Meeting Date
2-3-2014

ADD ON

AGENDA	
Section	New Business
Item No.	VI E 2

AGENDA REPORT

BREVARD COUNTY BOARD OF COUNTY COMMISSIONERS

SUBJECT:	Same-Sex Spouses eligibility for employee benefits
DEPT/OFFICE:	Office of Human Resources / Employee Benefits

Requested Action:

That the Board of County Commissioners provide direction to the Office of Human Resources / Employee Benefits with regard to same-sex spouse's eligibility for benefits under the Board's employee benefits program.

Summary Explanation & Background:

Given recent developments in the law with regard to the legality of same-sex marriages in Florida, the Office of Human Resources / Employee Benefits requested the County Attorney's Office address the question of benefits eligibility for same-sex spouses in the County's self-insured group health insurance program. Several requests for insurance coverage for same-sex spouses have been received in this office since the Brevard County Clerk of Courts office began issuing marriage licenses to same-sex couples on January 6, 2015.

The County Attorney has researched the legal issues surrounding this question and has provided a detailed Memorandum of Law in response to our initial inquiry. It is the County Attorney's opinion that the current state of the law in Florida on this question presents the Board of County Commissioners - as a provider of retirement benefits and health insurance – with an opportunity to choose how to address employees applying for benefits for their non-employee, same-sex spouses. There are several options available for the Board's consideration; detailed discussions of those options and required actions for the Board to take under each option are included in the attached Memorandum of Law. In summary, the Board's options are:

1. Continue to refuse recognizing non-employee spouses of same-sex marriages.
2. Wait for the U.S. Supreme Court to decide the issue.
3. Immediately cover non-employee spouses of same-sex marriages retroactively to January 6, 2015.
4. Provisionally cover non-employee spouses of same-sex marriages, retroactively to January 6, 2015, until such time as the Federal Courts ultimately decide the issue.
5. Cease insuring all non-employee spouses.

As noted in the attached Memorandum of Law, the least exposure to liability or other legal complications would be the Board's pursuit of Option #4. A well-crafted provisional change to the County's Medical Summary Plan Documents (SPD) will settle the matter in a way that avoids litigation while requiring the automatic return to the definition of "spouse" under the existing County SPD should the Federal Courts support the Constitutional question of a States right to define marriage.

Clerk to the Board instruction:

Exhibits Attached: Memorandum of Law on Same-Sex Employee Benefits 1/28/15

Contract /Agreement (If attached): Reviewed by County Attorney	Yes	☒	No	☐	PR ☐

County Manager	Department Director / Extension
Stockton Whitten	Gerard Visco, Insurance Director /x55446

BCC-149 (Rev.1-25-13) / Electronic Form

BREVARD County
BOARD OF COUNTY COMMISSIONERS

FLORIDA'S SPACE COAST

Tammy Etheridge, Clerk to the Board, 400 South Street • P.O. Box 999, Titusville, Florida 32781-0999

Telephone: (321) 637-2001
Fax: (321) 264-6972

February 4, 2015

MEMORANDUM

TO: Gerard Visco, Insurance Director

RE: Item VI.E.2., Same-Sex Spouses Eligibility for Employee Benefits

The Board of County Commissioners, in regular session on February 3, 2015, approved Option 4, to provisionally cover non-employee spouses of same-sex marriages, retroactively to January 6, 2015, until such time as the Federal Courts ultimately decide the issue.

Your continued cooperation is greatly appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
SCOTT ELLIS, CLERK

Tammy Etheridge

Tammy Etheridge, Deputy Clerk

cc: Human Resources Director
County Attorney

BOARD OF COUNTY COMMISSIONERS

County Attorney's Office
2725 Judge Fran Jamieson Way
Building C, Room 308
Viera, Florida 32940

Inter-Office Memo

TO: Frank Abbate, Director Human Resources
Jerry Visco, Risk Management

FROM: Scott L. Knox, County Attorney

SUBJ: **MEMORANDUM OF LAW ON SAME-SEX EMPLOYEE BENEFITS**

DATE: January 28, 2015

On January 16, 2015, the United States Supreme Court issued an order granting review of a series of same-sex marriage cases. The Court will review the following two issues:

1) Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

The decision in that case will determine the following described employee benefits issue recently raised with the County by same-sex married couples.

