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Andrew Malahowski

Jeff Nowak

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SAME-SEX MARRIAGE: EMPLOYMENT AND BENEFITS ISSUES FOR PUBLIC SECTOR EMPLOYERS

By, Andrew Malahowski and Jeff Nowak

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SAME-SEX MARRIAGE: EMPLOYMENT AND BENEFITS ISSUES FOR PUBLIC SECTOR EMPLOYERS

By, Andrew Malahowski and Jeff Nowak

Andrew Malahowski *is compliance counsel at Gallagher Benefit Services, working in Dallas, Texas. Andrew focuses on all areas of health and welfare plan compliance, including regulatory compliance under the Affordable Care Act, ERISA, and various employee benefits requirements under the Internal Revenue Code. Prior to joining Gallagher in March, Andrew was a partner with the law firm of Franczek Radelet, representing both private and public sector employers in all areas of employee benefits law. Andrew has been a contributing editor for the* Developing Labor Law*, and has contributed articles for the* Illinois Public Employee Relations Report *and the* Employment Law Strategist*. He received his B.A. from the University of Notre Dame,* cum laude*, in 1999, and his J.D. from the University of Notre Dame Law School,* magna cum laude*, in 2002.*

Jeff Nowak *is a partner with the law firm of Franczek Radelet. Jeff represents private and public sector management clients in all areas of labor and employment law. He regularly counsels and litigates single- and multi-plaintiff matters relating to employment discrimination and traditional labor claims, and has extensive trial experience in the area of employment law. He is considered a national leader in the areas of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA), including counseling clients on compliance with FMLA regulations, conducting FMLA audits and training, and successfully litigating FMLA and ADA lawsuits. He also is the author of FMLA Insights, which was named one of the top 100 legal blogs by the ABA Journal for the third consecutive year in 2013. Jeff received his B.A. from Indiana University in 1995, and his J.D. from Indiana University in 1999.*

I. INTRODUCTION

On June 26, 2013, the United States Supreme Court struck down part of the Defense of Marriage Act ("DOMA"), a federal law which prevented the federal government from recognizing same-sex marriages.[1] On November 5, 2013, both houses of the Illinois General Assembly voted to approve same-sex marriage, and Governor Quinn signed the bill into law on November 20.[2] The Supreme Court's decision in *United States v. Windsor* and the action of the Illinois General Assembly have immediate and long-term administrative compliance issues for employers and employer-sponsored benefit plans. This article explores some of the key implications for public sector employers. Part II provides a summary of the legal rules which governed same-sex unions both in Illinois and elsewhere, prior to the Court's decision in *Windsor*. Part III provides a summary of the Supreme Court's decision in *Windsor*. Part IV provides a summary of the Illinois Religious Freedom and Marriage Fairness Act, which will permit same-sex marriage in Illinois. Part V provides a summary of the guidance issued following the *Windsor* decision which is relevant for both employee relations and employee benefit plans in the public sector. We expect additional agency guidance to be issued in the future concerning same-sex marriages (perhaps even between the

time this article is written and the time it is published), so legal compliance remains somewhat of a moving target.

II. DOMA (PRE-*WINDSOR*) AND STATE LAWS GOVERNING SAME-SEX UNIONS

DOMA was enacted in 1996 with two significant sections: (1) Section 2 granted states the right to refuse recognition of same-sex marriages performed in other states; and (2) Section 3 amended the definition of "marriage" and "spouse" for all federal statutes, regulations, and interpretations administered by federal agencies and entities.[3] Specifically, DOMA defined "marriage" as "only a legal union between one man and one woman as husband and wife," and defined "spouse" as "a person of the opposite sex who is a husband or a wife."[4] Section 3's definitions affected more than 1,000 federal statutes – and their corresponding regulations – in which marital or spousal status is defined as a matter of federal law.[5]

Prior to the Court's decision in *Windsor*, it was clear that neither the Family and Medical Leave Act ("FMLA"),[6] nor the federal rules governing qualified retirement plans, health and welfare plans,[7] and payroll taxes[8] required the recognition of same-sex marriages. More to the point, in many cases the recognition of same-sex marriage was prohibited by DOMA. For example, the right to provide tax-free health and welfare benefits and the right to provide certain qualified retirement plan rights were limited to opposite sex spouses under federal law.[9] Therefore, based on the rules set forth in DOMA, it became common for employers to simply limit employment and employee benefits rights solely to opposite sex spouses. For example, it was common for employers to limit health and welfare plan eligibility to the employee and the employee's opposite sex spouse (and any dependent children). When defining eligibility for benefits, employee benefit plans often specifically referenced DOMA or "federal law" as a rationale and legal justification for this limitation. Further, FMLA leave was not provided to employees to care for a same-sex spouse with a serious health condition.

Nevertheless, even prior to the Court's decision in *Windsor*, a number of states had begun to recognize same-sex marriage – even though state law did not control on issues of federal law. At the time of the Court's decision in *Windsor*, the District of Columbia and 13 states recognized same-sex marriage.[10] On the other hand, a number of states took opposite measures. Twenty-nine states passed constitutional bans on same-sex marriage.[11] Many of these states also banned other types of same-sex unions.[12] Finally, six states and Puerto Rico had

statutory bans on the recognition of same-sex marriage at the time of the *Windsor* decision.[13]

Further, in some states that did not recognize same-sex marriage (including, at that time, Illinois), other "marriage-like" rights and privileges were extended by state legislatures. For example, on June 1, 2011, Illinois began recognizing civil unions in accordance with the Illinois Religious Freedom Protection and Civil Union Act (the "Civil Union Act").[14] The Civil Union Act allowed both same-sex and opposite sex couples to enter into civil unions and provide them with the same legal rights, responsibilities, benefits and protections as are afforded or recognized under Illinois law to married spouses (e.g., the ability to make emergency medical decisions for partners, adoption and parental rights, spousal testimonial privilege and state spousal benefits, including workers' compensation and spousal pension coverage).[15] A notable caveat was that the Civil Union Act did not label these civil unions as a "marriage." In fact, pursuant to the Civil Union Act, Illinois treated marriages lawfully performed in another state only as a civil union.[16]

The Civil Union Act spawned sometimes confusing rules with respect to employment and employee benefits issues – primarily due to the tensions between state and federal law at the time. For example, the Illinois Department of Insurance opined that the Civil Union Act had implications for sponsors of fully-insured employee benefit plans, which are governed in part by the Illinois Insurance Code. In that guidance, the Department of Insurance took the position that "health insurance policies and HMO contracts issued in Illinois must offer coverage to civil union couples and their families that is identical to the coverage offered to married couples and their families."[17] Insurance carriers and third-party administrators often reached a similar conclusion for governmental health plans, regardless of whether they were fully-insured or self-insured. In contrast, private sector self-insured plans were not legally required to cover civil union partners (though, in practice, many did anyway).

