

Respect for Marriage Act Reaffirms Protections for Same-Sex and Interracial Marriages

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A recently enacted federal law serves as a reminder to employers to ensure their workplace policies and procedures, including those relating to employee benefits, should not discriminate on account of an employee's marital status, including same-sex and interracial marriages. Specifically, on 13 December 2022, President Biden signed into law the bipartisan Respect for Marriage Act (Act)¹ that codifies and guarantees marriage rights and related federal protections to interracial and same-sex couples. The Act, introduced earlier this year in response to Justice Clarence Thomas' concurring opinion the United States Supreme Court's (Supreme Court) ruling in *Dobbs v. Jackson Women's Health Organization*² that overturned *Roe v. Wade*,³ codifies the definition of marriage—for purposes of federal law—as between two individuals that is valid under the state law where the marriage occurred. The legislation comes almost a decade after the Supreme Court's landmark decision that rendered discrimination of same-sex couples for purposes of determining federal benefits and protections unconstitutional.⁴ Moreover, the Act also repeals the Defense of Marriage Act (DOMA),⁵ which prohibited the federal government from recognizing same-sex marriages and permitted states to refuse to recognize same-sex marriages performed elsewhere. Although DOMA was struck down by the Supreme Court in 2013, it had not yet been formally repealed.

The Act also prohibits states from denying full faith and credit or any right or claim relating to interstate marriages on the basis of race, sex, ethnicity, or national origin. The new language stands in sharp contrast to prior provisions that do not impose an obligation on states to recognize same-sex marriages originating in other states. Passage of the Act, in essence, codifies the specific holdings in *Obergefell v. Hodges*⁶ and *Loving v. Virginia*⁷ that barred states from enacting laws that discriminate against same-sex and interracial marriages performed in other states, respectively. However, the Act does not mandate states to require the licensure of same-sex marriages. Despite having more of a symbolic effect, the Act effectively serves as a safeguard in the event the protections under *Obergefell* and *Loving* are invalidated and states are able to enact bans on same-sex and interracial marriages. If such legislative action did occur, the Act would still require all states to recognize a marriage legally performed in another state.

The United States Department of Justice can bring a civil action for a violation of the Act. The Act further expands the scope of its available relief by establishing a *private* right of action—any person

harmed by a violation of the Act may bring a civil action for declaratory and injunctive relief. However, the Act does not affect constitutional or federal protection of religious liberties or consciences. Nor does the Act mandate that nonprofit religious organizations must provide goods, services, or accommodations to recognize or celebrate a marriage. Any benefits or rights that do not arise from a marriage remain unaffected by the Act, and polygamous marriages are excluded from protection under the Act.

Although the Act does not require employers to take any specific action with regard to current employment policies, it reaffirms that employees in same-sex marriages will continue to enjoy employment benefits and other anti-discrimination protections as they have since *Obergefell*. In addition to being protected from discrimination and harassment based on sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964⁸ and applicable state and local laws, employees in same-sex marriages are also extended leave protections under the federal Family and Medical Leave Act⁹ and certain state and local unpaid and paid leave laws. As we approach a new calendar year, employers should review their handbooks and other employment policies, especially those relating to anti-discrimination, paid and unpaid leave entitlements, and other benefits offerings to ensure compliance with applicable federal, state, and local laws.

¹ H.R. 804 (2022).

² 597 U.S. ___ (2022).

³ 410 U.S. 113 (1973).

⁴ *United States v. Windsor*, 570 U.S. 744 (2013).

⁵ 28 U.S.C. § 1738C.

⁶ 576 U.S. 644 (2015).

⁷ 388 U.S. 1 (1967).

⁸ 42 U.S.C. § 2000e *et seq.*

⁹ 29 U.S.C. § 2601 *et seq.*