I. "Marriage" in Florida and its Relation to Employee Spousal Benefits

Brevard County has long provided benefits to employees and their non-employee dependents - children under the age of 26 and spouses. Pursuant to the current "Medical Summary Plan Description and HRA Plan Description" language, [hereafter referred to as "the County Plan"] the definition of a dependent includes the following language:

II.19 Dependent:

A. The term "Dependent" means:
   1. The Covered Employee's legal spouse who has met all requirements ***of a legal marriage*** in the state of Florida. If such spouse has coverage available through his/her employer, declines that coverage, and elects

coverage under Brevard medical plan, the employee will be assessed a surcharge in addition to the regular spouse rate.

(a) Defining "Marriage" in Florida

"Marriage" was first defined in Florida's Constitution in 2008 when Article I, §27 was added pursuant to the passage of what was then called "Amendment 2." Since then, the official, constitutional, definition of "marriage" in Florida has been: "the legal union of only one man and one woman as husband and wife."[1] Furthermore, "no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized." Id.

The concept that only "one man" and "one woman" could be married had long been codified in Florida. The "traditional" understanding of marriage in Florida can be traced back to at least 1977, when section 741.04, Florida Statues, was amended to add that marriage licenses could not be issued "unless one party is a male and the other party is a female." However, even prior to that 1977 amendment, Section 741, Florida Statutes, was entitled "Husband and Wife."

In 1997, Section 741.212, Florida Statutes, was introduced. Pursuant to that statute, marriages between persons of the same sex entered into in other jurisdictions were not to be "recognized for any purpose" in Florida. Fla. Stat. § 741.212(1).[2] Furthermore, that same statute went on to say that "[f]or the purposes of interpreting any state statue or rule, the term "marriage" means only the legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union." Fla. Stat. § 741.212(3).

Pursuant to the above-stated provisions of Florida law, henceforth referred to as the "man and woman marriage provisions," a legal marriage in the state of Florida could only exist between a man and a woman. Under the foregoing quoted language in the County Plan, Brevard County has consistently denied expanding employee benefits to include same-sex partners because Florida law defined a marriage meant a "legal union between one man and one woman as husband and wife."

II. Constitutionality of Florida Same-Sex Marriage Provisions

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[1] ARTICLE I, SECTION 27. **Marriage defined.**—Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.

[2] 741.212 **Marriages between persons of the same sex.**—
(1) Marriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, or relationships between persons of the same sex which are treated as marriages in any jurisdiction, whether within or outside the State of Florida, the United States, or any other jurisdiction, either domestic or foreign, or any other place or location, are not recognized for any purpose in this state.
(2) The state, its agencies, and its political subdivisions may not give effect to any public act, record, or judicial proceeding of any state, territory, possession, or tribe of the United States or of any other jurisdiction, either domestic or foreign, or any other place or location respecting either a marriage or relationship not recognized under subsection (1) or a claim arising from such a marriage or relationship.
(3) For purposes of interpreting any state statute or rule, the term "marriage" means only a legal union between one man and one woman as husband and wife, and the term "spouse" applies only to a member of such a union.