Finally, in the absence of state action (or even in the presence of state action that didn't fulfill the employer's wishes), many employers voluntarily decided to offer certain rights and benefits to same-sex spouses, domestic partners, and civil union partners – at least where it was possible to do so. For example, many employers provided for the right of domestic partners of an employee to enroll in their group health plans. This often created difficult payroll tax responsibilities for employers. After all, while opposite sex spouses were permitted to receive tax free benefits under federal law, domestic partners would only be entitled to receive tax-free benefits if they met the criteria for being "qualified dependents" under the Internal Revenue Code.[18] Sometimes they did, and sometimes they didn't. This

discrepancy led to complicated obligations for employers to "impute" additional taxable income for certain individuals but not others.

In short, prior to *Windsor*, the legal landscape could not have been much more complicated, challenging, and uncertain for employers.

III. SUMMARY OF THE *WINDSOR* DECISION

Suffice it to say that the Supreme Court's decision in *Windsor* has changed everything. And hopefully, in time, the Court's decision will simplify things from an administrative perspective for employers. In *Windsor*, the Supreme Court held in a 5-4 decision that Section 3 of DOMA violated the Equal Protection clause of the Fifth Amendment to the United States Constitution.[19] With the reversal of Section 3, the Court granted the same benefits and rights under federal law to same-sex spouses as to opposite sex spouses.

A. Facts of the Windsor *Case*

Long-time New York residents Edith Windsor and Thea Spyer registered with the state as domestic partners in 1993. In 2007, facing Spyer's ailing health, the couple married in Ontario, Canada. They returned and continued to reside in New York, which recognized their marriage at the time Spyer died in 2009.

Spyer left her entire estate to Windsor. The Internal Revenue Service, however, deemed Windsor ineligible for the marital exemption from the federal estate tax because of the prohibitions contained in DOMA. As a result, Windsor owed $363,053 in estate taxes. She paid the tax and requested a refund. The IRS denied the refund since Windsor did not qualify as a "surviving spouse."[20]

Windsor sued in the United States District Court for the Southern District of New York claiming Section 3 of DOMA violated her Fifth Amendment right to equal protection. The District Court held Section 3 unconstitutional and ordered the IRS to refund the tax with interest.[21] The Second Circuit affirmed. The United States did not comply with the judgment, and the case was appealed to the United States Supreme Court.[22]

B. The Supreme Court's Analysis

The Court traced the history of domestic relations as an area of law left virtually exclusively to the states.[23] In this context, the Court found that New York's decision to recognize same-sex marriages performed outside the state – and ultimately, its decision to permit same-sex marriages to be performed in New York

– was a valid exercise of state sovereign power to define and regulate marriage. The Court characterized New York's enactments as a determination by New York's citizens and elected officials to right an earlier injustice and acknowledge "the intimate relationship between two people, a relationship deemed by the state worthy of dignity in the community equal with all other marriages."[24]

The Court acknowledged that, in some circumstances, Congress had enacted statutes bearing on marital rights and privileges. However, the Court contrasted Section 3 with these statutes, noting that DOMA had a "far greater reach" and was "directed to a class of persons that the laws of New York, and of 11 other States, have sought to protect."[25] In this regard, the Court found, DOMA diverged from the history and tradition of relying on state law to define marriage.[26]

Turning to DOMA's legislative history, the Court found that the "essence" of DOMA was to interfere with the equal dignity of same-sex marriages.[27] Indeed, the House of Representatives Report for DOMA expressly stated that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage."[28] Congress's goal was to "put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws" for the purpose of imposing inequality, not for other reasons like governmental efficiency.[29] The Court found that the "bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group."[30]

Finally, the Court noted that DOMA had real-life consequences for certain married couples. The Court noted, for example, that same-sex spouses were prevented from obtaining government healthcare benefits they would otherwise receive; were deprived of special bankruptcy protections for domestic-support obligations; and could not be buried together in veterans' cemeteries.[31] Similarly, DOMA imposed financial burdens on the children of same-sex couples.[32]

Based upon this analysis, the Court invalidated Section 3 of DOMA, and held:

> [N]o legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.[33]

The Court emphasized, however, that its ruling applied only in states that recognize same-sex marriages.[34] Therefore, the reach of the *Windsor* decision in all states – some of which recognize same-sex marriage, and others which do not – remained somewhat unclear at the time that it was decided.

IV. SAME-SEX MARRIAGE IN ILLINOIS

The State of Illinois has followed the *Windsor* decision with action of its own. On November 5, 2013, Senate Bill 10 (the Illinois same-sex marriage bill) passed out of the General Assembly and was sent to Governor Pat Quinn for his signature. The Governor signed SB10 into law on November 20, 2013, and SB10 became Public Act 98-597 (called the Illinois Religious Freedom and Marriage Fairness Act). The law's provisions will go into effect on June 1, 2014, and same-sex couples will be able to file applications for marriage licenses. Below is a summary of the key provisions of the Act, including a discussion of some of the law's ambiguities:

Same-sex marriage provisions: The Act states that, "All [state] laws…applicable to marriage . . . shall apply equally to marriages of same-sex and different-sex couples and their children."[35] The bill removes any distinction between same-sex and opposite sex marriages for the purpose of any benefits conferred by state law. In addition, the bill provides that marriage-related terms such as "spouse," "family," "immediate family," "dependent," and others apply equally to same-sex and opposite sex spouses. [36]

Interaction with federal law: The Act also provides that when Illinois marriage law relies on or refers to federal law, same-sex couples and their children will be treated as if federal law recognizes the marriages of same-sex couples in the same manner as the law of the State of Illinois.[37] The bill was first proposed in the Senate prior to the U.S. Supreme Court's decision in *Windsor*. After the *Windsor* decision, however, the effect of this section remains unclear.

Effect on civil unions: Civil unions performed in the state pursuant to the earlier Civil Union Act will continue to be recognized after the Act has taken effect. The Act also provides couples currently in a civil union with the opportunity to "convert" their legal relationship into a marriage, and waives the marriage license fee for these couples for a period of one year after the Act takes effect.[38] In other words, until June 1, 2015, couples currently in a civil union may apply to have their civil union converted into a marriage without paying a fee or performing a new ceremony. The converted marriage will become effective retroactively as of the date the civil union was first performed. After June 1, 2015, couples wishing to convert their civil union into a marriage will have to pay a new fee, perform a new ceremony, and their marriage date will not be retroactive to the date of their civil union.

