

## **What the same-sex marriage case means**

**Cher E. Wynkoop and Corina V. San-Marina**  
**Willcox Savage**

© October 20, 2014 *Inside Business*

Same-sex marriage became legal in Virginia on Oct. 6 when the Fourth Circuit issued a mandate to remove the last barrier to same-sex marriage in Virginia.

Virginia now recognizes same-sex marriages lawfully performed in Virginia as well as other states. This development follows the U.S. Supreme Court's announcement earlier the same day declining to hear the Virginia-based same-sex marriage case as well as others in two federal circuit courts.

On Oct. 7, Virginia Gov. Terry McAuliffe issued an executive order declaring that the same-sex spouses of state employees are eligible for employer-provided health benefits, provided their marriage is recognized in Virginia.

State employees whose same-sex marriage is recognized in Virginia may enroll their spouse and eligible dependents in the health benefits program for state employees within 60 days of marriage.

The same day, the Virginia Department of Taxation announced that same-sex marriages that are valid under the law of any state will now be recognized for Virginia income tax purposes.

This development has important implications for Virginia employers. Same-sex spouses of employees who legally marry in Virginia or any other state that recognizes same-sex marriage will now be considered a "spouse" for many employment law and employee benefit plan purposes, including the employee's eligibility to request leave to care for a spouse under the Family Medical Leave Act and to enroll their spouse in fully insured group health plans.

Employers should amend their documents such as HR manuals, policies, procedures and payroll systems to reflect similar treatment of both opposite-sex and same-sex married couples.

Virginia employers should consult with their brokers, health insurers and legal counsel to determine what next steps must be taken in light of these new developments.

For instance, it is likely that state health insurance laws will immediately reflect the new definition of spouse and require fully insured group health plans to execute a "special enrollment" period this month to allow same-sex spouses of eligible employees to enroll in health insurance for the remainder of 2014. Annual open enrollment materials related to fully insured group health plans will have to offer same-sex spouse eligibility for the upcoming plan year as well.

The establishment by plan sponsors of spousal eligibility criteria in self-insured ERISA group health plans is arguably still exempt from application of Virginia's newly expanded definition of "spouse" - but litigation testing this long-standing exemption is sure to be swift and voluminous.

Self-insured ERISA group health plans that currently define "spouse" by reference to Virginia law will have to determine whether to amend their plans' eligibility terms to exclude same sex spouses specifically or to retain their existing language, which will automatically extend eligibility to same-sex spouses of eligible employees.

Immediate special enrollment and upcoming annual open enrollment adjustments will be required with the latter decision.

In addition to Virginia, the Fourth Circuit's decision also affects North Carolina and South Carolina. Employers with employees located in these states that, for now, do not recognize same-sex marriage will have to keep a close eye on whether they recognize same-sex marriages, especially for state income tax purposes.

*Cher E. Wynkoop is a partner in the employee benefits group of Willcox Savage. She can be reached at [cwynkoop@wilsav.com](mailto:cwynkoop@wilsav.com) or 628-5581. Corina V. San-Marina is an associate in the employee benefits group of Willcox Savage. She can be reached at [csanmarina@wilsav.com](mailto:csanmarina@wilsav.com) or 628-5607.*