(a) State Cases

Beginning in July 2014, south Florida circuit judges began to rule against Florida's same-sex marriage provisions. *Huntsman v. Heavilin,* 21 Fla. L. Weekly Supp. 916a (Fla. 16th Jud. Cir., Monroe Co., July 17, 2014) (Florida's same-sex marriage ban is unconstitutional under the Fourteenth Amendment because marriage is a fundamental right); *Pareto v. Ruvin,* 21 Fla. L. Weekly Supp. 899a (Fla. 11th Jud. Cir., Miami-Dade Co., July 25, 2014) (Florida's same-sex marriage ban and related statutes deprive couples due process and equal protection of the laws as guaranteed by the Fourteenth Amendment); *Brassner v. Lade*, 21 Fla. L. Weekly Supp. 920a (Fla. 17th Jud. Cir., Broward Co., Aug. 4, 2014) (Florida's denial of marriage rights to same-sex couples and refusal to recognize same-sex marriages from other jurisdictions is unconstitutional). *Estate of Frank C. Bangor*, Case No. 50214CP001857XXXXMB (Fla. 15th Jud. Cir., Palm Beach Co., Aug. 5, 2014) (Florida's constitutional and statutory provisions prohibiting recognition of out of state same-sex marriages are unconstitutional as applied to probate considerations). No similar case has been decided in the 18th judicial circuit encompassing Brevard County and none of the referenced cases have resulted in a decision from a Florida appellate court.

However, on August 27, the 2nd District Court of Appeal, pursuant to Article V, Section 3 of the Florida Constitution,[3] certified a question regarding same-sex marriage to the Supreme Court. The specific question at hand was whether the Florida same-sex marriage provisions deprived the circuit court in Hillsborough County jurisdiction in a divorce action by same-sex couple who were married in another state. *Shaw v. Shaw*, 39 Fla. L. Weekly D1813 (Fla. 2nd DCA 2014). The Florida Supreme Court refused to accept jurisdiction over the matter without the 2nd DCA first rendering a disposition of its own and thusly remanded the question back to the lower court for further proceedings. *Shaw v. Shaw*, 2014 Fla. LEXIS 2671 (Fla. Sept. 5, 2014).

(b) The Federal Case: Brenner v. Scott

On August 21, 2014, in the case of *Brenner v. Scott,* a Federal judge in the Northern District of Florida decided that Florida's marriage statute—in which marriage is defined as "as a union between a man and a woman" – is unconstitutional. The case is currently on appeal to the 11th Circuit. Until the 11th Circuit decides the issue, the question is who does the Northern District decision bind and does that binding effect extend throughout the State of Florida.

Judge Robert L. Hinkle of the Northern District of Florida held that Florida's same-sex marriage provisions were unconstitutional under the United States Constitution. The Judge held that "...[M]arriage is a fundamental right as that term is used in cases arising under the Fourteenth Amendment's Due Process and Equal Protection Clauses," Accordingly, the court utilized the "strict scrutiny" standard of review when assessing the constitutionality of Florida's same-sex marriage provisions and determined that, "when so reviewed, the provisions are unconstitutional." Id. at 1282.

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[3] **The Supreme Court... May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal. Fla. Const. Art. V, § 3(b)(4).**

In making his decision, Judge Hinkle relied heavily on the United States Supreme Court decision declaring portions of the federal Defense of Marriage Act unconstitutional in *United States v. Windsor,*[4] citing to the case no less than nine times in his opinion. The issue in *Windsor* was whether a same-sex spouse recognized under New York law could be barred from claiming an estate tax spouse exemption under the federal tax code in view of the Defense of Marriage Act which excludes a same-sex partner from the definition of "spouse" as that term is used in all federal statutes. There, the US Supreme Court repeatedly stated that "By history and tradition ***the definition*** and regulation of marriage...***has been treated as being within the authority and realm of the separate States***."[5] However, the Supreme Court qualified the States' powers to define marriage with this statement: "State laws defining and regulating marriage, of course, must respect the constitutional rights of persons...but, subject to those guarantees, "regulation of domestic relations" is "an area that has long been regarded as a virtually ***exclusive*** province of the States."[6]

Accordingly, the *Windsor* decision—at its root—declared DOMA unconstitutional because the effect of that law was to ignore the State of New York's definition of marriage by denying the same-sex couple benefits and rights provided under federal laws which, the Court concluded, was a denial of equal protection under the Fifth Amendment—an amendment that only applies to violations of equal protection caused by federal laws and agencies. In other words, once the State of New York (or any other state) decides to recognize same-sex marriage, Congress cannot pass federal laws punishing same-sex couples by denying federal benefits and rights that are available to heterosexual married couples.