V. EMPLOYMENT AND BENEFIT LAW IMPLICATIONS

The law has changed significantly in a short period of time, many interpretation issues remain, and concise regulatory guidance is hoped for but not yet promulgated on many fronts. Nevertheless, legal compliance obligations surge forward anyway. Even for employers who have only one employee who has a same-sex spouse – or even if the employer has none today, but might in the future – there are a number of administrative compliance issues to be aware of. The agency guidance to date has attempted to simplify compliance to some extent, but some compliance steps remain educated guesswork. The Court's decision in *Windsor* essentially holds that "a spouse is a spouse," and the agency guidance so far largely follows that rough generalization. Nevertheless, understanding all of the legal ramifications of that conclusion can be difficult.

A. Federal Agency Guidance Issued To Date

As of the date this article was written, only basic foundational agency guidance has been released to help interpret the *Windsor* decision. On August 29, 2013, the Internal Revenue Service released Revenue Ruling 2013-17 to provide general guidance on whether, for federal tax purposes, the IRS would recognize a marriage of same-sex individuals even if the individuals no longer resided in a state that recognizes same sex marriage.[39] On September 18, 2013, the Department of Labor published Technical Release 2013-14, which deals with the same question for ERISA purposes.[40] Subsequently, IRS Notice 2013-61 provided further guidance on how employees and employers might seek refunds of taxes paid on the value of same-sex spousal benefits.[41] Finally, the IRS issued Notice 2014-1 to provide rules for same sex spouses who participate in employer cafeteria plans (including the payment of pre-tax premiums and contributions to health and dependent care flexible spending accounts) and health savings accounts.[42]

While a number of questions remain, the primary interpretive question following *Windsor* has been answered by this agency guidance – namely, whether the "state of residence" (i.e., the state where the married couple resides) or the "state of celebration" (i.e., the state where the marriage was performed) determines whether a same sex marriage is recognized under federal tax and benefits law. The agencies have chosen the latter approach, which simplifies compliance greatly. The DOL and IRS guidance holds that "marriage" includes same-sex marriages performed in any domestic or foreign jurisdiction, even if the couple does not currently reside in a state that recognizes same-sex marriages.[43] Further, in a press release accompanying the release of the DOL's ERISA guidance, Labor Secretary Thomas Perez commented, "[The *Windsor*]

decision represents a historic step toward equality for all American families, and I have directed the department's agency heads to ensure that they are implementing the decision in a way that provides maximum protection for workers and their families."[44] Therefore, further agency guidance on other legal issues surrounding DOMA is likely to take a similar approach.

B. Employee Benefit Plan Issues

Unlike private sector employee benefit plans, public sector plans are not governed by ERISA.[45] However, public sector plans (both health plans and retirement plans) are governed by tax rules under the Internal Revenue Code which permit employers to offer certain benefits on a tax-free or tax-deferred basis. Similarly, group health plans have sometimes complicated payroll taxation consequences for employee participants, which are now simpler following the Supreme Court's decision in *Windsor* and the subsequent agency guidance. The following sections summarize the essential compliance steps for employers facing these changes in the law.

1. Amend Plan Documents If Necessary

Health and welfare plan documents that offer spousal coverage typically include a definition of "spouse" for eligibility purposes. As noted above, it was somewhat common before the *Windsor* decision for employers to define spouse to exclude same-sex partners, or to define spouse strictly according to federal law. Now that a key part of DOMA has been held unconstitutional, and federal regulatory law has been clarified by the IRS and DOL, old plan definitions may no longer match the employer's intent. Or, if the plan's definition of spouse explicitly references DOMA, it will not make any practical sense at all. Therefore, plan documents should be amended so that the plan's written definition of spouse matches how the plan will be administered.

Further, while self-insured private sector employers may continue to have freedom to exclude same-sex spouses from health plan coverage, fully-insured plans and public sector employers in Illinois likely will not have the same freedom. In light of the *Windsor* decision, as well as the statutory recognition of same-sex marriage in Illinois, we expect both fully-insured plans and all governmental plans in Illinois to be required to offer the same rights to same-sex spouses as they do to opposite sex spouses. Further guidance would be welcome as to what is mandated and what is permissive.

2. Determine Employee Marital Status

Employers who offer health plan coverage to spouses will now need to determine which employees have a legal marriage to a same-sex spouse. This includes employers who currently offer coverage only to domestic partners rather than same-sex spouses. It is likely that some employees who have been receiving coverage for their same sex domestic partner also have a formal marriage to that partner. On the other hand, some employees will currently meet only the traditional criteria for domestic partner coverage (joint residence and joint bank accounts, etc.), but will not have a legally performed marriage to that partner. The only way the employer can know the answer to this question is to ask, and the employer has every right to ask so that it can apply the eligibility terms of its health plan accurately.

3. Taxation of Benefits Provided to Employees With Same-Sex Spouses

Same-sex spouses are now treated the same as opposite sex spouses have historically been treated with respect to the taxation of group health plan benefits. In general, employees are not taxed on the value of group health benefits provided to their spouse. Further, employer flexible spending account ("FSA") plans may reimburse qualified medical expenses for both the employee and the employee's spouse (including any qualified dependents). Finally, employees may pay for the cost of premiums for group health coverage for themselves and their spouse (and qualified dependents) on a pre-tax basis pursuant to the employer's cafeteria plan under Section 125 of the Internal Revenue Code. These same benefits are now available to same-sex spouses after the Supreme Court's decision in *Windsor* and the subsequent guidance issued by the IRS.

4. Continuing Tax Implications For Non-Spouse Domestic Partners

Even in the wake of *Windsor* and the Illinois Religious Freedom and Marriage Fairness Act, some employers may still offer certain benefits to same-sex domestic partners of their employees. Employers who continue to offer health coverage to non-spousal domestic partners will continue to have more complicated tax obligations. The IRS was careful to note that, for federal tax purposes, a spouse does "not include individuals (whether opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state."[46]

The Internal Revenue Code permits employers to provide tax-free health benefits only to employees, their spouses (now including same-sex spouses), children

under the age of 27, and qualified dependents under Section 105(b) of the Internal Revenue Code. Individuals who do not fall within one of these categories are not entitled to receive tax free health benefits. In the case of domestic partners, some individuals may meet the criteria for being a qualified dependent and others may not. While a full explanation of these taxation rules is not provided here, generally a qualified dependent is an individual who: (i) has the same principal place of residence as the employee and is a member of the employee's household for the calendar year; (ii) is provided over one-half of his or her financial support for the calendar year by the employee.[47] For example, domestic partners who rely on the employee for financial support and reside with the employee are likely to meet the criteria for being a qualified dependent; working domestic partners who provide their own support or who do not meet the criteria would not.

