Fundamental Rights and Vague Responsibilities.
By Jon Jablon, Esq. and Kelly E. Dempsey, Esq., The Phia Group.

No matter your opinion on Obergefell v. Hodges – the recent Supreme Court case holding that interpreted the fourteenth amendment as granting same-sex couples the right to marry – it is undeniably an important occurrence in our country's culture. While this holding will have profound impacts on many lives, its effects are not quite limited to simply the act of marriage. For instance, areas of the law that will be changed include bankruptcy law, Medicare entitlement, wills and inheritances, taxes – and health plans.

Many facets of the legal changes come in the form of new or amended rights for those most directly affected by this new common law; many other changes are more relevant to other entitles, and employer-sponsored healthcare is a great example of that. We often suggest that self-funding, versus offering a fully-insured policy, carries with it the freedom to structure a benefit plan however the plan sponsor wants. While that is generally the case, this new bit of common law – which will soon be enacted into law by states that have not yet so enacted – places a restriction upon a plan sponsor, and to some extent limits the sponsor's ability to fully customize its benefit plan.

Plan sponsors have historically been permitted to exclude benefits for same-sex spouses, in states that had not, at the time, recognized marriages between same-sex couples. The practical result of Obergefell v. Hodges is not directly or immediately realized; the Supreme Court interprets existing law, rather than creates new law from scratch (which is actually the primary rationale behind each dissenting opinion in the decision), and the interpretation was that the Fourteenth Amendment to the United States Constitution applies to prohibit a state from denying the legality or validity of a same-sex marriage.

The Supreme Court's decision was issued on June 26th, and within just the first three days (which, by the way, were a Friday, Saturday, and Sunday), our consulting division received over a dozen questions from third party administrators regarding how this decision will affect their groups and their groups' prior decisions to treat same-sex spouses as ineligible. These questions can be grouped into three and a half categories.

Some questions from third-party administrators are regarding a general notion of what will the effect be. The answer to this question also depends on whether the plan sponsor is in the private or public sector. Public-sector plan sponsors will be prohibited from drawing an eligibility distinction between same-sex spouses and opposite-sex spouses, while private-sector plan sponsors will not be so prohibited, but may still face allegations of sex discrimination under Title VII of the Civil Rights Act of 1964.

FMLA applies to employees caring for, among certain other individuals, their spouses. Under previous guidance in the form of Fact Sheet #28F, issued by the Wage and Hour Division of the Department of Labor (issued after Windsor but before Technical Release 2013-04), the definition of "spouse" as used for the purpose of the Family and Medical Leave Act (FMLA) defers to the state's definition of the term in order to define who is classified as a valid spouse. In other words, this definition referred to the state of residence rather than the state of celebration. If the employee resided in a state that did at the time consider "spouse" to include same-sex spouses, then the employer was required to offer FMLA coverage to the employee to care for the same-sex spouse. If the employee resided in a state that did not consider "spouse" to include same-sex spouses, then the employer was not required to offer FMLA coverage in conjunction with caring for the same-sex spouse. In February 2015, the Department of Labor

issued new guidance which focused on the state of celebration rather than the state of domicile – so that a marriage license lawfully issued in any state in the country would be sufficient for FMLA to apply to a spouse, whether same- or opposite-sex.

Through Technical Release 2013-04, the United States Department of Labor, in response to United States v. Windsor – perhaps not coincidentally decided exactly two years prior to Obergefell – adopted "a rule that recognizes marriages that are valid in the state in which they were celebrated." "Celebrated," in this context, refers to the state of issuance of the marriage. In other words, if Massachusetts permitted and recognizes same-sex marriage, then benefit plans within Massachusetts were required to have no more restrictive a definition of "spouse" than Massachusetts law, which defined marriage as not between a man and a woman but by two consenting adults.

Obergefell, in effect, extends the effects of Technical Release 2013-04 to all states. That distinction, the Department reasoned, minimized the administrative burden for health plans under ERISA and ensured uniformity. It is a distinction that will no longer be necessary, though, given Obergefell; this case effectively renders every state a state that recognizes same-sex marriage as legal and valid, and considers a "spouse" to be of either sex.

Other third-party administrators want to know what effect ERISA pre-emption has on this new law. That's never a simple question to answer; pre-emption takes many forms, involves certain pre-made multi-factor "tests," is very fact-intensive, and generally involves the examination of decades of legal precedent. Given the intense effect of the Supreme Court's decision – that same-sex marriage is as fundamental a right as opposite-sex marriage – pre-emption becomes more unclear than many other situations. On the one hand, a fundamental right – and a protected class – under the United States Constitution is not something that federal courts will take lightly; it would be comparable to excluding eligibility for a certain sex, race, or nationality. On the other hand, "ERISA preempts state laws that (1) mandate employee benefit structures or their administration; (2) provide alternate enforcement mechanisms; or (3) bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself." Penny/Ohlmann/Nieman, Inc. (PONI) v. Miami Valley Pension Corp., 399 F.3d 692, 698 (6th Cir. 2005), Internal quotations omitted. In other words, such state laws as will be enacted as a result of Obergefell likely fall within at least one of the three categories of preempted state laws.

Another question we've been asked by the numerous third-party administrators anxious for some clarity is regarding when this new law will become truly effective. The answer to that is an unknown. For instance, the Department of Labor did not provide guidance on United States v. Windsor for some twelve weeks (the decision came out on June 26, 2013, and Technical Release 2013-04 released on September 18, 2013). So, if Windsor is any indication, we can expect guidance mid-June – but the Department of Labor is often unpredictable and we may receive guidance in a few weeks, or many months.

In the meantime, though, we are advising third-party administrators and health plans to begin complying with the law in good faith, which simply entails deleting any provision within the Plan Document that excludes same-sex spouses from eligibility. Obergefell can be viewed almost as an extension of Windsor in this regard; Windsor required that public-sector benefit plans define "spouse" as in the state of celebration of the marriage, and Obergefell extends that to all states, since the Fourteenth Amendment now requires all states to legalize and recognize same-sex marriage. Private-sector plan sponsors are at this time not required to abide by the same obligation – but given this new

interpretation of the Fourteenth Amendment, affording different treatment to same-sex marriage as to opposite-sex marriage may be viewed as discriminatory under the Civil Rights Act of 1964, even though not enforceable by the state on a private-sector plan sponsor.

Lest we forget, of course, the Hobby Lobby case regarding contraceptive coverage and potential religious challenges to the laws created or modified by Obergefell. Hobby Lobby prevailed in its argument that the Religious Freedom Restoration Act prohibited the government from imposing restrictions upon private-sector entities if the restrictions violated the entity's religious freedom. It is a safe bet that similar arguments will be raised regarding the implications of the Obergefell decision.

We were asked one outlier question (hence the three and a half categories of questions) regarding what effect will this law have on stop-loss? And the answer to that is…have you ever seen a stop-loss policy that has its own definition of "spouse?" If you're a self-funded group and you've contracted with a stop-loss partner that refuses to mirror the Plan Document's most basic definitions, you might want to look for some new quotes, because you're in trouble.