Numerous federal appellate courts and federal district court judges—including Judge Hinkle—seized upon the Supreme Court's "must respect constitutional rights of persons" qualification to extend the reach of the *Windsor* case using the Fourteenth Amendment equal protection clause to declare state man and woman marriage laws unconstitutional on the grounds that that marriage is a fundamental right under the Constitution—a doctrine purports to extend the "suspect class" designation to sexual orientation. That means man-woman marriage laws would have to be reviewed under a "strict scrutiny" test, which requires the state to demonstrate a compelling state interest for differential treatment of man/woman and same-sex couples for the law to be upheld—a very high standard that is difficult to meet.

However, the Sixth Circuit United States Court of Appeals has taken a contrary view by applying a simple "rational basis" test which requires the state law to upheld if there is any legitimate state interest for recognizing the differential treatment—a very low standard that is fairly easy to meet, especially if the view expressed in 2003 by former Justice O'Connor in *Lawrence v. Texas*[7] prevails on the current high Court. In that case, Justice O'Connor drew this conclusion in an opinion concurring with the Court's decision striking down Texas sodomy laws:

"Texas cannot assert any legitimate state interest here, such as national security or

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[4] 133 S. Ct. 2675

[5] 133 S.Ct. at 2689-2690

[6] Id. at 2691

[7] 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508

> *preserving the traditional institution of marriage*. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—*other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group." 539 U.S. at 585.* [Emphasis supplied]

Using such a rational basis analysis, the Sixth Circuit upheld the man-woman marriage laws in the state of Kentucky, Tennessee, Michigan and Ohio.[8] The Supreme Court of the United States will now determine which of the two tests adopted by federal appellate courts was the correct statement of the law—strict scrutiny or rational basis.

(c) The Status of Same-Sex Marriage in Florida

The Florida Attorney General has effectively taken a hands-off position on the legal effect of Judge Hinkle's order declaring Florida's definition of marriage statute to be unconstitutional. She has suggested that Clerks throughout the state exercise their own discretion on whether or not to issue marriage licenses to same-sex couples who have been through a marriage ceremony that would have been legal had the couple been a man and a woman. (Attorney General Press Release attached as "A").The Brevard County Clerk of Courts began issuing marriage licenses to same-sex couples on January 6th, 2015.[9]

The Attorney General's position raises the issue of the binding scope of Judge Hinkle's injunction requiring the issuance of marriage licenses to same-sex couples. The federal district court order declaring the state definition of marriage statute to be unconstitutional is significant to the County in that the Brevard County insurance contract with its employees states that only spouses legally married under Florida law are entitled to insurance coverage. The question, therefore, is whether or not the County is required to extend benefits to same-sex spouses under Judge Hinkle's decision rendered in the Northern District federal court in Florida.

III. The Scope of Judge Hinkle's Decision

Federal courts, just as state courts, are courts subject to jurisdictional limitations. As such, when Judge Hinkle made his ruling, questions regarding its scope surfaced. Specific questions of relevance were whether Judge Hinkle's decision applied to: (1) only the cases before him, (2) only the clerk of Court in Washington County, (3) the entirety of the Northern District of Florida; or (4) all of Florida.

In the order clarifying the scope of his decision Judge Hinkle stated that:

> "There should be no debate . . . on the question whether a clerk of court may follow the ruling, even for marriage-license applicants who are not parties to this case. *And a clerk who chooses not to follow the ruling should take note: the governing statutes and rules of procedure allow individuals to intervene as plaintiffs in pending*

[8] *Deboer v. Snyder*, 772 F.3d 388 (6th Cir. 2014)

[9] Likewise, on January 5, 2015, Judge Sarah Zabel of the 11th Judicial Circuit of Florida lifted a self-imposed stay on her decision in Pareto v. Ruvin, 21 Fla. L. Weekly Supp. 899a (Fla. 11th Jud. Cir., Miami-Dade Co., July 25, 2014).