If an employee's non-marital domestic partner participates in the employer's health plan but does not meet the criteria for being a qualified dependent, additional taxable income must be imputed to the employee. Providing benefits to a nonqualified dependent is a taxable event. The amount of imputed income must be the "fair market value" of the nonqualifying coverage, though the exact amount to impute is not set in stone. In one private letter ruling request to the IRS, COBRA rates were used as the fair market value of non-dependent domestic partner coverage. [48] Other informal rulings have followed a similar path. However, the IRS declined to expressly rule on the appropriateness of this valuation method, citing its policy of not ruling on fact issues such as the determination of fair market value. More recently, the IRS noted informally at an ABA Joint Committee on Employee Benefits meeting that it "declines expressing an opinion on how fair market value is determined."[49] Many employers use COBRA rates (minus the 2% administrative charge) as the fair market value of coverage for purposes of imputed income, but other approaches are permissible.

Due to the complications provided by these rules, we expect that most employers will decide to remove domestic partner coverage from their employee benefit plans in favor of simply providing coverage to spouses (including same-sex spouses). After all, the original rationale for providing domestic partner coverage no longer exists because same-sex couples will have opportunities, even in Illinois, to get a legal marriage and secure tax free benefits. Nevertheless, a smooth transition is recommended. It would cause a significant amount of upheaval for employees if domestic partner coverage was removed with no advance lead time, such as time to actually get a legal marriage so that benefit eligibility can be preserved. Therefore, employers who remove domestic partner benefits in favor

of same-sex spousal benefits should consider providing advance notice to their employees and a delayed effective date for such action.

5. COBRA Continuation Rights

The rules governing COBRA continuation coverage are memorialized in both the Internal Revenue Code and ERISA. However, the Code's COBRA provisions are inapplicable to governmental plans[50], and ERISA's COBRA provisions are also inapplicable to governmental plans.[51] Nevertheless, COBRA continuation obligations still extend to governmental employers pursuant to the Public Health Service Act ("PHSA").[52] While formal guidance would be welcome, it is expected that COBRA continuation rights for same-sex spouses will also apply to governmental employers under the PHSA. Therefore, if a public employer provides group health coverage to same-sex spouses and that spouse experiences a qualifying event under COBRA (for example, divorce from the employee or the employee's termination of employment), a notice of continuation rights should be provided and continuation of health benefits should be permitted for the same-sex spouse pursuant to the PHSA.

6. Retirement Plans

All of the obligations for qualified retirement plans following *Windsor* are not yet clear, but some guidance has begun to emerge. In a Q&A released following Revenue Ruling 2013-17, the IRS announced that "[a] qualified retirement plan must treat a same-sex spouse as a spouse for purposes of satisfying the federal tax laws relating to qualified retirement plans."[53] The IRS also stated that it intends to issue further guidance on how qualified retirement plans and other tax-favored retirement arrangements must comply with *Windsor*, including guidance on plan amendment requirements and any necessary corrections relating to plan operations for periods before this guidance is issued. As of the date that this article was written, we are still awaiting this additional guidance.

Pending additional guidance, we expect that the following rules will apply at a minimum to qualified retirement plans in the public sector: (1) statutory public sector plans which are governed by the Illinois Pension Code will likely be required to offer their existing spousal benefits, such as survivor annuities and death benefits, to same-sex spouses; (2) non-statutory public sector plans may not be subject to the same mandate, though many employers will choose to equalize benefits for both same-sex and opposite sex spouses and broad plan definitions of "spouse" may lead to that conclusion as well; (3) plans must allow same-sex widows of employees to make direct rollovers of the employee's accrued and vested benefit to their own IRA or eligible retirement plan in the same way that opposite

sex spouses can; (4) required minimum distributions under Section 401(a)(9) of the Internal Revenue Code must take into account the life expectancy of the participant and his or her spouse (whether that spouse is same-sex or opposite sex); (5) benefits may be transferred to a divorced same-sex spouse pursuant to a valid Qualified Illinois Domestic Relations Order. Other rules affecting qualified retirement plans in the private sector (which are governed by ERISA and additional rules under the Internal Revenue Code which are unique to ERISA-covered plans) may not apply to public sector plans. Concise agency guidance, differentiating between ERISA plans and governmental plans, would be welcome.

C. Employment Law Issues

The primary impact that *Windsor* will have on federal employment law concerns the FMLA. The FMLA allows an eligible employee to take leave in order to care for a spouse with a serious health condition; because of any qualifying exigency arising out of the fact that the spouse is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces; or to care for a spouse who is a covered service member.[54]

The FMLA defines "spouse" as "a husband or wife, as the case may be."[55] The corresponding DOL regulations define "spouse" as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized."[56] While this regulation suggests that the DOL would look to state law to define "spouse," the DOL acknowledged in a 1998 Opinion Letter that it was bound by DOMA's definition of "spouse," concluding, "Because FMLA is a Federal law, it is our interpretation that only the Federal definition of marriage and spouse as established under DOMA may be recognized for FMLA leave purposes."[57] Until *Windsor*, then, married same-sex couples who resided in states that recognized their marriages were ineligible to take FMLA leave to care for a spouse as permitted by the FMLA. In light of guidance provided by the DOL for employee benefit plans, and Secretary Perez's comments, it is reasonable to expect that the DOL will adopt a "state of celebration" rule for purposes of the FMLA similar to that adopted for ERISA and the tax code.

In striking down Section 3 of DOMA, the Supreme Court cleared the way for each state to decide its own definition of "spouse." *Windsor* makes clear that if an employee is married to a same-sex partner *and* lives in a state that recognizes same-sex marriage, the employee will be entitled to take FMLA leave for a spouse as permitted by the FMLA. What *Windsor* left unclear, however, is how the FMLA

will be applied to employees who reside in states that do not recognize same-sex marriage.

As an initial matter, the relevant FMLA regulation references the state in which the employee resides to determine whether a person is a spouse for purposes of the FMLA. Therefore, even if the employee formerly lived or was married in a state that recognized the same-sex marriage, the employee is unlikely to be considered a spouse in the "new" state for purposes of the FMLA unless the new state recognizes the marriage (as New York did at the time of Spyer's death).

