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# Martial Status Discrimination In The Workplace: The Need for Title VII Protection and a Unifrom Definition Of the Term " Marital Status"

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**Comment**

# Marital Status Discrimination In the Workplace: The Need for Title VII Protection and a Uniform Definition Of the Term "Marital Status"

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**Abstract**

Over 40 years ago, states began enacting anti-discrimination laws aimed at protecting individuals from unlawful discrimination based on marital status. Marital status discrimination is often implicated by employers' no-spouse or antinepotism policies. Claims of marital status discrimination can also arise from an employer taking adverse action against a prospective or current employee solely because the employee is married, unmarried, or going through a divorce. Without federal guidance on marital status discrimination, states treat claims quite differently and take varied stances on the proper scope of marital status protection. Some states apply broad coverage to marital status discrimination, while other states adopt a narrow approach. This unpredictability among the states affects both employers and employees, and it has resulted in unclear expectations as to marital status discrimination law.

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This Comment will discuss the current law and varied interpretations of marital status discrimination among the states and the need for federal protection of marital status discrimination. This Comment will propose that Congress amend Title VII of the Civil Rights Act of 1964 to include marital status as a proscribed basis for unlawful discrimination by employers. A Title VII amendment would provide a clear definition of the scope of marital status protection and promote uniformity among the states to ensure that employer policies comply with marital status discrimination laws and protect employees from unlawful discrimination based on marital status.

## Table of Contents

## I. INTRODUCTION

Imagine an unmarried couple works together for the same company—a situation not all that uncommon in the United States.[1] The company has an antinepotism policy, which prohibits spouses employed by the company from working closely together or supervising one another. The couple becomes engaged and is warned by human resources that upon marriage, one employee will have to transfer departments or office locations, or be forced to resign to comply with the company's antinepotism policy. This problem is exacerbated when the company does not have other office locations, or when switching departments would not prevent the couple from working closely together. The only options would be for one individual to resign or face being fired.

Enforcing an antinepotism policy is not the only example of an adverse employer action that implicates marital status discrimination.[2] More egregious claims for marital status discrimination often arise. For example, an individual terminated from his job after their employer discovered unfavorable information about the individual's wife constitutes marital status discrimination in some states.[3] Perhaps the individual's wife was seeking nomination for a public office and actively expressed her beliefs and political views, which were not in line with those of the employer. The employer then decided that it was necessary to fire the individual in order to preserve the employer's own values.

These examples represent several adverse employer actions based on marital status.[4] Individuals in situations similar to these, however, currently have no federal protection against marital status discrimination.[5] While the Civil Rights Act of 1964[6] was enacted to protect individuals from discrimination on the basis of race, color, religion, sex, or national origin,[7] Congress has neglected to include additional bases for

1. *See* Saily M. Avelenda, *Love and Marriage in the American Workplace: Why No-Spouse Policies Don't Work*, 1 U. PA. J. LAB. & EMP. L. 691, 697 *1998) (discussing how the increasing number of women in the workplace since the 1970s has resulted in more couples meeting at work). In a study done in the late 1990s, approximately 80% of people have either observed or have been in a relationship with a fellow employee. Jennifer Dean, *Employer Regulation of Employee Personal Relationships,* 76 B.U. L. REV. 1051, 1073–74 (1996).

2. *See infra* Part II.A.

3. *See, e.g.*, Taylor v. LSI Corp. of Am., 796 N.W.2d 153, 155 (Minn. 2011).

4. *See infra* Part II.A.

5. Marital status discrimination is federally recognized as an unlawful employer practice, applicable only to federal employees. *See* 5 U.S.C. § 2302(b)(1)(E) (2012).

6. 42 U.S.C. § 2000 (2012).

7. *Id.* § 2000e-2(a)(1).

unlawful discrimination.[8] Absent federal coverage addressing discriminatory trends that have emerged in the last 50 years, many states have enacted legislation that proscribes additional forms of discrimination, including prohibiting discrimination based on marital status.[9] Without federal guidance on the scope of marital status, however, states disagree over how to interpret and apply the law.[10]

Some states do not provide any protection for discrimination based on marital status, and thus, there will be no redress for the employer's action.[11] However, even if an employee lives in a state that prohibits marital status discrimination, the claim likely will still fail because of the narrow protection some states apply to marital status discrimination.[12] The varied, and sometimes limited, state protection for marital status discrimination exemplifies the need for uniform federal protection against such discrimination.

Part II of this Comment will discuss the history of marital status discrimination, beginning with how claims for marital status discrimination usually arise.[13] Part II will also describe the current and varying approaches state laws take in protecting employees from marital status discrimination.[14] Part III will analyze specific issues that arise when states have inconsistent interpretations of an area of the law. Additionally, Part III will discuss the need for federal guidance to ensure a uniform approach.[15] Finally, Part III will culminate with a recommendation that Congress amend Title VII to include marital status as a proscribed basis for discrimination.[16] Part IV of this Comment will conclude with a summary of the topics discussed throughout.[17]

8. Amendments have been made to the Civil Rights Act of 1964, including protection against discrimination based on age, disabilities, and pregnancy. *See, e.g., id.* § 2000(e)(k) (amending Title VII to include discrimination based on pregnancy or childbirth as unlawful sex-based discrimination).

9. Many states have also provided protection against discrimination based on sexual orientation and political affiliation, but this Comment will focus solely on discrimination based on marital status.

10. *See infra* Part II.A.

11. An employee may, of course, seek recovery by claiming discrimination under a different theory. *See infra* Part II.A.1.

12. *See infra* Part II.C.1.

13. *See infra* Part II.A.

14. *See infra* Part II.C.

15. *See infra* Part III.A.

16. *See infra* Part III.B.

17. *See infra* Part IV.

## II. THE PAST AND PRESENT STATE OF MARITAL STATUS DISCRIMINATION LAW FEDERALLY AND AMONG THE STATES

### *A. Defining Marital Status Discrimination and the History of Marital Status Discrimination Claims*

Marital status discrimination is a relatively young and developing area in employment discrimination law.[18] Discrimination based on marital status is typically understood to mean discrimination based on "assumed characteristics,"[19] or stereotypes of individuals based on their status as married, single, or divorced.[20] In the employment context, marital status discrimination occurs when certain rights are granted or denied to an individual in the workplace because of his or her marital status.[21] A claim for marital status discrimination can stem from an adverse employment action made during the hiring process,[22] throughout the course of employment,[23] or upon termination of the employee.[24]

Marital status discrimination claims most commonly challenge employers' antinepotism or no–spouse rules, usually under state civil rights statutes.[25] Antinepotism rules traditionally barred immediate family members from working for the same company to avoid problems such as favoritism, undeserved rewards, or unfair employment decisions related to the hiring or promoting process.[26] By the 1970s, when the number of

18. Timothy D. Chandler et al., *Spouses Need Not Apply: The Legality of Antinepotism and No-Spouse Rules*, 39 SAN DIEGO L. REV. 31, 34 (2002) (stating that marital status based legal challenges began to appear in courts when more women entered the workforce in the 1970s and 1980s).