> *actions, allow certification of plaintiff and defendant classes, allow issuance of successive preliminary injunctions, and allow successful plaintiffs to recover costs and attorney's fees."* (January 1, 2015 Order, pg 3) (emphasis added).

Any question about the validity of Judge Hinkle's claim regarding intervention of plaintiffs to his action must be considered in the context of Federal Rule of Procedure 20, entitled "Permissive Joinders." The relevant text follows:

> "(a) Persons Who May Join or Be Joined.
> (1) Plaintiffs. Persons may join in one action as plaintiffs if:
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the
> same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all plaintiffs will arise in the action.
>
> (2) Defendants. Persons--as well as a vessel, cargo, or other property subject to admiralty process in rem--may be joined in one action as defendants if:
> (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising
> out of the same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all defendants will arise in the action."

Court cases from across the country indicate that permissive joinders are able to be utilized exceptionally liberally. *United Mine Workers v. Gibbs,* 383 U.S. 715, 724 (U.S. 1966)(under the rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged); *Cordero v. AT&T*, 190 F.R.D. 26, 29 (D.P.R. 1999) (the requirements of Rule 20 are construed liberally in order to promote broadest scope of action consistent with fairness to parties); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 918 (9th Cir. Cal. 1977)(the rule regarding permissive joinder is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits).

However, there is a substantial question as to whether Rule 20 can be interpreted to permit the joining of public officials from outside the jurisdiction of the federal court—a question that was affirmatively answered in 1965 in *United States v. Mississippi,* 380 U.S. 128, 142-143 (U.S.

1965).[10] The repeal of the two venue statutes upon which that decision was based—in 1986 in the case of 28 USCS §1393 and 2011 in the case of 28 USCS §1392—raises significant doubt that the 1965 decision is still viable since those two statutes allowed venue to extend to parties outside a federal court's district under the specific circumstances that were considered in *U.S. v. Mississippi*. In contrast, Rule 82 of the Federal Rules of Civil Procedure explicitly prohibits the application of Rule 20 in a way that would extend the venue of a federal district court to parties outside a district. Rule 82 would appear to be the prevailing law at this time, meaning it is doubtful that Judge Hinkle would be within the permissible scope of his authority were he to allow joinder of parties outside the North District to the action before him. Therefore, it would be unlikely that Brevard County could be joined in the Northern District suit. Moreover, it is doubtful that a provision in the County's insurance plan could be held to involve the same occurrence or transaction as the issuance of a marriage license, meaning it would be doubtful that the County could be added as a party to the *Brenner* suit.

(d) EEOC and Civil Rights

However, joinder to the existing suit is not the only exposure faced by the county if insurance benefits are not extended to same sex couples. The Equal Employment Opportunity Commission and the U.S. Department of Justice have entertained and pursued a variety of sex discrimination claims filed under section 42 USCS §1983 and Title VII of the federal Civil Rights Act United States. The EEOC has found that gender identity discrimination against an individual based on that person's transgender status is covered under Title VII of the Civil Rights Act of 1964.[11] The Commission has also found that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping states a sex discrimination claim under Title VII.[12]

More relevant to the same-sex marriage issue before the County Commission is the EEOC's finding that a sex-stereotyping, hostile work environment claim exists under Title VII to the Civil Rights Act where one employee reacted with hostility to another employee after announcing a future same-sex marriage and the employer did not take measures to eliminate the hostility.[13]

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[10] Those sections (below) were repealed by Act Dec. 7, 2011, P.L. 112-63, Title II, § 203, 125 Stat. 764

§ 1392. Defendants or property in different districts in same State

(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts.

(b) Any civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.

§ 1393. Divisions; single defendant; defendants in different divisions

(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides.

(b) Any such action, against defendants residing in different divisions of the same district or different districts in the same State, may be brought in any of such divisions.

[11] *See Macy v. Department of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012),http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

[12] *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011), http://www.eeoc.gov/decisions/0520110649.txt

[13] *See Veretto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011), http://www.eeoc.gov/decisions/0120110873.txt

IV. Implications for Brevard County

In light of the foregoing developments in the law, the County Commission—as a provider of retirement benefits and health insurance—must now choose how to address employees applying for benefits for their non-employee, same-sex spouses. There are several options available to the Board.