To date the DOL has issued only limited guidance on how *Windsor* will impact the definition of "spouse" in states that do not recognize same-sex marriage. In August 2013, the DOL updated its FMLA Fact Sheets to reflect that the definition of "spouse" under the FMLA also includes those individuals who have entered into a same-sex marriage. Specifically, the Fact Sheets define "spouse" as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage."[58] The DOL also indicated that the 1998 Opinion Letter discussing the application of DOMA to the FMLA is "under review" in light of *Windsor*.[59]

As noted above, Governor Quinn has now signed SB10 and Illinois will become the sixteenth state to allow same-sex marriage, starting on June 1, 2014.[60] For purposes of the FMLA, therefore, same-sex married couples in Illinois, including those residing in Illinois who were lawfully married in another jurisdiction, will be entitled to the spousal leave benefits guaranteed by the FMLA when the Act becomes effective.

While the most widespread impact of *Windsor* with respect to employment law will be with the FMLA, other employment statutes are also affected. For example, *Windsor* broadens the reach of the Genetic Information Nondiscrimination Act of 2008 (GINA).[61] GINA prohibits discrimination based on genetic information by employers and other covered entities having 15 or more employees.[62] Specifically, the statute forbids an employer or other covered entity from requesting, requiring, or purchasing genetic information of an employee or a family member of the employee.[63] GINA defines "family member" as a "dependent," and references ERISA's definition of that term.[64] The referenced provision of ERISA deals with special enrollment periods for health insurance coverage, including when an individual becomes a dependent through marriage.[65] Since GINA expressly incorporates a definition of "family member" from federal law that uses the terms "marriage" and "spouse," the definition will be broadened to include same-sex spouses in states that recognize such marriages

as a result of *Windsor*. Consequently, it is now a violation of GINA to request, require, or purchase genetic information with respect to same-sex spouse of an employee in states where same-sex marriage is allowed.

In addition, *Windsor* will result in same-sex spouses being excluded from coverage under certain federal laws.[66] For example, the National Labor Relations Act excludes from its definition of employee "any individual employed by his . . . spouse."[67] As a result, these individuals are no longer entitled to organize or to engage in collective bargaining. Similarly, the Fair Labor Standards Act exempts from coverage "any establishment that has as its only regular employees the owner thereof or the . . . spouse . . . of such owner."[68]

VI. CONCLUSION

We expect 2014 to be a busy year for federal agencies and employee benefits specialists alike, as additional regulatory guidance is issued. In particular, additional federal guidance is expected on the retroactivity of the *Windsor* decision, and it is always possible that additional state legislative or court action will modify the legal landscape governing same-sex marriage even further. There will certainly be growing pains along the way, but the hope is always that compliance becomes second-nature in due time.

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[1] *United States v. Windsor*, 133 S.Ct. 2675(2013).

[2] 750, ILL COMP STAT. 80/1-80/997 (effective June 1, 2014) (legislative history *available at*: http://www.ilga.gov/legislation/billstatus.asp?DocNum= 0010&GAID=12&GA=98&DocTypeID=SB&LegID=68375&SessionID=85&SpecSess=).

[3] *Windsor,* 133 S. Ct. at 2682 (citing 28 U.S.C. § 1738C and 1 U.S.C. § 7).

[4] *Id.* at 2683 (quoting 1 U.S.C. § 7).

[5] *Id.*

[6] *See* Wage and Hour Division of United Stated Department of Labor, *Letter FMLA-98* (November 18, 1998), <http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-98.htm> (stating that under the FMLA the term spouse can only apply to opposite sex couples).

[7] *See* Employee Benefits Security Administration, *Advisory Opinion 2001-05A,* Fn. 3 (June 1, 2001), <http://www.dol.gov/ebsa/regs/aos/ao2001-05a.html> (stating that a non-spousal domestic partner cannot qualify as a spouse for any purpose under federal law).

[8] *See* Internal Revenue Service, *Private Letter Ruling 9850011* (December 11, 1998), 1998 WL 855396 (stating that for the purposes of the Internal Revenue Code, a same-sex domestic partner does not qualify as a spouse).

[9] *Id.*

[10] The 13 states that recognized same-sex marriage at the time of the *Windsor* decision were California (originally recognized in *In Re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008); reversed by California Proposition 8 in 2008, Cal.Const. Art. 1, § 7.5; subsequently re- recognized in *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 1003 (N.D. Cal 2008) and *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2668 (finding petitioners did not have standing to appeal the decision of the N.D. of California to either the Ninth Circuit or the Supreme Court).), Connecticut (*Kerrigan v. Comm'r of Public Heath*, 957 A.2d 407, 481-82 (Conn. 2008).), Delaware (DEL. CODE tit. 13, § 101.), Iowa (*Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).), Maine (ME. REV. STAT. tit. 19-A, § 650-A.), Maryland (MD. CODE, FAM. LAW § 2-201.), Massachusetts (*Goodridge v. Dep't of Public Health*, 708 N.E.2d 941, 969-70 (Mass. 2003).), Minnesota (MINN. STAT. §§ 517.01 and 517.03.), New Hampshire (N.H. REV. STAT. ANN. §§ 457:1 and 457:1-A.), New York (N.Y. DOM. REL. LAW § 10-a (McKinney).), Rhode Island (R.I. GEN. LAWS § 15-1-1.), Vermont (VT. STAT. ANN. tit. 15, § 8.), and Washington (WASH. REV. CODE § 26.04.010.). Illinois (750 ILL. COMP. STAT. 5/212 (effective June 1, 2014).), New Jersey (*Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013).), New Mexico (*Griego v. Oliver*, 316 P.3d 865 (N.M. 2013), and Hawaii (HAW. REV. STAT. § 572-1.) have since recognized same-sex marriage through legislation or court decisions.

[11] The states with constitutional bans on same-sex marriage are Alaska (AK CONST. Art. 1, § 25), Alabama (ALA. CONST. art. I, § 36.03.), Arkansas (ARK. CONST. amend. 83, § 1.), Arizona (ARIZ. CONST. art. 30, § 1.), Colorado (COLO. CONST. art. 2, § 31.), Florida (FLA. CONST. art. 1, § 27.), Georgia (GA. CONST. art. 1, § 4, ¶ I.), Idaho (IDAHO CONST. art. III, § 28.), Kansas (KAN. CONST. art. 15, § 16.), Kentucky (KY. CONST. § 233A.), Louisiana (LA. CONST. art. 12, § 15.), Michigan (MICH. CONST. art. 1, § 25.), Mississippi (MISS. CONST. art. 14, § 263A.), Missouri (MO. CONST. art. 1, § 33.), Montana (MONT. CONST. art. 13, § 7.), Nebraska (NEB. CONST. art. I, § 29.), Nevada (NEV. CONST. art. 1, § 21.), North Carolina

(N.C. CONST. art. XIV, § 6.), North Dakota (N.D. CONST. art. 11, § 28.), Ohio (OHIO CONST. art. XV, § 11.), Oklahoma (OKLA. CONST. art. 2, § 35.), Oregon (OR. CONST. art. XV, § 5a.), South Carolina (S.C. CONST. art. XVII, § 15.), South Dakota (S.D. CONST. art. 21, § 9.), Tennessee (TENN. CONST. art. 11, § 18.), Texas (TEX. CONST. ART. 1, § 32.), UTAH (UTAH CONST. ART. 1, § 29.), VIRGINIA (VA. CONST. ART. 1, § 15-A.), AND WISCONSIN (WIS. CONST. ART. 13, § 13.).