19. *See* Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 592 (2011) (discussing how discriminatory action based on a particular characteristic is a result of "unvoiced beliefs, assumptions, and associations").

20. *See* Courtland C. Merrill & Cory D. Olson, *Individual In The Class Marital Status Discrimination in Employment*, 68-AUG BENCH & B. MINN. 18, 18 (2011).

21. *See* Mary Curlew & Julie Weber, *Opportunities For Policy Leadership on Marital Status Discrimination*, SLOAN WORK & FAM. RES. NETWORK (2009), https://workfamily.sas.upenn.edu/sites/workfamily.sas.upenn.edu/files/imported/pdfs/policy_makers21.pdf.

22. *See Pre-Employment Inquiries and Marital Status*, U.S. EEOC, http://eeoc.gov/laws/ practices/inquiries_marital_status.cfm (last visited Oct. 9, 2014) (discussing interview questions that are inappropriate for an employer to ask because of the questions' relevance to marital status).

23. *See* River Bend Cmty. Unit Sch. Dist. No. 2 v. Human Rights Comm'n, 597 N.E.2d 842, 843 (Ill. App. Ct. 1992).

24. *See* Aase v. Wapiti Meadows Cmty., 832 N.W.2d 852, 854 (Minn. Ct. App. 2013).

25. Lee R. Russ, *What Constitutes Employment Discrimination on Basis of "Marital Status" For Purposes of State Civil Rights Laws*, 44 A.L.R. 4th 1044 § 1 (1986).

26. *See* Joan G. Wexler, *Husbands and Wives: The Uneasy Case for Antinepotism Rules*, 62 B.U. L. REV. 75, 75–77 (1982).

women entering the workforce dramatically increased,[27] employers began to include spouses within the scope of their antinepotism policies.[28] Employers also commonly created an additional policy that expressly forbid spouses from working for the same employer, also known as no-spouse rules.[29]

Less commonly litigated claims for marital status discrimination involve adverse employment actions based solely on the employee's marital status.[30] Examples of such claims include: discharging an employee because the employee is going through a divorce,[31] firing an unmarried employee because he or she is living with his or her romantic partner,[32] or terminating an employment relationship because an employee's spouse is working for a competitor.[33]

Challenges to employer policies or actions claiming marital status discrimination are often unsuccessful,[34] but the likelihood of success increases dramatically when the claim is brought in state court.[35] One study, for example, found that 49 percent of plaintiffs claiming marital status discrimination are successful in state court, compared to only 9 percent in federal court.[36] The discrepancy in the likelihood for success depending on whether the claim is brought in state or federal court is likely due to state legislation prohibiting marital status discrimination, and the lack of similar legislation at the federal level.[37]

More importantly, the outcome of marital status discrimination claims is dependent on whether the claimant's state recognizes marital status discrimination claims,[38] and if so, how the state defines "marital status."[39] In a state that broadly defines the term, all types of marital sta-

27. *Id.* at 77 n.17 (stating that by 1974, 36 million women were employed); Chandler et al., *supra* note 18, at 32–33 (discussing that the increase of women in the workforce is due to trends such as men's decreased wages and an increase in college–educated women).

28. *See* Wexler, *supra* note 26, at 77—78.

29. *See id.*

30. *See* Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 3–4 (2000).

31. Smith v. Millville Rescue Squad, No. A-1717-12T3, 2014 N.J. Super. Unpub. LEXIS 1548, at *4 (N.J. Super. Ct. App. Div. 2014).

32. Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 546 (Minn. Ct. App. 1986).

33. Aase v. Wapiti Meadows Cmty., 832 N.W.2d 852, 854 (Minn. Ct. App. 2013).

34. Chandler et al., *supra* note 18, at 44 (stating that only 29% of marital status discrimination claimants are successful).

35. *Id.*

36. *Id.*

37. *Id.*

38. *See* Porter, *supra* note 30, at 16.

39. *See id.* at 18–19.

tus discrimination claims will likely have a chance of success.[40] If a state interprets "marital status" narrowly, however, the likelihood of recovery greatly diminishes due to the limited instances in which the narrow interpretation states will recognize marital status discrimination.[41] Therefore, the scope of coverage and the current interpretation a state affords to marital status protection has proven to be the determining factor in the success of a marital status discrimination claim.

### *B. The Current State of Marital Status Discrimination*

#### 1. Federal Law

Notable federal legislation governing employment discrimination is Title VII of the Civil Rights Act of 1964,[42] which promotes equal employment opportunities and prohibits discriminatory employment practices.[43] Specifically, Title VII makes it unlawful for an employer to hire, refuse to hire, or terminate an employee based on the individual's "race, color, religion, sex, or national origin."[44] Marital status is, however, not a protected category under Title VII.[45]

Because Title VII lacks explicit protection against marital status discrimination, many litigants who may have such a claim in state court often choose to bring an alternative claim under Title VII in federal court.[46] For instance, claimants will commonly allege sex-based discrimination under Title VII,[47] particularly if the adverse action involves a no-spouse rule.[48] Claims brought under Title VII may nevertheless fail due to the high standard required to prove discrimination when the adverse employer practice is not facially discriminatory.[49] Discrimination claims under Title VII can be brought alleging either disparate treatment or dis-

40. *See* Chandler et al., *supra* note 18, at 45 (stating that 67% of claims are successful when the court broadly defines marital status).

41. *Id.* (stating that 38% of marital status discrimination claims fail when the court narrowly interprets marital status).

42. 42 U.S.C. § 2000e-2(a)(1) (2012).

43. Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

44. 42 U.S.C. § 2000e-2(a)(1).

45. *Id.* Marital status discrimination is federally recognized as an unlawful employer practice, applicable only to federal employees. *See* 5 U.S.C. § 2302(b)(1)(E) (2012).

46. *See* Porter, *supra* note 30, at 7 (indicating that the only feasible option for many litigants claiming marital status discrimination is to allege sex-based discrimination under Title VII).

47. *Id.*

48. There is evidence that no-spouse rules are more likely to affect women. *See* Wexler, *supra* note 26, at 92. Thus, a woman may have success in alleging sex discrimination under Title VII, rather than marital status discrimination under the appropriate state statute. *See* Chandler et al., *supra* note 18, at 35, 47.

49. *Id.* at 44–47.

parate impact.[50] Disparate treatment requires that the employer treat an individual differently than others and that the policy or adverse action be discriminatory on its face,[51] creating an inference of discrimination.[52] However, employment policies that expressly communicate the employer's discriminatory intent are relatively rare.[53]

Alternatively, disparate impact claims involve practices that are "fair in form, but discriminatory in operation,"[54] meaning that a policy or practice is facially neutral, yet has a discriminatory effect when enforced.[55] For example, the disparate impact claim in the landmark U.S. Supreme Court case *Griggs v. Duke Power Co.*[56] involved a hiring policy requiring applicants to hold a high school diploma or obtain a particular score on an aptitude test.[57] The Court reasoned that the particular policy, while facially neutral, had a disparate impact on African-American applicants and served to disqualify African-Americans at a substantially higher rate than Caucasian applicants.[58]

A plaintiff asserting disparate impact must prove more than a mere inference of discrimination.[59] Rather, the plaintiff is required to show that the employer's action had a significant discriminatory impact on a protected group of individuals.[60] The plaintiff has the initial burden of proof and must introduce statistical evidence that demonstrates a disproportionate adverse effect, which is often a difficult task to accomplish.[61] The employer then has an opportunity to articulate a legitimate, nondiscriminatory reason for the adverse action.[62] The plaintiff can rebut the employer's proffered reason, but rebuttal requires additional evidence.[63]

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50. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 (1977).

