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DOMA's Demise Requires Immediate Benefit Plan Action

BY GLOBAL COMPENSATION, BENEFITS & ERISA PRACTICE

On June 26, 2013 the Supreme Court held in *United States v. Windsor* that Section 3 of the Defense of Marriage Act of 1996 ("DOMA") unconstitutionally encroached on states' rights to regulate marriage.[1] Section 3 of DOMA prohibited for purposes of federal law the recognition of same-sex marriages.[2] Prior to the *Windsor* ruling, DOMA provided a uniform definition of "spouse" and "marriage" for federal law purposes (*e.g.*, ERISA, Internal Revenue Code, COBRA, FMLA, *etc.*), allowing employers to treat same-sex couples (spouses and domestic partners) the same throughout the country. Now that the Court has struck down Section 3 of DOMA, employers must navigate a patchwork of state laws as they work to expand federally protected rights and benefits to treat same-sex spouses equally. The *Windsor* holding is effective July 21, 2013. Thus, employers should promptly act to address some aspects of this decision with respect to their benefit plans.

We recommend employers promptly communicate to their employees the following changes required by *Windsor*:

Benefit Plan Impact

Tax-Qualified Retirement Plans	
Qualified Pre-Retirement Survivor Annuity	A same-sex spouse is now eligible for a qualified pre-retirement survivor annuity under a defined benefit pension plan if his or her employee spouse dies prior to retirement.
Qualified Joint and Survivor Annuity	A same-sex spouse is now eligible for a qualified joint and survivor annuity, and must consent to his or her spouse's election of an alternative form of payment.
Default Beneficiary	A same-sex spouse is now the default beneficiary under defined benefit and defined contribution retirement plans, and must consent to the designation of an alternative beneficiary.
Qualified Domestic Relations Order	Same-sex spouses can now obtain qualified domestic relations orders.
Hardship Distributions	A same-sex spouse's medical and educational costs can now serve as the basis for a hardship distribution.
Required Minimum Distributions	Same-sex spouses may now defer required minimum distributions until April 1 of the year in which their spouse would have turned 70½.

Health and Welfare Plans	
Coverage	State insurance laws in states that recognize same-sex marriage already require fully-insured plans in those states to offer coverage to same-sex spouses to the same extent offered to opposite-sex spouses. Because ERISA does not require spousal coverage and self-insured plans are not subject to state insurance laws, an employer arguably could continue to deny same-sex couples coverage under a self-insured plan. However, such treatment might be challenged under Title VII of the Civil Rights Act of 1964.
Taxability	Same-sex spouses will no longer have income imputed on employer-paid or subsidized coverage.
Special Enrollment	Marriage to, or divorce from, a same-sex spouse is now a special HIPAA enrollment event under plans offering spousal coverage. An open question is whether the *Windsor* decision itself is a special enrollment event since a same-sex couple did not become a "spouse" for special enrollment purposes until Section 3 of DOMA was struck down. Federal guidance on this issue is likely forthcoming.[3]
COBRA	Same-sex spouses now have COBRA rights.
Expense Reimbursement and Election Changes	Eligible medical expenses incurred by same-sex spouses are now reimbursable under health care flexible spending accounts (FSAs), health reimbursement accounts (HRAs) and health savings accounts (HSAs). Mid-year election changes are now permitted due to events involving the same-sex spouse. Same-sex spouses who are not gainfully employed will now cause their employee spouses to be ineligible for dependent care flexible spending accounts.
Family and Medical Leave Act	Same-sex spouses are now entitled to Family and Medical Leave Act rights.

Implementation Challenges

There are a few things that employers should clearly do.

All Plans

- Take an inventory of all plans that might be affected and review existing plan terms to determine areas impacted and alternatives available.
- Allay employee concerns by promptly distributing a participant communication outlining the employer's same-sex marriage game plan for employee benefits. This communication should clearly spell out what changes the employer knows it is making and the effective date of such changes. To address issues that require more analysis or guidance, the communication could indicate that other important legal matters are unclear, but that the employer is monitoring developments closely and will communicate future decisions to affected employees.
- Decide how the plans should determine whether a same-sex marriage is lawful under state law (e.g., the participant's state of residence or the state in which the marriage was performed). See the discussion below.
- Review plan documents to determine whether an amendment is required to offer same-sex spousal coverage when desired or required. For example, if a spouse is defined as a participant's lawfully married spouse as determined under state law, except as otherwise

provided by federal law, then no amendment is necessary (except, possibly, with respect to defining the state law that will govern spouse determinations). On the other hand, if the plan defines a spouse as an opposite-sex spouse, then an amendment is needed to offer same-sex spouse coverage.