[12] Alabama (ALA. CONST. art. I, § 36.03.), Arkansas (ARK. CONST. amend. 83, § 2.), Florida (FLA. CONST. art. 1, § 27.), Georgia (GA. CONST. art. 1, § 4, ¶ I.), Idaho (IDAHO CONST. art. III, § 28.), Kansas (KAN. CONST. art. 15, § 16.), Kentucky (KY. CONST. § 233A.), Louisiana (LA. CONST. art. 12, § 15.), Michigan (MICH. CONST. art. 1, § 25.), Nebraska (NEB. CONST. art. I, § 29.), North Carolina (N.C. CONST. art. XIV, § 6.), South Carolina (S.C. CONST. art. XVII, § 15.), South Dakota (S.D. CONST. art. 21, § 9.), Texas (TEX. CONST. art. 1, § 32.), Utah (UTAH CONST. art. 1, § 29.), Virginia (VA. CONST. art. 1, § 15-A.), and Wisconsin (WIS. CONST. art. 13, § 13.) have constitutional amendments banning other types of same-sex civil unions.

[13] The six states, in addition to Puerto Rico (P.R. LAWS ANN. tit. 31, § 221.), were Hawaii (HAW. REV. STAT. § 572-1 (2012, amended 2013).), Illinois (750 ILL. COMP. STAT. 5/212 (current version effective until May 31,2014).), Indiana (IND. CODE § 31-11-1-1.), Pennsylvania (23 PA. CONS. STAT. § 1102.), West Virginia (W. VA. CODE § 48-2-104.), and Wyoming (WYO. STAT. ANN. § 20-1-101.). Illinois (750 ILL. COMP. STAT. 5/212 (effective June 1, 2014) and Hawaii (HAW. REV. STAT. § 572-1.) have since passed legislation that will permit same-sex marriage.

[14] 750 Ill. Comp. Stat. 75/1-75/90.

[15] *Id.* at 75/20.

[16] *Id.* at 75/60 (effective until June 1, 2014).

[17] Illinois Department of Insurance, *Civil Unions and Insurance Benefits*, 2 (May 2011), <http://www.insurance.illinois.gov/newsrls/2011/05/CivilUnions Final05-25-11.pdf>.

[18] *See* Internal Revenue Service, *Private Letter Ruling 9850011* (December 11, 1998), 1998 WL 855396 (stating that a domestic partner may qualify as a dependent if certain criteria are met and therefore health benefits paid by the employer would not be included in gross income).

[19] *United States v. Windsor*, 133 S. Ct. 2675, 2681, 2695-96 (2013).

[20] *Id.* at 2683.

[21] *Id.* at 2682.

[22] *Id.* at 2683-84. The procedural posture of this case was unusual, as the Court recognized. While the district court suit was pending, the Attorney General announced that the President would no longer defend DOMA's constitutionality. At the same time, however, the Department of Justice announced the President's intention to continue enforcing DOMA. In the wake of the Attorney General's announcement, the House of Representative's Bipartisan Legal Advisory Group (BLAG) sought to intervene in theproceedings as an interested party. In its opinion, the Supreme Court addressed whether the U.S. Government and/or BLAG had standing to appeal to the Second Circuit and later seek certiorari. Over the vehement dissent of Justice Scalia, the Court ultimately determined that it could proceed on the merits. *Id*.

[23] *Id.* at 2691.

[24] *Id.* at 2692.

[25] *Id.* at 2690.

[26] *Id*. at 2692.

[27] *Id.* at 2693.

[28] *Id.* (referring to H.R.Rep. No. 104-664, pp. 12-13 (1996)).

[29] *Id.* (quoting *Massachusetts v. United States Dept. of Health and Human Servs*., 682 F. 3d 1, 12-13 (1st Cir. 2012)).

[30] *Id*. (quoting D*ep't of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973)).

[31] *Id.* at 2694. *See* 5 U.S.C. §§8901(5), 8905; 11 U.S.C. §§101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15); National Cemetery Administration Directive 3210/1, at 37 (June 4, 2008).

[32] *Windsor*, 133 S. Ct. at 2695.

[33] *Id.* at 2696.

[34] *Id.*

[35] 750 Ill. Comp. Stat. 80/10(a).

[36] *Id.* 80/10(c).

[37] *Id.* 80/10(d).

[38] *Id.* 75/65.

[39] I.R.S. Rev. Rul. 2013-17, <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>.

[40] U.S. Dept.of Labor, Technical Release 2013-14, Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in *United States v. Windsor* (Sept. 18, 2013), <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.

[41] I.R.S. Notice 2013-61, "Application of *Windsor* Decision and Rev. Rul. 2013-17 to Employment Taxes and Special Administrative Procedures for Employers to Make Adjustments or Claims for Refund or Credit," (Sept. 23, 2013), <http://www.irs.gov/pub/irs-drop/n-13-61.pdf>.

[42] I.R.S. Notice 2014-1, "Sections 125 and 223 – Cafeteria Plans, Flexible Spending Arrangements, and Health Savings Accounts – Elections and Reimbursements for Same-Sex Spouses Following the Windsor Supreme Court Decision," (Dec. 16, 2013), http://www.irs.gov/pub/irs-drop/n-14-01.pdf.

[43] DOL Technical Release 2013-14; IRS Rev. Rul. 2013-17.

[44] U.S. D.O.L, E.B.S.A. News Release, New guidance issued by US Labor Department on same-sex marriages and employee benefit plans, (Sept. 18, 2013), <http://www.dol. gov/opa/media/press/ebsa/EBSA20131720.htm>.

[45] 29 U.S.C. § 1003(b)(1).

[46] IRS Rev. Rul. 2013-17.

[47] *See generally I.R.C.* § 152.