51. An example of employer action that is discriminatory on its face is a policy that contains language explicitly discriminating on the basis of a Title VII protected ground. *See* Sheryl Rosensky Miller, *From the Inception to the Aftermath of International Union,* UAW v. Johnson Controls, Inc.*: Achieving its Potential to Advance Women's Employment Rights*, 43 CATH. U.L. REV. 227, 229 (1993) (describing that a facially discriminatory policy directly violates Title VII's "prohibitions against gender discrimination because the measures themselves contain language explicitly discriminating on the basis of gender").

52. *See Int'l Bhd. of Teamsters*, 431 U.S. at 335; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1972).

53. *See* Anna Giattina, *Challenging No-Spouse Employment Policies As Marital Status Discrimination: A Balancing Approach*, 33 WAYNE L. REV. 1111, 1115 (1987).

54. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

55. *See id.* at 432.

56. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

57. *Id.* at 427–28.

58. *Id.* at 426.

59. Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 753 (5th Cir. Sept. 1981).

60. *See Griggs*, 401 U.S. at 429.

61. Wexler, *supra* note 26, at 102–03.

62. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

63. *Id.* at 255.

Due to the difficult burden plaintiffs face while litigating a discrimination claim under federal law, and the lack of Title VII marital status protection, plaintiffs often resort to state law to claim marital status discrimination.

2. State Law

Because federal legislation does not recognize marital status as a protected category for unlawful discrimination, litigants are often forced to seek redress outside the federal forum.[64] States have taken the lead in enacting legislation aimed at combatting discrimination based on marital status.[65] Since the 1970s, at least 20 states and the District of Columbia have amended their respective civil rights statutes to add marital status as a basis for a potential unlawful discrimination claim.[66]

State legislatures often describe marital status discrimination provisions as aiming to prevent "arbitrary classifications" related to marriage.[67] Specifically, including marital status in anti-discrimination statutes aims to protect the fundamental right individuals have in their marital relationships.[68] Marital status protection also attempts to prevent employer interference in "one of the most personal decisions an individual makes—whether to marry, and to remain married."[69]

Many state civil rights statutes are worded similarly to one another, stating that an employer may not refuse to hire, discharge, or discriminate against an individual because of religion, race, color, national origin, sex, or marital status.[70] Many states, however, have failed to both define the term "marital status" and explain what constitutes marital status dis-

64. *See* Porter, *supra* note 30, at 7.

65. *See* Stephen B. Humphress, *State Protection Against Marital Status Discrimination By Employers*, 31 U. LOUISVILLE J. FAM. L. 919, 920 (1992) (stating that many states enact more comprehensive anti-discrimination laws than federal law provides).

66. *See* ALASKA STAT. ANN. § 18.80.220 (West 2014); CAL. GOV'T CODE § 12921 (West 2014); CONN. GEN. STAT. § 46a-60 (West 2014); DEL. CODE ANN. TIT. 19, § 711 (West 2014); D.C. Code Ann. § 1-1402.11 (West 2014); FLA. STAT. ANN. § 760.10 (West 2014); HAW. REV. STAT. § 378-2 (West 2014); 775 ILL. COMP. STAT. ANN. 5/1-102 (West 2014); MD. CODE ANN., STATE GOV'T § 20-606 (West 2014); MICH. COMP. LAWS ANN. § 37.2202 (West 2014); MINN. STAT. ANN. § 363A.08 (West 2014); MONT. CODE ANN. § 49-2-303 (West 2014); NEB. REV. STAT. § 48-1104 (West 2014); N.H. REV. STAT. ANN. § 354-A:7 (West 2014); N.J. STAT. ANN. § 10:1-1 (West 2014); N.Y. EXEC. LAW § 296 (McKinney 2014); N.D. CENT. CODE § 14-02.4-03 (West 2014); OR. REV. STAT. § 659A.030 (West 2014); VA. CODE ANN. § 2.2-3900 (West 2014); WASH. REV. CODE ANN. § 49.60.180 (West 2014); WIS. STAT. ANN. § 111.321 (West 2014).

67. Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979).

68. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

69. Smith v. Millville Rescue Squad, No. A-1717-12T3, 2014 N.J. Super. Unpub. LEXIS 1548, at *18 (N.J. Super. Ct. App. Div. 2014).

70. *See, e.g.*, MICH. COMP. LAWS ANN. § 37.2202; HAW. REV. STAT. § 378-2.

crimination.[71] In addition, most states have neglected to delineate the intended scope of marital status protection.[72]

Currently, only 7 out of the 21 states that include marital status as an unlawful basis for discrimination define the statutory term "marital status."[73] States that have defined the term differ on whether marital status is the condition of being married or unmarried,[74] or if the term also includes being divorced, separated, or widowed.[75] Defining and interpreting the appropriate scope of marital status for purposes of a discrimination claim is left to state courts, particularly in states whose legislatures do not provide any guidance as to the term's breadth.[76]

### *C. State Courts' Differing Interpretations of the Term "Marital Status"*

Several states have narrowly interpreted the term "marital status" to refer only to the employee's status as married or unmarried.[77] Further, while still interpreting marital status narrowly, some states choose to also protect individuals who are separated, divorced, or widowed.[78] Other states have adopted a broad interpretation of marital status to combat adverse employer actions based on the identity, actions, occupation, and beliefs of an individual's spouse.[79]

#### 1. Narrow Interpretation

Some of the states[80] that have narrowly interpreted the scope of marital status protection include Michigan,[81] New Jersey,[82] and New

71. *See* Giattina, *supra* note 53, at 1116 (stating that state legislatures have not "sufficiently clarified" their intent with respect to marital status discrimination).

72. *Id.*

73. *See* D.C. Code Ann. § 2-1401.02(17)(West 2014); HAW. REV. STAT. § 378-1; 775 ILL. COMP. STAT. ANN. 5/1-103 (West 2014); MINN. STAT. ANN. § 363A.03(24)(West 2014); NEB. REV. STAT. § 48-1102(12) (West 2014); WASH. REV. CODE ANN. § 49.60.040(17) (West 2014); WIS. STAT. ANN. § 111.32(12) (West 2014).

74. *See* HAW. REV. STAT. § 378-1; NEB. REV. STAT. § 48-1102(12).

75. *See* D.C. Code Ann. § 2-1401.02(17); 775 ILL. COMP. STAT. ANN. 5/1-103; WASH. REV. CODE ANN. § 49.60.040(17); WIS. STAT. ANN. § 111.32(12).

76. Giattina, *supra* note 53, at 1116 (discussing how state courts have the burden of interpreting marital status until state legislatures provide more guidance).