(a) Option 1: Continue to Refuse Recognizing Non-Employee Spouses of Same-Sex Marriages

The Board of County Commissioners could ignore Judge Hinkle's order at the risk of being joined in the pending federal action or subjected to an EEOC complaint and/or civil rights action, along with whatever attorney's fees and court costs are associated with the matter. This would also open up the Board to general legal action by any employee that has been legally married and is therefore seeking benefits for his or her same-sex spouse.

(b) Option 2: Wait for the U.S. Supreme Court to Decide the Issue

A second option is to wait for the Supreme Court to decide whether state laws defining marriage as a union between a man and woman are constitutional. If this option is selected, the Board would have to determine whether or not benefits would be afforded retroactively in the event the Supreme Court declares man/woman marriage laws unconstitutional.

Retroactive coverage raises several problematic issues: if an employee's same-sex spouse might have been covered, but becomes ill or injured and does not receive medical treatment in circumstances where the earlier treatment would have made a difference in their health, what happens? If a newly covered spouse receives treatment, but not at the health plan's negotiated rates or can only obtain treatment with doctor/at facility not covered under the plan – how does the plan reconcile payment? As a practical matter, only those that needed health care and reimbursement will ask for coverage during that retroactive period and there will be no offset in cost picked up for group needing health care through premium payments from other eligible employees with same-sex spouses that did not need or seek health care under the County Plan.

(c) Option 3: Cover Non-Employee Spouses of Same-Sex Marriages

To avoid litigation or discrimination complaints, the Board of County Commissioners could agree to begin to provide an open enrollment period for spouses of employees in a legal same-sex marriage. This option would open up a window that would apply to both spouses of employees married in other jurisdictions and a Florida marriage entered into after Judge Hinkle's ruling. Under this option, a thirty day window would open up for qualifying employees to add their same-sex dependent spouses. The language in the County's "Medical Summary Plan Description and HRA Plan Description" would be altered to include same-sex spouses as dependents.

(d) Option 4: Provisionally Cover Non-Employee Spouses of Same-Sex Marriages

This option is the same as option three above, except that provisional language would be added to the County's "Medical Summary Plan Description and HRA Plan Description" stating that should man/woman state laws be upheld by the U.S. Supreme Court or the 11th Circuit Court of Appeals, that the current definition of spouse linked to a legal marriage under Florida law, as set forth in the County Plan, would be automatically reinstated. Whether or not the Board would then grandfather in the same-sex spouses already covered is another consideration for the Board.

However, it can be anticipated that Florida's man/woman marriage definition statute will eventually be reviewed for constitutionality under the Florida Constitution by the Florida Supreme Court even if the U.S. Supreme Court declare such laws to be constitutional under the U.S. Constitution. Therefore, under this option the County Plan language defining "spouse" should also state that should Florida's man/woman marriage definition laws be declared unconstitutional at some future date by a Florida Court of last resort, same-sex spouses of county employees in a legal marriage would be covered.

(e) Option 5: Cease Insuring All Non-Employee Spouses

The Affordable Care Act requires that an employer of Brevard County's size provides insurance benefits to its full-time employees and those employee's "dependents." The term "dependents" was interpreted by the IRS to not include spouses.[14] Accordingly, if the Board wanted to stop providing healthcare insurance to all dependent spouses, regardless of sexual orientation, they would be able to do so prospectively, since making such a policy retroactive would raise the possibility of a class action suit asserting County liability for breach of contract of employment. This approach would require an alteration of the language of the County's "Medical Summary Plan Description and HRA Plan Description" as it relates to all new employees after the effective date.

V. What are The State and Other Counties Doing?

(a) The State

According to a memo written by Suzette Furlong, Chief of Operations of the Department of Management Services, the state has begun providing retirement and health benefits to dependent spouses of same-sex marriages. "Employees whose marriages will be legally recognized in Florida as of Jan. 6, 2015, have a qualifying status change event window between Tuesday, Jan. 6, 2015, through Friday, March 6, 2015, to enroll in a family plan," the memo states. (Memo attached as "B.")