[48] IRS, Private Letter Ruling 200108010 (Nov. 17, 2000).

[49] *See* May 7-9, 2009 American Bar Association Joint Committee on Employee Benefits Meeting, Q&A 2.

[50] I. R. C.§ 4980B(d)(2).

[51] 29 U.S.C. § 1003(b)(1).

[52] *See* 42 U.S.C. § 300bb-1.

[53] I.R.S., Answers to Frequently Asked Questions for Individuals of the Same-sex Who are Married Under State Law, Q&A 16 (last reviewed Nov. 20, 2013), <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>.

[54] 29 U.S.C. §§ 2612(a)(1), 2612(a)(3).

[55] 29 U.S.C. § 2611(13).

[56] 29 C.F.R. § 825.102.

[57] DOL Op. Ltr. FMLA 98 (Nov. 18, 1998), *available at* <http://www.dol.gov/WHD/opinion/FMLA/prior2002/FMLA-98.htm>. However, this may change, as the web page states, as of February 2, 2014, "This letter is under review in light of the U.S. Supreme Court's decision in UNITED STATES v. WINDSOR, EXECUTOR OF THE ESTATE OF SPYER, ET AL., which held the referenced provision in the Defense of Marriage Act (DOMA) to be unconstitutional."

[58] *See, e.g.,* U.S. Dept. of Labor, Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act, *available at:* <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm>.

[59] DOL Op. Ltr. FMLA-98 (Nov. 18, 1998), *available at:* <http://www.dol.gov/WHD/opinion/FMLA/prior2002/FMLA-98.htm>.

[60] 5 Ill.Comp. Stat. 75/2.

[61] Pub.L. 110-233 (2008), condified at 42 U.S.C. §§ 2000ff to 2000ff-10.

[62] *Id.* §§ 2000ff((2)(B),(C).

[63] *Id.* §§ 2000ff-1(b), 200055-2(b), 2000ff-3(b), 2000ff-4(b).

[64] *Id.* §§ 2000ff(3)(A),(B) (referencing section 701(f)(2) of ERISA, 29 U.S.C. § 1181(f)(2).

[65] Section 701(f)(2) of ERISA, 29 U.S.C. § 1181(f)(2).

[66] U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT 5, 32 (GAO/OGC-97-16) (1997), *available at:* <www.gao.gov/archive/1997/og97016.pdf>.

[67] 29 U.S.C. § 152(3).

[68] I29 U.S.C. § 203(s)(2).

RECENT DEVELOPMENTS

By, Student Editorial Board:

Marco Berrios, Peter Brierton, Alec Hausermann, and Stephanie Ridella

Recent Developments is a regular feature of the Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the public employee collective bargaining statutes.

I. IELRA DEVELOPMENTS

A. Arbitrability

In *Harlem Federation of Teachers, Local 540, IFT-AFT, AFL-CIO, and Harlem School District No. 122*, 30 PERI ¶ 153 (IELRB 2013), the Union filed a grievance, claiming that several reductions in force, position eliminations and other district reorganizations violated the collective bargaining agreement, and that the School District should be compelled to arbitrate. The School District contended that the collective bargaining agreements provided that the arbitrator did not have the authority to decide any question within the responsibility of the Board of Education to decide, and that the decisions made were within the inherent managerial authority of the Board.

The IELRB concluded that the issues were arbitrable. The IELRB reasoned that a management rights clause does not mean a grievance is inarbitrable, as the meaning of that clause within the agreement is a matter of interpretation for the arbitrator to determine. The collective bargaining agreements themselves contained a number of provisions that touched upon the decisions made in reorganizing the district. The arbitration provisions in the collective bargaining agreements were susceptible to an interpretation that covers the parties' disputes. The function of the IELRB was not to weigh the merits of the grievance and the merits must not be considered in deciding whether grievances are arbitrable; even frivolous claims can be susceptible to interpretation favoring arbitration.

The School District argued the grievance over reductions in force and reorganization were inarbitrable because Section 10-23.5 of the School Code provided that a school district has the power to "employ such educational support personnel employees as it deems advisable and to define their employment duties,"

and provides procedures to reduce the number of employees and eliminate programs. However, the IELRB said the statute does not render the grievances inarbitrable because, while it "grants school districts the power to define the employment duties of educational support employees, it does not provide that these decisions are within the sole discretion of the school district." Other aspects of the employment relationship are not covered under the statute, such as employee work year or hours, but are subject to collective bargaining, and thus the issues are arbitrable.

B. Duty to Provide Information

In *Board of Education of City of Chicago v. IELRB*, 2013 Ill. App. (1st) 122447, the First District Appellate Court reversed the IELRB and held that the School Board was not obligated under the IELRA to release student records to the union for use in a grievance proceeding. A school security officer was terminated after being accused of starting altercations with two students. During the grievance proceedings, the union argued that the first alleged altercation did not happen and that the second was started by the student, who had violent tendencies and was later expelled because of a fight with school staff.

The dispute went to arbitration and the School Board denied the Union's request for the students' redacted disciplinary records. The School Board refused to comply with the arbitrator's subpoena, although it indicated it would comply with a court order. Rather than file in court, the Union filed an unfair labor practice charge, and proceeded with the arbitration. In arbitration, the employee was reinstated.

The unfair labor practice charge alleged that the School Board's refusal to provide the student records violated its duty under the IELRA to bargain in good faith with employee representatives. The School Board responded that under the Illinois Student Records Act it could only turn over those records pursuant to a court order. The IELRB found that the request for redacted records mitigated confidentiality concerns for the students, and found that the School Board committed an unfair labor practice.

On appeal, the court reversed. The court observed that the duty to provide information upon request, while a part of the obligation to bargain in good faith, is not absolute; the information must be "relevant to the proceedings and reasonably necessary to the union's performance of its responsibilities." Furthermore, employers may assert an affirmative defense to production, such as confidentiality

or employee privacy. As a matter of first impression in published Illinois decisions, the court examined the merits of a statutory defense to production.

Examining the Student Records Act, the court first held that redacted student records, despite the removal of individual information, were still protected student records because they are still sought to gain information about two individual students. Although the students would be identified by initials rather than names, the union would know who they were. The court distinguished cases involving overall statistical information in which individual students could not be identified. Section 6 of the Student Records Act requires a court order before student records may be disclosed, and the rights of parents and students do not yield to the duty to bargain in good faith. The court saw "no basis upon which to conclude that the union's need for student records, under any and all circumstances, takes precedence over the right of parents to notice and the opportunity to challenge the release of their child's records."