77. *See* HAW. REV. STAT. § 378-1; MICH. COMP. LAWS ANN. § 37.2202; NEB. REV. STAT. § 48-1102(12); N.J. STAT. ANN. § 10:1-1 (West 2014); N.Y. EXEC. LAW § 296 (McKinney 2014).

78. *See* D.C. Code Ann. § 2-1401.02(17); 775 ILL. COMP. STAT. ANN. 5/1-103(J); WASH. REV. CODE ANN. § 49.60.040(17); WIS. STAT. ANN. § 111.32(12).

79. *See* HAW. REV. STAT. § 378-2; MINN. STAT. ANN.§ 363.03; MONT. CODE ANN. § 49-2-303 (West 2014).

80. Illinois, Florida, Michigan, New Jersey, New York, Washington, and Wisconsin narrowly interpret marital status.

81. *See* Whirlpool Corp. v. Civil Rights Comm'n, 390 N.W.2d 625, 627 (Mich. 1986); Miller v. C.A. Muer Corp., 362 N.W.2d 650, 653 (Mich. 1984).

York.[83] Courts adopting a narrow definition of marital status reason that the term should be afforded its plain meaning within the anti-discrimination statute, referring only to the "condition enjoyed by an individual by reason of . . . having participated or failed to participate in a marriage."[84]

In other words, in these states, marital status refers only to the state of being married, single, divorced, or widowed absent statutory language to the contrary.[85] The identity of an individual's spouse is not considered in these courts' analyses because inquiring into spousal identity would effectively abolish employers' antinepotism or no-spouse rules.[86] These rules often survive if spousal identity is ignored because the employer action, such as the refusal to hire an individual because the individual is married to a current employee, is based on to whom the individual is married, rather than on the individual's marital status.[87]

For example, in *Miller v. C.A. Muer Corp.*,[88] the Michigan Supreme Court analyzed an employer's policy that required relatives or spouses of employees to quit, transfer, or be fired.[89] The court held that marital status should be interpreted narrowly and stated that the relevant inquiry is whether an individual is married or not, rather than "to whom" one is married.[90] In finding that the policy did not violate the anti-discrimination statute, the court reasoned that the statute's purpose is to prevent employer prejudices or biases against members of a protected class.[91] Married individuals are considered to be a protected class.[92] The court found no instances of such prejudices or biases against married individuals that would justify special protection.[93]

82. *See* Thomson v. Sanborn's Motor Express, Inc., 382 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1977).

83. *See* Manhattan Pizza Hut, Inc., v. N.Y. State Human Rights Appeal Bd., 415 N.E.2d 950, 964 (N.Y. 1980); State Div. of Human Rights ex rel. Howarth v. Village of Spencerport, 78 A.D.2d 50, 53 (N.Y. App. Div. 1980).

84. *Manhattan Pizza Hut, Inc.*, 415 N.E.2d at 950, 953.

85. *See Whirlpool*, 390 N.W.2d at 627; *Miller*, 362 N.W.2d at 654; *Manhattan Pizza Hut, Inc.*, 415 N.E.2d at 953.

86. *See Miller*, 362 N.W.2d at 654 (discussing the effect of marital status interpretation on antinepotism policies, stating that a broad interpretation would enlarge the protected class to include "all married persons who desire to work with their spouse").

87. *Id.* at 653.

88. Miller v. C.A. Muer Corp., 362 N.W.2d 650 (Mich. 1984).

89. *Id.* at 651.

90. *Id.* at 653.

91. *Id.*

92. *Id.* at 654.

93. *Miller*, 362 N.W.2d at 653–54.

Similarly, other state courts often uphold antinepotism or no spouse policies by affording a narrow interpretation of marital status.[94] In *Thomson v. Sanborn's Motor Express*,[95] the Superior Court of New Jersey validated a company's no-spouse policy on the basis that the termination of an employee's wife was not based on her status of being married.[96] Rather, the court found that her termination resulted from her relationship with another employee, who happened to be her husband.[97]

Outside the realm of antinepotism and no-spouse rules, courts that narrowly interpret marital status may still reject marital status discrimination claims on similar grounds. In *State Division of Human Rights ex rel. Howarth v. Village of Spencerport*,[98] for example, the New York Appellate Division held that the employee's "status" must be the cause of the employer's unlawful action.[99] In *Howarth*, a discharged employee claimed that she was discriminated against based on her marital status when her employer discharged her because of her husband's involvement in increasing property taxes in the town as a tax assessor.[100] The court conceded that the employee was terminated due to her husband's actions.[101] The court found, however, that the plaintiff did not have a valid claim because her marital status did not cause the termination; she would have been discharged regardless of how she was linked to the tax assessor.[102] While narrow interpretation courts require that marital status be the sole motivating factor for the adverse employment action, courts taking a broad view will look beyond the individual's status and consider factors such as spousal identity, conduct, or beliefs.[103]

2. Broad Interpretation

Hawaii,[104] Minnesota,[105] and Montana,[106] have all broadly interpreted the term "marital status." These courts interpret marital status to

94. *See* Avelenda, *supra* note 1, at 710 (stating that no-spouse and antinepotism policies create more "subtle" forms of discrimination and therefore are supported by the narrow interpretation of marital status).

95. Thomson v. Sanborn's Motor Express, Inc., 382 A.2d 53 (N.J. Super. Ct. App. Div. 1977).

96. *Id.*

97. *Id.* at 56.

98. State Div. of Human Rights ex rel. Howarth v. Village of Spencerport, 78 A.D.2d 50 (N.Y. App. Div. 1980).

99. *Id.* at 53.

100. *Id.*

101. *Id.* at 54.

102. *Id.*

103. *See infra* Part II.C.2.

104. *See* Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1041 (Haw. 1994).

mean the condition of being married, unmarried, divorced, or widowed, and will consider the identity of an individual's spouse.[107] The rationale for a broad interpretation stems from the idea that people do not marry in the "generic sense."[108] Rather, individuals marry a specific perso[n,] making it impossible to separate the identity of one's spouse from one's marital status.[109] Discrimination based on spousal attributes, such as occupation or beliefs, is therefore discrimination based on one's marital status.[110]

Courts taking a broad view of the term marital status frequently discuss legislative intent to justify their interpretation.[111] For example, in *Thompson v. Board of Trustees*,[112] the Supreme Court of Montana reasoned that a broad interpretation is appropriate because the legislature's objective in enacting the anti-discrimination statute was to combat discrimination by encouraging employers to hire or terminate employees based "solely on merit."[113] *Thompson* involved a challenge to a no-spouse rule, and the court further reasoned that a narrow interpretation would be "absurd" because the couple could get around the rule and keep their jobs by simply dissolving their marriage.[114]

Like Montana, Minnesota also provides protection against marital status discrimination and, compared to other states, offers the greatest protection.[115] Minnesota is the only state that broadly describes the term "marital status" in its statute, stating that marital status includes "protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse."[116] Further, for over 30 years, Minnesota state courts have broadly interpreted marital status to include the identity and actions of an employee's spouse.[117] While Minnesota courts originally required a "direct attack on the institution of marriage"

105. *See* Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979); Cybyske v. Indep. Sch. Dist. No. 196, 347 N.W.2d 256, 261 (Minn. 1984); Taylor v. LSI Corp. of Am., 796 N.W.2d 153, 156 (Minn. 2011).

