriages when offering coverage because ERISA would not preempt the WFEA for these plans.

4. All employers should review their health insurance plan document and summary plan descriptions (SPDs) to determine if any changes should be made. For example, if the SPD defines “spouse” to exclude same-sex spouses, that SPD might require revision.


b. In a case decided before the Supreme Court’s decision in Obergefell, one district court held that when a plan specifically exempts same-sex spouses from coverage, ERISA and the IRS guidance do not affirmatively require employers to provide coverage to same-sex spouses. The court specifically stated that it was not ruling on whether the plan was constitutional or violated other federal laws. Roe v. Empire Blue Cross Blue Shield, 2014 U.S. Dist. LEXIS 61345, *25 (S.D.N.Y. May 1, 2014).

c. Obergefell v. Hodges, 135 S.Ct. 2584 (US, June 26, 2015) held that state laws prohibiting recognition of same-sex marriages denied same-sex couples equal protection under the law. The decision did not rule that private benefit plans could not discriminate against based on sexual orientation, but as discussed above there are state and federal discrimination laws that employers may violate by drafting discriminatory plans.

5. The Patient Protection and Affordable Care Act (ACA) does not require employers to provide spousal coverage in order to avoid a Shared
Responsibility payment because spouses are not considered dependents for the purposes of this calculation. 26 U.S.C. § 4980H; 26 C.F.R. § 54.4980H-1(a)(12).

Employers may therefore deny spousal benefits to both same-sex and opposite-sex spouses and still comply with the ACA Shared Responsibility requirements.

6. Some employers have attempted to create spousal carve-outs for employees with spouses who have coverage from another employer.

   a. Spousal carve-outs are not available in Wisconsin for insured plans because Wis. Stat. § 632.746(7), (10) requires insurers to provide enrollment to a spouse that becomes a dependent of an individual through marriage.

   b. A private employer with a self-insured health plan wishing to deny providing same-sex spousal benefits may be able to eliminate spousal benefits for its employees, although this decision carries some legal risk.

      i. Dropping spousal coverage is likely not a qualifying event triggering Wisconsin insurance continuation rights or COBRA rights. See Wis. Stat. § 632.897(2)(b); 29 U.S.C. § 1163.

      ii. However, there are some legal risks in spousal carve-outs, such as claims of marital status discrimination.

      iii. For example, in Braatz v. LIRC, 174 Wis. 2d 286, 496 N.W.2d 597 (1993), the Wisconsin Supreme Court found that a school district discriminated on the basis on marital status by issuing a health insurance non-duplication policy. This policy required married employees to choose either the district’s policy or the spouse’s policy, but not both. The policy did not require single employees with insurance from another source to choose one or the other.

      iv. While it may be possible to draft a spousal carve-out policy to comply with the Braatz decision, employers should proceed cautiously because of the legal risks.

   c. Some large companies like UPS have already begun to phase-out spousal coverage for spouses who receive coverage from their own employers. Jena McGregor, UPS to Cut Employees’ Working Spouses from its Health Plans, Washington Post, August 26, 2013,

7. In lieu of spousal carve-outs, some employers have considered adding spousal surcharges whereby employees with spouses who have coverage from another source have to pay an additional amount for spousal coverage. Employees with spouses who do not have coverage from another source would not pay this surcharge. This approach may have less legal risk because the basis of the surcharge is not marital status but rather that the employee’s spouse has coverage available from another source. However, this area of law is underdeveloped, so some legal risk remains.

D. Other Employment Benefits.

1. Bereavement leave, sick leave, and all non-FMLA leave policies.

All leave policies should be reviewed so as not to discriminate between same-sex and opposite-sex marriages. For example, if a bereavement policy allows an employee in a same-sex marriage to take bereavement leave if the employee’s mother-in-law dies, the policy must afford the same right to an employee in an opposite-sex marriage.

2. Retirement and disability benefits.

   a. ERISA preemption could apply to ERISA covered retirement and disability plans just as it could apply to health plans as discussed above. However, IRS guidance has provided stricter guidance to qualified retirement plans.

      i. IRS Notice 2014-19 provides guidance to employers that any retirement plan qualification rule based on marital status must be applied to both opposite-sex and same-sex couples.

         (a) Qualified plans that are not in compliance with the Windsor decision risk losing their qualified status. Any necessary plan amendments needed to be completed by year-end 2014.

         (b) If plans do not provide a definition of “spouse,” the Notice states that the plan must be operated in accordance with Windsor.

   ii. Even if employers modify their plans to comply with Windsor, employers may still be retroactively liable for
ERISA claims from employees denied spousal coverage before *Windsor*.

Some lower courts have begun hearing cases arguing that *Windsor* should be applied retroactively to hold employers liable under ERISA for denying same-sex married couples certain benefits. *See, e.g.*, Complaint at 10, *Schuett v. FedEx Corp.*, No. 15-cv-189 (N.D. Cal. Jan. 14, 2015).

b. For plans not covered by ERISA, employers should provide the same coverage to same-sex married couples as they do to opposite-sex married couples to prevent a WFEA complaint.

E. **Taxation of Benefits.**

1. Prior to *United States v. Windsor* (June 26, 2013), employees who received same-sex spousal benefits from employers that chose to provide them had to pay income tax on those benefits.

2. *United States v. Windsor* changed the federal income tax rules, resulting in same-sex spousal benefits no longer being subject to federal income tax.