C. Employee Reclassifications

In *International Union of Operating Engineers, Local 399 v. IELRB*, 2013 IL App (1st) 122432-U), the First District Appellate Court upheld the IELRB's dismissal of the union's claim alleging that Western Illinois University had violated sections 14(1) and 14(5) of the IELRA by failing to apply the terms of the collective bargaining agreement (CBA) to employees who had received a new job classification removing them from the bargaining unit and who were returned to the bargaining unit at a later date.

"Maintenance workers" were added to the job classification portion of the collective bargaining agreement in April 1991. This term continued to be part of the agreement when a new CBA was negotiated in July 2010 that was effective August 1, 2009 until July 31, 2014. Maintenance workers were tasked with removing asbestos and installing heat and frost insulation. By January 2010, however, a large portion of the work was installation of heat/frost insulation. As a result, six employees were reclassified as "building heat/frost insulators," and were treated by the university as unrepresented prevailing rate employees. They received a $3 increase in hourly pay, a 15 minute paid morning break, increased shift differential (from $.70 to $1), and lost their 30 minute paid lunch (cutting their weekly hours from 40 to 37.5). On November 8, 2010, the union petitioned the IELRB to add heating and frost insulators to the bargaining unit; the IELRB granted the petition. In February 2011 the union asked the university to apply the current CBA terms, including the paid lunch, to the heating and frost insulators. The university refused saying it was only obligated to maintain the status quo for

the newly classified employees until terms of employment could be negotiated. The university offered to bargain with the union but no negotiations occurred. The union filed an unfair labor practice charge alleging that Western Illinois University had violated sections 14(1) and 14(5) of the IELRA by failing to apply the terms of the CBA to employees who had requested a new job classification removing them from the bargaining unit and who were added back to the bargaining unit at a later date.

The court held that although the employees' job duties remained relatively the same, their job classification did not. The court cited to *Federal Mogul Corp.*, 209 N.L.R.B. 343 (1974) in holding that just as it was unfair to apply the current CBA to newly added employees, it would also be unfair to require the university to apply the current CBA to newly classified employees who had previously not been represented by the union without additional bargaining. The court held that until the parties engage in collective bargaining the university is not permitted to apply the terms of the existing CBA to the heat and frost insulators and is required to maintain the status quo.

II. IPLRA DEVELOPMENTS

A. Peace Officers and Security Personnel

In *Board of Education of Peoria School. District No. 150 v. Peoria Federation of Support Staff, Security/Policeman's Benevolent and Protective Ass'n Unit*, 2013 IL 114853, 998 N.E.2d 36, the Illinois Supreme Court held unconstitutional Public Act 96-1257 which had removed peace officers employed by a school district on the effective date of the act from coverage under the IELRA and placed them under the IPLRA. One effect of this act was to deny such employees the right to strike and to grant them the right to interest arbitration. As of the effective date of the act, Peoria School District 150 was the only school district in the state to employ its own peace officers in its own police department.

The court held that the act contravened the Illinois Constitution's prohibition of special legislation. The court interpreted the act to apply only to those school districts employing peace officers in their own police departments on the act's effective date and not to apply to school districts that might establish police departments and employ peace officers in the future. Examining the act's purpose to ensure that police officers are not allowed to strike no matter who employs them, the court found the act's distinction between the one school district who employed peace officers on the effective date of the act and school districts who might employ peace officers in the future lacked any rational justification.

In *Metropolitan Alliance of Police, River Valley Detention Center, Chapter 228 v. ILRB*, 2013 IL App (3d) 120308, 1N.E.3d 593, the Third District Appellate Court, affirmed the ILRB State Panel's holding that the River Valley Juvenile Detention Center ("RJDC") was not a correctional facility and its supervisors were therefore not security personnel entitled to interest arbitration. The union which represented shift and nonline supervisors engaged RJDC in negotiations for a new collective bargaining agreement. Mediation failed to produce any results and the union demanded interest arbitration which the employer refused. The union filed an unfair labor practice charge.

Evidence during the hearing showed that the RJDC is not governed by the Illinois Department of Corrections ("IDOC"); the residents are not in IDOC custody; the RJDC used IDOC procedures though; the RJDC contained males and females aged 10 to 16; residents could be admitted through a court order or through either an arresting officer's or department's recommendation and a subsequent evaluation by RJDC staff in order to determine if admittance is proper, which in turn would lead to a detention hearing where a court would determine if there was probable cause for delinquency; the vast majority of the residents were awaiting the disposition of their cases; shift supervisors were responsible for maintaining the secured parts of the RJDC and supervising the juvenile detention officers; the nonline supervisors included employees such as the court liaison and the program manager; both types of managers were required to meet the standards set forth by the Supreme Court and the Probation and Probation Officers Act; and the juvenile detention officers monitored the health of the residents, oversaw daily activities, and attended to the emotional needs of the juveniles.

The RJDC is under the oversight of the Administrative Office of the Illinois Courts ("AOIC"). The AOIC's mission is to "improve and enhance the probation court services field." The RJDC submits its annual plan and budget to the AOIC, and the AOIC in part provides the RJDC's funding. The IDOC does not provide any funding for the center.

The court looked to the following Illinois laws: the IPLRA defines a security employee as "an employee who is responsible for the supervision and control of inmates at correctional facilities;" the Unified Code of Corrections defines "correctional facility" as "any building or part of a building where committed persons are kept in a secured manner;" commitment is "a judicially determined placement in the custody of the Department of Corrections on the basis of delinquency or conviction;" detention is defined by the Juvenile Court Act of 1987 as the temporary care of a minor who is allegedly delinquent and who requires temporary dentation pending disposition by a court; and the Probation Act defines

a probation officer as a person employed in probation or court services under the Probation Act or Juvenile Court Act of 1987 and meets the standards set by the Supreme Court. An employee who is a probation officer is also considered a judicial employee.

In affirming the ILRB's decision the court pointed out that the nature of the confinement was a critical distinction between RJDC and a corrections facility. The residents of the RJDC were awaiting adjudication and had not yet been sentenced. The residents of the RJDC were under a detention order rather than an order of commitment. The court was also persuaded by the legislative action that created the Department of Juvenile Justice, which is separate from the IDOC. Furthermore, the court pointed to the distinction created by the Prohibition Act that identifies detention staff, but not correctional staff, as probation officers. Finally, the court pointed out that the RJDC receives its funding and standards from the AOIC and the employees are hired under circuit's probation and court services department. In closing the court stated, "Had the legislature intended the staff at juvenile detention homes to be considered correctional officers and the detention homes to be correctional facilities, it would have done so. Instead, the legislature expressly differentiated between detention homes and correctional facilities."