106. *See* Thompson v. Bd. Of Trs., Sch. Dist. No. 12, 627 P.2d 1229, 1232 (Mont. 1981).

107. *Ross*, 879 P.2d at 1041; *Thompson*, 627 P.2d at 1231; *Kraft*, 284 N.W.2d at 389.

108. *Ross*, 879 P.2d at 1041.

109. *Id.*

110. *Ross*, 879 P.2d at 1041; *Kraft*, 284 N.W.2d at 386, 388.

111. *Thompson*, 627 P.2d at 1231; *Kraft*, 284 N.W.2d at 388.

112. Thompson v. Bd. Of Trs., Sch. Dist. No. 12, 627 P.2d 1229 (Mont. 1981).

113. *Id.* at 1231.

114. *Id.*

115. *See* Humphress, *supra* note 65, at 927.

116. MINN. STAT. ANN. § 363A.03(24) (West 2014).

117. *See* Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979).

to have a valid claim for marital status discrimination,[118] the Supreme Court of Minnesota rejected the direct attack requirement in 2011.[119]

In *Taylor v. LSI Corporation of America*,[120] a terminated employee alleged in her claim for marital status discrimination that she was fired because the company felt it would be "awkward" keeping her as an employee after her husband had resigned as president of the company.[121] In rejecting the direct attack requirement, the court looked to the Minnesota statute's plain language, which stated that employers cannot take adverse action against an employee "because of . . . marital status."[122] The court found the statute's language unambiguous and rejected the notion that adverse employer actions need to be "directed at the institution of marriage."[123] Rather, the court decided that the plaintiff was only required to prove that the action was taken on the basis of marital status.[124] The court further reasoned that the claim was valid because the termination was based on a change in the occupation of the employee's spouse, again citing the language of the statute, which explicitly states that it is unlawful to discriminate on the basis of spousal identity.[125] While the Minnesota court found support for a broad interpretation from the plain language of their anti-discrimination statute, there is a general lack of clarity as to how states will define and interpret the scope of marital status protection.

## III. UNPREDICTABILITY, INCONSISTENCY, AND A PROPOSED SOLUTION

### *A. The Need for Congressional Interpretation of Marital Status: A Proposal for Title VII Protection*

While states have been the primary forces behind protection against marital status discrimination, that protection is still insufficient. Currently, 29 states do not provide any redress for marital status discrimination.[126] Among the states that do protect against marital status discrimination, there is wide variance in how to define marital status and the

118. *See* Cybyske v. Indep. Sch. Dist. No. 196, 347 N.W.2d 256, 261 (Minn. 1984) (finding that no marital status discrimination occurred when a prospective employee was not hired due to her spouse's political views because the discrimination was not a direct attack on marriage).

119. *See* Taylor v. LSI Corp. of Am., 796 N.W.2d 153, 156 (Minn. 2011).

120. Taylor v. LSI Corp. of Am., 796 N.W.2d 153 (Minn. 2011).

121. *Id.* at 155.

122. *Id.* at 156.

123. *Id.*

124. *Id.*

125. *Taylor*, 796 N.W.2d at 156.

126. *See supra* Part II.B.2.a.

proper scope of protection.[127] The inconsistency in applying marital status discrimination law has consequences for both employees and employers.[128] Protecting marital status through federal legislation would not only solve these issues, but is also a logical step to take because marital status as a proscribed basis for discrimination fits within Title VII's objectives and statutory scheme.[129]

1. Changing and Inconsistent Interpretations Call for a Uniform Approach

Not only is there unpredictability as to one state's interpretation compared to another, there also remains uncertainty as to how a single state will choose to define marital status from year to year.[130] At least 3 of the 21 states that provide protection against marital status discrimination initially adopted one definition of the term marital status, only to later reverse and adopt the opposite interpretation.[131]

Illinois, for example, originally broadly interpreted marital status, but later narrowed its interpretation.[132] Illinois courts initially held that inquiries as to the identity of an individual's spouse fits within the scope of marital status.[133] Four years later, the Supreme Court of Illinois changed course and held that marital status protection does not encompass spousal identity.[134] Currently, Illinois' statute complies with the more recent narrow interpretation, defining marital status as the condition of "being married, single, separated, divorced, or widowed."[135]

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127. *See supra* Part II.C.

128. *See infra* Part III.2.

129. *See supra* Part III.3.

130. *See, e.g.*, River Bend Cmty. Unit Sch. Dist. No. 2 v. Human Rights Comm'n, 597 N.E.2d 842, 846 (Ill. App. Ct. 1992); Boaden v. Dep't of Law Enf't, 664 N.E.2d 61, 65 (Ill. 1996).

131. Hawaii, Illinois, and Washington adopted one interpretation and later adopted the opposite view. *See* HAW. REV. STAT. § 378-1 (West 2014) (defining marital status narrowly); *River Bend Cmty. Unit Sch. Dist. No. 2*, 597 N.E.2d at 846 (interpreting marital status broadly); Wash. Water Power Co. v. Wash. State Human Rights Comm'n, 586 P.2d 1149, 1153 (Wash. 1978) (holding that marital status includes spousal identity). *But see* Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1041 (Haw. 1994) (finding that marital status should be interpreted broadly); *Boaden*, 664 N.E.2d at 65 (finding that an inquiry into marital status discrimination does not encompass the identity of one's spouse); Magula v. Benton Franklin Title Co., 930 P.2d 307, 310 (Wash. 1997) (rejecting a broad approach to marital status).

132. *See River Bend Cmty. Unit Sch. Dist. No. 2*, 597 N.E.2d at 846 (recognizing marital status discrimination based on spousal identity). *But see Boaden*, 664 N.E.2d at 65 (finding that marital status discrimination does not encompass discrimination based on spousal identity).

133. *River Bend Cmty. Unit Sch. Dist. No. 2*, 597 N.E.2d at 842, 846.

134. *Boaden*, 664 N.E.2d at 61, 65.

135. 775 ILL. COMP. STAT. ANN. 5/1-103 (West 2014).

Conversely, some states have broadened the definition of marital status through judicial opinion, despite guidance from the legislature on the term's meaning.[136] In Hawaii, for instance, the legislature narrowly defined "marital status" in its statute to mean "the state of being married or being single."[137] The Supreme Court of Hawaii, however, has interpreted the statute broadly, holding that spousal identity is implicit in the definition of marital status.[138] This demonstrated variance in the scope of marital status coverage state-to-state, and year-to-year in some states, has proven to be problematic.

2. Changing and Inconsistent Interpretations of Marital Status Have Far-reaching Implications

The inconsistency and unpredictability in protection and interpretation of the term "marital status" poses issues for both employees and employers. A uniform approach as to the coverage and meaning of marital status is necessary in a day and age where employees may live in one state and commute to another for work,[139] and employers may have offices in multiple states.[140] Federal guidance will provide clear expectations for employees and employers and solve some of the existing issues caused by the current state of marital status discrimination.

a. Issues Affecting Employees

Employees will better be able to protect themselves if Congress speaks on the issue of the proper scope of marital status protection. The most obvious and problematic issue employees face due to the lack of federal protection against marital status discrimination is that employees in 29 states are left without recourse against marital status discrimination in the workplace.[141] The absence of federal protection for marital status often forces litigants to bring an alternative claim under Title VII in federal court, which is often unsuccessful.[142] Not only do plaintiffs have

136. *See, e.g.*, HAW. REV. STAT. § 378-1; *Ross*, 879 P.2d at 1041.