(b) Other Counties

[14] "The term dependents, as defined in these proposed regulations for purposes of section 4980H, does not include any individual other than children as described in this paragraph of the preamble, including an employee's spouse. Thus, an offer of coverage to an employee's spouse is not required for purposes of section 4980H because section 4980H refers only to dependents (and not spouses). " http://www.irs.gov/pub/newsroom/reg-138006-12.pdf

It seems as though the several other counties in Florida are choosing to comply with Judge Hinkle's decision as well. A brief survey of what the other Florida counties[15] are contemplating is as followed:

- Charlotte, Monroe, Sarasota and Wakulla Counties are each extending employee benefits to non-employee dependent spouses of same-sex marriages.

- Polk County stated that their county administrator was likely to open enrollment based on what other counties are doing.

- Lake County has been recognizing same-sex marriages from other states for over a year through their provider, Blue Cross/Blue Shield.

- St. John's County has language that is similar to Brevard County's in terms of what is a spousal dependent. Their County Attorney noted that while the definition of marriage in Florida has not officially changed yet, that they are likely to offer employee benefits to same-sex spouses provided that their insurance provider agrees with it. In Brevard's case, the insurance company administering the plan does not have to be consulted.

VI. Conclusion

The least exposure to liability or other legal complications would be the Board's pursuit of option 4 [subparagraph (d)]. A well-crafted provisional change to the "Medical Summary Plan Description and HRA Plan Description" will settle the matter for the time being in a way that avoids litigation, while requiring the automatic return to the definition of "spouse" under the existing County plan if the Florida man/woman marriage provisions are supported by a decision from the U.S. Supreme Court.

[15] Information from other counties gathered from a January 9, 2015 Florida Association of County Attorneys Conference Call.

ATTACHMENT 'A'

Attorney General Pam Bondi News Release

January 16, 2015
Media Contact: Jenn Meale
Phone: (850) 245-0150

Attorney General Pam Bondi's Statement on the U.S. Supreme Court's Decision to Accept Same Sex Marriage Cases

TALLAHASSEE, Fla.—Attorney General Pam Bondi today issued the following statement regarding the U.S. Supreme Court's decision to decide same sex marriage cases.

"All along, I have maintained that the U.S. Supreme Court should decide the same sex marriage issue in order to provide uniformity in Florida and resolve the legal issue nationwide. I am pleased that the U.S. Supreme Court will hear the same sex marriage issue and provide finality on the matter."

ATTACHMENT 'B'

FLORIDA DEPARTMENT OF MANAGEMENT SERVICES
state group insurance
We serve those who serve Florida

4050 Esplanade Way, Suite 215
Tallahassee, Florida 32399-0950
Tel: 850.921.4600 | Fax: 850. 488.0252

Rick Scott, Governor

Chad Poppell, Secretary

MANAGEMENT ADVISORY 15-001

DATE: January 6, 2015

TO: Agency and University Personnel Officers and Benefit Coordinators

FROM: Suzetta Furlong, Chief of Operations

SUBJECT: Legal Spouse

Employees whose marriages will be legally recognized in Florida as of Jan. 6, 2015, have a qualifying status change event window between Tuesday, Jan. 6, 2015 through Friday, March 6, 2015, to enroll in a family plan. If they wish to enroll, these employees must complete the following steps:

1. Call the People First Service Center toll free at 866-663-4735. TTY users call 866-221-0268. Service center hours are weekdays from 8 a.m. to 6 p.m. Eastern time. The service center will be closed Jan. 19, 2015.
2. Supply the names, birth dates and Social Security numbers for the legal spouse and any eligible dependent children to be covered.
3. Certify that the spouse and children meet eligibility requirements.

For questions about eligibility, enrollment and payments, employees should call People First. For questions about plan benefits, employees may visit the myBenefits website or contact the insurance companies directly.