3. Same-sex spousal benefits were still subject to state income tax.


      i. These special administrative procedures are only available to correct overpayments for 2013 and prior years.

      ii. Employers could file one Form 941-X form for the fourth quarter of the prior year and write “WINDSOR” in dark bold letters across the top margin of page 1 of the form.
iii. This procedure only applied to refunds of overpayments of FICA taxes paid in years for which the applicable period of limitations had not expired.

iv. Generally, an employer can correct overreported taxes on a Form 941 by filing a Form 941-X within 3 years of the date the return was filed or 2 years from the date the employer paid the tax reported on Form 941, whichever is later. Forms are considered filed on April 15 of the succeeding year if filed before that date. See http://www.irs.gov/instructions/i941x/ch01.html#d0e369

v. If an employer overreported taxes for the 2013 calendar year, the IRS considers the return filed on April 15, 2014. The employer has until April 15, 2017 to file a refund for FICA taxes paid regarding same-sex spouse benefits for 2013.

6. The Wisconsin Department of Revenue (DOR) has also indicated that same-sex couples who have paid taxes on same-sex spousal benefits in the past may file amended tax returns if they chose. See Wis. Dep’t. of Revenue, Same-Sex Couples, Oct. 21, 2014, https://www.revenue.wi.gov/faqs/ise/samesex.html.

This benefit does not extend to same-sex couples in domestic partnerships – only to same-sex spouses whose marriage was not previously recognized in Wisconsin.

F. Domestic Partner Benefits.

1. In the wake of the legalization of same-sex marriage, many former domestic partners may choose to get married. However, domestic partnership law is still good law in Wisconsin. Some couples may choose to continue as domestic partners, so employers should be aware of the differences between a domestic partnership and a marriage under the law.

   a. Chapter 770 of the Wisconsin statutes permits same-sex and opposite-sex couples to establish domestic partnerships.

   b. Wis. Stat. § 40.02(21d) provides an alternative method for same-sex and opposite-sex domestic partnerships to be recognized for the purposes of receiving benefits from the Department of Employee Trust Funds.

   c. Domestic partnership does not provide exactly the same benefits as marriage for same-sex couples. Individual employee benefit plans
generally dictate what type of benefits are available to domestic partners.

2. Employers are not required under the WFEA to extend the same benefits to domestic partners that they extend to spouses (including same-sex spouses) because the WFEA’s provision against discrimination based on marital status does not extend to “spouse equivalents.” See Phillips v. Wis. Pers. Comm’n, 167 Wis. 2d 205, 220, 482 N.W.2d 121, 126 (Ct. App. 1992).

3. People in domestic partnerships as defined in Chapters 770 and 40 of the Wisconsin Statutes are not entitled to take federal FMLA leave to care for a partner with a serious health condition. 29 U.S.C. § 2612(a)(1)(C) only permits an employee to take leave to care for a spouse, son, daughter, or parent with a serious health condition. 29 C.F.R. § 825.122(b) (2015) defines spouse to require a legal marriage in any state.

4. People in domestic partnerships under both Chapter 770 and Chapter 40 remain eligible for Wisconsin FMLA to care for a partner with a serious health condition. Wis. Stat. § 103.10(3)(b). The employee is limited to two weeks of leave under Wisconsin law (rather than the 12 weeks that federal FMLA permits). Wis. Stat. § 103.10(3)(a).

5. Taxation of domestic partner benefits.
   a. Employers must still impute domestic partner benefits for both state and federal income tax unless the domestic partner qualifies as a dependent.
   b. A domestic partner qualifies as a dependent if:
      i. The individual has the same principal place of abode as the employee and is a member of the employee’s household.
      ii. The employee provides over one-half of the individual’s support for the year.
      iii. The individual is a citizen or national of the United States or is a resident of the United States or a country contiguous to the United States.
      iv. The individual has not filed a joint return with his or her spouse.
      v. For the purposes of employer-provided health insurance, the domestic partner does not have to meet the gross income requirement (under $4,000 in 2015). I.R.S. Notice 2004-79.
c. For employees who are in domestic partnerships in 2015, receive domestic partnership benefits, and subsequently get married sometime in 2015, the payroll and tax implications are more complicated.


ii. Once the domestic partners get married, the employer would no longer impute the value of the benefits as income on the employee’s W-2 because they have become spousal benefits. DOR issued guidance to employers that they should not impute the value of any spousal benefits received after marriage. However, employers should impute the value of the received domestic partner benefits. See Wis. Dep’t. of Revenue, Same-Sex Couples, Oct. 21, 2014, https://www.revenue.wi.gov/faqs/ise/samesex.html.

This procedure requires employers to change the way they report these benefits mid-year when domestic partners receiving benefits get married mid-year.

6. Employers that have chosen to offer domestic partner benefits in the past may want to consider whether to continue to offer these benefits in the wake of Obergefell.

a. Same-sex couples who wish to receive benefits may choose marriage over domestic partnership because of the wider array of benefits provided by marriage. Additionally, employers have to pay FICA taxes on domestic partner benefits, whereas they do not have to pay those taxes for spousal benefits. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

b. Discontinuing domestic partner benefits generally will not trigger coverage continuation rights. Domestic partners are not spouses, and are rarely dependents so they are not qualified beneficiaries, and this type of discontinuation is not usually a qualifying event. See Wis. Stat. § 632.897(2)(b); 29 U.S.C. § 1163.
c. Employers should also consider the practical implications of discontinuing these benefits. If employees are still receiving domestic partner benefits, discontinuing these benefits could raise issues of employee morale.