137. HAW. REV. STAT. § 378-1.

138. *See Ross*, 879 P.2d at 1041.

139. A study released in 2013 by the United States Census Bureau found that 3.8 percent of American workers, amounting to approximately 5.2 million people, work outside their state of residence. *See* Brian McKenzie, *Out-of-State and Long Commutes: 2011*, U.S. CENSUS BUREAU 8 (Feb. 2013), http://www.census.gov/hhes/commuting/files/2012/ACS-20.pdf.

140. *See* Claire Harrison, *Best Practices For Multistate Employers*, LAW360 (Feb. 18, 2009), http://www. dykema.com/media/publication/31_Multistate%20Employers.pdf.

141. Currently, 29 states have not included marital status as a proscribed basis for unlawful discrimination. *See supra* Part II.B.2.a.

142. *See* Porter, *supra* note 30, at 7.

low rates of success when challenging antinepotism or no–spouse policies,[143] but a favorable outcome is largely dependent on the litigant being female.[144]

For example, a female applicant who was denied employment because her husband already worked for the employer may choose to challenge the no-spouse policy in federal court by claiming that the policy has a disparate impact on females.[145] No-spouse rules have an adverse effect on women because women historically enter the workplace on a permanent basis later than men, and commonly have lower salaries than men, making resignation by the woman less financially harmful to a couple faced with a no-spouse policy.[146] Because evidence suggests that no-spouse policies have a disproportionate effect on females, it is likely that a female's claim would stand a chance for success.[147]

Conversely, if the plaintiff were a male whose wife was already employed by the company, his claim would likely fail due to the lack of evidence that the no-spouse policy disproportionately affects males.[148] The absence of federal safeguards against marital status discrimination therefore not only precludes individuals from recovery if the individual lives in one of the 29 states that fails to protect marital status, but it also results in inequitable treatment towards male plaintiffs. Because males do not have the same opportunity as females to claim sex discrimination when the action is more appropriately categorized as marital status discrimination, federal protection of marital status would provide male plaintiffs with a chance for redress.

b. Issues Affecting Employers

While federal coverage of marital status may appear to provide added protection solely for employees, federal protection of marital status discrimination will also provide additional safeguards for employers. For example, some of the typical defenses to Title VII claims can apply to marital status discrimination claims, such as the bona fide occupation-

143. *See* Chandler et al., *supra* note 18, at 44.

144. *See id.* at 35, 47 (discussing the increased likelihood of a woman successfully claiming sex discrimination when adverse employer action is based on her marital status).

145. *See id.*

146. Porter, *supra* note 30, at 29–30.

147. No-spouse rules have commonly been found to negatively impact women. *See* Wexler, *supra* note 26, at 79 (discussing both the direct and subtle negative effects of no–spouse policies on women); Chandler et al., *supra* note 18, at 42—43 (finding that 71% of plaintiffs challenging no-spouse or antinepotism rules were female).

148. While no-spouse or antinepotism rules have the capacity to adversely impact men, there is a much greater likelihood of the policies adversely impacting women. *See* Wexler, *supra* note 26, at 79; Chandler et al., *supra* note 18, at 45.

al defense,[149] as it does for most other protected categories. Federal guidance will not only provide a statutory defense for employers against claims of marital status discrimination, but will also alleviate issues affecting multi-state employers due to the unclear state of marital status discrimination law.[150]

For example, multi-state employers currently face the possibility of being held liable for unlawful discrimination in one state and not in another, even if the claim and adverse action were identical, such as a challenge to a company-wide policy.[151] As a result, employment experts have suggested a number of policies that multi–state employers can implement to avoid liability.[152] One commentator has advised multi-state employers to completely refrain from implementing a company-wide policy that may potentially be challenged as effecting marital status discrimination.[153] The commentator reasons that the employer may be safe to implement a policy in one state, where there is no protection against marital status discrimination or because the state provides narrow coverage.[154] Yet, in another state where the employer operates, the same policy may result in liability because that state has taken a broad approach or has proven to inconsistently interpret marital status.[155] Another commentator has suggested that multi-state employers should consult with counsel prior to making any employment decision because an action may expose that employer to liability for marital status discrimination in one state, while the same action would not lead to similar litigation in a neighboring state.[156]

Although these suggestions are considered to be the "best practice," to avoid liability, executing these strategies is likely impractical.[157] There is evidence that employers favor antinepotism policies, largely because such policies aim to prevent personal relationships from interfering with employee productivity.[158] Therefore, employers will likely choose to run the risk of liability by implementing or refusing to amend antinep-

149. *See infra* Part III.B.

150. *See* Julius M. Steiner & Steven P. Steinberg, *Caught Between Scylla and Charybdis: Are Antinepotism Policies Benign Paternalism or Covert Discrimination?*, 20 EMP. REL. L.J. 253, 262 (1994) (discussing the issues facing multi-state employers due to the "conflicting statutory interpretations" of marital status).

151. *Id.*

152. *See e.g.*, Steiner, *supra* note 144, at 262–64; Harrison, *supra* note 134.

153. Steiner, *supra* note 144, at 262.

154. *Id.*

155. *Id.*

156. *See* Harrison, *supra* note 134.

157. *Id.*

158. *See* Avelenda, *supra* note 1, at 698 (discussing the steady growth of antinepotism policies in corporate America since the 1970s).

otism policies.[159] Additionally, requiring employers to consult counsel before making any employment decision at all, including hiring, promoting, and terminating, could be a costly and administratively inefficient undertaking.

3. Marital Status Discrimination Fits Within Title VII's Objectives and Statutory Scheme

Title VII requires an employer to make employment decisions based on an individual's qualifications or job performance and protects against arbitrary employer actions based on stereotypical generalizations of a particular characteristic an individual possesses.[160] These generalizations are commonly known as "invidious assumptions."[161] Accordingly, including marital status as a proscribed basis for unlawful discrimination is a logical addition to Title VII because claims for marital status discrimination often arise when an employer makes a generalization of an employee on the basis of their marital status.[162] Adding marital status protection will also serve to foster Title VII's established interests because of the close relationship marital status discrimination has with sex discrimination, a protected category under Title VII.[163] Finally, states currently treat marital status discrimination as if marital status is already federally protected.[164] States not only model marital status discrimination legislation after Title VII, but state courts also apply Title VII procedural framework to marital status discrimination claims.[165]

a. Marital Status Discrimination Involves "Invidious Assumptions"

Congress chose to protect race, color, religion, sex, and national origin under Title VII because discrimination based on these classifications involves invidious assumptions and prejudices.[166] Like the categories currently protected under Title VII, discrimination based on marital status usually involves similar "invidious assumptions."[167] For example, employers often create no-spouse rules assuming how a married couple

159. *See* Steiner, *supra* note 144, at 262–64.
160. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
161. *Id.*
162. *See infra* Part III.A.3.a.
163. *See infra* Part III.A.3.b.
164. *See infra* Part III.A.3.c.
165. *See infra* Part III.A.3.c.
166. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that Congress sought to remove "artificial, arbitrary, and unnecessary barriers . . . when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification").
167. *See* Giattina, *supra* note 53, at 1125—26.

may work together, rather than based on observations or actual problems that have arisen in the workplace.[168] The justification for no-spouse rules—that such a rule prevents personal problems from infiltrating the workplace—assumes that all married couples cannot work productively together and does not give any consideration to an individual's qualifications or job performance.[169]

Regardless of the fact that marital status involves invidious assumptions, like the traits currently protected under Title VII, those opposed to Title VII protection of marital status would likely argue that marital status does not deserve protection because it is not an immutable characteristic.[170] An immutable characteristic is defined as a characteristic that is "beyond the power of an individual to change."[171] However, Title VII does not require that the basis for discrimination feature an immutable characteristic.[172] A useful comparison can be made between marital status and religion, a protected category under Title VII.[173] Religion has similar properties to marital status in that one's religion can seemingly be changed just as easily as one's marital status.[174] Despite the fact that one's religion is not an immutable trait, Congress nevertheless opted to protect religion as an unlawful basis for discrimination.[175] Therefore, a lack of immutability has not proven to be a barrier to Title VII protection and marital status could be similarly protected under the statute.[176]

Further, critics may argue that marital status discrimination is simply not severe or prevalent enough to rise to a level requiring Title VII protection.[177] However, while most marital status discrimination claims involve no-spouse and antinepotism rules, other marital status discrimination claims involve more reprehensible employer action.[178] For example, an employee who is fired because his employer found out that he was living with his girlfriend out of wedlock exemplifies arbitrary employer action based solely on the employer's disagreement with personal marital decisions of his employee.[179] In another case, an employee was

168. *Id.*
169. Wexler, *supra* note 26, at 78.
170. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (stating that sex is a recognized suspect class due to its immutable nature).
171. In re Acosta, 19 I. & N. Dec. 211, 233 (B.I.A 1985).
172. *See* 42 U.S.C. § 2000e-2(a) (2012) (including religion as a protected class, a characteristic that can be changed).
173. *Id.*
174. Porter, *supra* note 30, at 27–28.
175. 42 U.S.C. § 2000e-2(a).
176. *Id.*
177. Porter, *supra* note 30, at 28.
178. *See, e.g.*, Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 546 (Minn. Ct. App. 1986).
179. *Id.*

fired because of his pending divorce, a similar example of employer disagreement with an employee's marital decision.[180] The impact of marital status discrimination is likely sufficiently pervasive when considering these types of egregious claims, in addition to the popularity of no-spouse and antinepotism policies.[181] Inclusion of marital status as a protected class under Title VII would not only further the statute's goal of preventing arbitrary employment actions, but would also further other interests of Title VII.

b. The Addition of Marital Status Would Further the Interests Title VII Serves to Protect

Most notably, marital status discrimination is inevitably intertwined with sex discrimination.[182] No-spouse and antinepotism rules, while facially sex-neutral, have a disproportionate effect on women.[183] When a couple is faced with a no-spouse rule requiring denial of employment or resignation for one spouse, there is a greater likelihood that the woman will be the one who is denied employment or resigns.[184]

While a woman may choose to challenge a no–spouse policy as sex discrimination under Title VII, proving a disproportionate effect on females is difficult, in part because no-spouse rules implicate discrimination based on marital status more so than discrimination based on sex.[185] Including marital status would present an alternate, and likely more appropriate, theory of recovery for women challenging no-spouse rules.[186] Adding marital status as a protected category under Title VII would complement the protection of sex discrimination and thereby further the interests of Title VII.

c. Many States Already Apply Title VII's Framework to Marital Status Discrimination Claims

Many state legislatures have chosen similar wording to Title VII in their statutes protecting against marital status discrimination.[187] Several state courts have also described their respective anti-discrimination stat-

180. Smith v. Millville Rescue Squad, No. A-1717-12T3, 2014 N.J. Super. Unpub. LEXIS 1548, at *4 (N.J. Super. Ct. App. Div. 2014).

181. The pervasiveness of marital status discrimination is likely unknown and underreported given the lack of protection in federal court and many state courts. Thus, its prevalence may actually be greater. *See supra* Part II.B.

182. *See supra* Part II.B.1.

183. Wexler, *supra* note 26, at 92.

184. *See id.*; Porter, *supra* note 30, at 29–30.

185. *See supra* Part II.C.1.

186. Porter, *supra* note 30, at 33.

187. *See supra* Part II.C.2.a.

utes as having the same or similar objectives as Title VII's.[188] Despite the current lack of protection for marital status under Title VII, state courts apply the same procedural framework and rules of Title VII actions to state marital status discrimination claims.[189] A plaintiff in state court claiming marital status discrimination can submit his or her claim under either of the traditional Title VII theories of disparate impact or disparate treatment.[190]

State courts will also use the federal burden-shifting framework to determine whether the plaintiff has made a prima facie claim of discrimination before shifting the burden to the employer to articulate a neutral reason for the action.[191] Furthermore, some state legislatures and state courts will recognize the Title VII employer defenses of business necessity and bona fide occupational qualification in state marital status discrimination claims.[192] Because states already model their marital status discrimination treatment after Title VII, an amendment to Title VII including marital status as a proscribed basis would not require states to alter their procedure. Federal protection against marital status discrimination would provide a much-needed uniform interpretation of marital status and alleviate many issues created by the inconsistency and unpredictability of the scope of marital status protection among the states.[193]

### *B. Crafting a Title VII Amendment*

The most appropriate way for Congress to address marital status discrimination would be to amend Title VII to include marital status as an unlawful basis for discrimination.[194] Of course, amending Title VII to include additional categories of unlawful discrimination places more responsibility on the Equal Employment Opportunity Commission

188. *See, e.g.*, Whirlpool Corp. v. Civil Rights Comm'n, 390 N.W.2d 625, 626 (Mich. 1986) (stating that Michigan's civil rights act's purpose is to prevent discrimination based on "stereotyped impressions"); Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979) (stating that Minnesota's anti-discrimination legislation aimed to "outlaw arbitrary classifications relating to marriage").

189. Humphress, *supra* note 65, at 925.

190. *See, e.g.*, Farmington Educ. Ass'n v. Farmington Sch. Dist., 351 N.W.2d 242, 245 (Mich. Ct. App. 1984).

191. *See, e.g.*, Slohoda v. United Parcel Serv., Inc., 504 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1986).

192. *See* MINN. STAT. ANN. § 363.03 (West 2014); Wash. Water Power Co. v. Wash. State Human Rights Comm'n, 586 P.2d 1149, 1151 (Wash. 1978); *Kraft*, 284 N.W.2d at 388.

193. *See supra* Part III.A.1.

194. *See* Dennis Aldering, *The Family That Works Together . . . Can't: No-Spouse Rules as Marital Status Discrimination Under State and Federal Law*, 32 U. LOUISVILLE J. FAM. L. 867, 883 (1994).

(EEOC), which handles initial employment discrimination complaints.[195] However, because an amendment to Title VII protecting against marital status discrimination is necessary and consistent with the goals of Title VII, such an amendment should be enacted despite the added burden placed on the EEOC.[196]

Moreover, if Congress were to amend Title VII to add marital status as a protected classification, additional clarifications would be needed in order to avoid the pitfalls of the current state–directed system of marital status protection.[197] For instance, the scope of marital status protection should be clearly defined in the statute in order to avoid running into the same inconsistency problems that presently exist among the states.[198] Further, employers should be able to assert the bona fide occupational qualification to ensure that employers can exercise legitimate business decisions that otherwise may be construed as marital status discrimination.[199]

There are several ways that Title VII can be amended to include marital status as an unlawful basis for discrimination.[200] Amending Title VII to include marital status as unlawful discrimination can be accomplished by including it as a division of another protected category, such as sex.[201] Alternatively, marital status can be added as its own separate category for unlawful discrimination.[202] The mode of amending Title VII is not as important as ensuring that marital status is clearly defined somewhere in the text to avoid the issues of unpredictability and inconsistency the states are currently facing.[203]

1. The Rationale for a Broad Statutory Definition

The definition of marital status included in a Title VII amendment should be broad enough to encompass spousal attributes, including the

195. *See* 42 U.S.C. §§ 2000e-4(g)(6), 2000e-5(f)(1) (2012). In 2014, the EEOC received 88,778 total charges of discrimination based on the protected grounds of Title VII, retaliation, age, disability, violations of the Equal Pay Act, and violations of The Genetic Information Nondiscrimination Act of 2008 (GINA). *Charge Statistics FY 1997 Through FY 2014*, U.S. EEOC, http://eeoc.gov/eeoc/ statistics/enforcement/charges.cfm. The total charges would presumably increase should an additional ground for discrimination be added to Title VII.

196. Porter, *supra* note 30, at 23.

197. *See infra* Part III.B.1.

198. *See infra* Part III.B.2.

199. *See infra* Part III.B.3.

200. *See* 42 U.S.C. § 2000(e)(k); *id.* § 2000e-2(a).

201. *See* 42 U.S.C. § 2000(e)(k) (amending Title VII to include discrimination based on pregnancy as unlawful sex-based discrimination).

202. *See id.* § 2000e-2(a).

203. *See supra* Part III.A.

identity, situation, actions, or beliefs of a spouse.[204] While only a minority of states have adopted a comprehensive interpretation of the term, broadly defining marital status would better aid in eliminating the adverse employment actions anti-discrimination laws set out to combat.[205] Specifically, a broad definition would allow individuals to challenge arbitrary no-spouse rules that allow employers to make decisions based on factors wholly unrelated to the individual's qualifications or job performance.[206]

Additionally, because marital status discrimination extends beyond no-spouse rules, a broad definition would better protect employees from egregious employer actions taken simply because the employer disagrees with the employee's personal marital decisions.[207] Though these types of claims are less common, they represent the need for broad protection because employers often attempt to argue that marital status is not implicated if the action was not taken based on the employee's status as married, unmarried, or single.[208] Because courts would have to consider the identity of one's spouse, there would be more cases heard by courts that involve these egregious types of claims, and therefore, a greater likelihood that victims of discrimination will seek and obtain redress.[209] An amendment with a broad definition will provide employees with significant protection, and the amendment will also ensure that employers are able to make necessary business decisions without implicating marital status discrimination.

2. The Bona Fide Occupational Qualification Defense

While federal coverage of marital status favors protection of employees, an amendment to Title VII would provide employers the opportunity to defend against discrimination claims by asserting the bona fide occupational qualification defense.[210] The bona fide occupational qualification defense is available for disparate treatment claims under Title VII.[211] If a plaintiff proves disparate treatment based on religion, sex, or national origin, an employer may assert that the adverse action was taken as a "bona fide occupational qualification reasonably necessary to the

204. *See, e.g.*, MINN. STAT. ANN. § 353A.03(24) (WEST 2014).
205. *See supra* Part II.D.2.
206. *See supra* Part II.D.2.
207. *See supra* Part III.B.1.
208. *See supra* Part II.D.1.
209. *See e.g.*, Ross v. Stouffer Hotel Co., 879 P.2d 1037, 1041 (Haw. 1994); Thompson v. Bd. of Trs., Sch. Dist. No. 12, 627 P.2d 1229, 1232 (Mont. 1981); Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979).
210. 42 U.S.C. § 2000e-2(e)(1)(2012).
211. *Id.*

normal operation of that particular business or enterprise."[212] Essentially, discrimination that would ordinarily be unlawful is lawful if the employer can prove that the employment decision is justified despite having a discriminatory impact.[213]

While the Court warned that the bona fide occupational qualification defense should be applied narrowly,[214] it is logical to extend the availability of the defense to marital status claims. The legislative history of the Civil Rights Act of 1964 shows that the defense was originally suggested to apply to all five categories of Title VII, including race and color.[215] The suggestion was rejected, not because of a stated concern of over-inclusion, but because there were simply no circumstances under which the legislature would excuse adverse employer action on the basis of race and color.[216] Unlike race and color discrimination, there are plausible circumstances under which employers should be afforded the opportunity to assert the defense against a marital discrimination claim, such as defending an employer policy that prohibits one spouse from participating in compensation or promotion decisions involving the other spouse.[217] This safeguard for employers provides balance to the widespread protection that a Title VII amendment will grant to employees.

## IV. CONCLUSION

Currently, 21 states prohibit unlawful discrimination on the basis of marital status. The definition and scope of marital status discrimination has proven to be inconsistent and unpredictable when left to the states to interpret. States are split on whether marital status should be afforded a narrow or broad interpretation. The varying protections afforded under the current state–dominated system obviate the need for Congressional action amending Title VII to add marital status as a protected category and broadly defining the term.

Federal guidance is necessary to protect both employees and employers from the adverse effects of marital status discrimination. An amendment to Title VII is vital to safeguard those individuals who currently have no redress against marital status discrimination in the work-

212. *Id.*

213. *See* Dothard v. Rawlinson, 433 U.S. 321, 334, 336 (1977) (holding that sex is a bona fide occupational qualification when an all-male maximum security prison did not hire a female prison guard because many of the inmates had been convicted of sex crimes and female guards were perceived as more vulnerable to attack than male guards).

214. *Id.* at 334.

215. Jean Fielding, *Discrimination Law—Impermissible Use of the Business Necessity Defense and the Bona Fide Occupational Qualification*, 12 W. NEW ENG. L. REV. 135, 141 (1990).

216. *Id.*

217. Porter, *supra* note 30, at 47.

place, including those discriminated against under no–spouse or antinepotism rules and those victimized by egregious employer actions. Such an amendment will also further the interests of Title VII, particularly by limiting the adverse impact no-spouse policies have on female employees. Adding marital status as an unlawful basis for discrimination will provide a uniform definition and clear expectations for both employees and employers on what conduct constitutes marital status discrimination.