- Decide whether to amend each plan individually, or whether an omnibus amendment is appropriate to address particular matters until future guidance clarifies all of *Windsor*'s impacts.

- Amend summary plan descriptions and issue summaries of material modifications as required.

- Decide whether changes should be prospective or retroactive. Some commentators have suggested that *Windsor* will be retroactive and the government may weigh in on whether retroactivity will be required. In the meantime, employers considering retroactivity will need to carefully consider the administrative and financial consequences of their decision.

Welfare Plans

- Decide whether to offer special mid-2013 same-sex spouse enrollment rights, or whether to wait for forthcoming government guidance.

- Stop imputing income on employer-paid benefits provided to same-sex spouses residing in states that recognize same-sex marriage, if income imputation was not required for opposite-sex spouse coverage.[4]

- Decide whether domestic partner and civil union coverage remains appropriate or if it needs refinement.

- Stop providing unnecessary tax-gross ups for health coverage provided to such spouses (consider how to handle past gross-ups and imputed pay for 2013, and prior years).

- Decide whether to file a refund claim for payroll taxes paid on account of previously imputed income (depending on the level of employer subsidy and the number of same-sex spouse participants, this could be a significant refund claim).

Qualified Plans

- Implement required changes described in the chart above.

State Law Issues

Applying two separate benefit administration schemes – one for states that recognize same-sex marriage and one for states that do not – may seem easy at first blush. However, problems arise when an employee is married in a state that recognizes same-sex marriage but resides in a state that does not. Presently, thirteen states and the District of Columbia have enacted laws recognizing same-sex marriages. Section 2 of DOMA, however, permits states to refuse to recognize same-sex marriages performed in other states, and the Windsor decision did not address Section 2. In addition, the IRS[5] and many other departments and agencies, determine whether an individual is married based on the laws of the state in which the individual resides. Other departments and agencies base their determination on the laws of the state in which the marriage ceremony was performed.

Using the state of residence is particularly problematic as today's workforce is highly mobile. Under this rule, an employee who was legally married and resides in the District of Columbia would lose all of the benefits listed in the charts above if the employee moved only a few miles away to Virginia. Further, the burden of tracking an employee's state of residence could be overwhelming, particularly for large, nationwide corporations. Of course, this issue already exists in some opposite-sex marriages (such as "common law" marriages).

The complexity of this analysis will demand careful attention, as any approach conceivably could be "wrong" from an IRS/DOL perspective. To address this issue, we believe the Departments should issue interim guidance providing for safe harbor determinations of whether a spouse is legally married.

Family Leave Issues

The Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA") permit eligible employees to take leave to care for certain family members suffering from a serious health condition. FMLA spouse determinations are made by reference to the law of the state in which the employee resides. *See* 29 C.F.R. § 825.122(b); comment to 29 C.F.R. § 825.113; Fed. Reg. Vol 60, No. 4 at 2191 (1995). Spouse determinations under the CFRA are made by reference to "marriage" as defined in California Family Code section 300. *See* 2 C.C.R. § 7297.0(p). The United States Supreme Court decision in *Hollingsworth v. Perry*,[6] issued the same day as the *Windsor* decision, effectively laid the ground work for same-sex marriage recognition in California.[7]

After *Perry* and *Windsor*, employees now will be able to take leave: (1) to care for the serious health condition of a same-sex spouse; (2) to care for the serious health condition of a son or daughter of the same-sex spouse under the "stepchild" prong definition of "son or daughter"; (3) to care for the serious illness or injury of a qualifying same-sex military or veteran spouse; and (4) to attend to qualifying exigencies arising out of the call to military duty of a same-sex spouse.

Although many issues have been resolved by *Perry* and *Windsor*, employers still need to address a few anomalies in the law. For example, because the CFRA recognizes registered domestic partner leave rights, whereas the FMLA does not, registered domestic partners in California (and perhaps certain other states with similar leave laws) will continue to have greater leave rights than employees with spouses (same or opposite sex). California employees are entitled to take 12 weeks of CFRA leave to care for a registered domestic partner. But, because this leave does not count against the employee's FMLA leave entitlement, those employees are entitled to take an additional 12 weeks of leave for any other FMLA qualifying circumstance (for a possible total of 24 weeks of protected leave). In contrast, employees with a spouse are entitled to 12 concurrent weeks of leave under the FMLA and CFRA.

Conclusion

There is no doubt that *Windsor* requires the benefit plan changes set forth in the chart above. Prompt employee communications should help allay employee concerns. As to the more challenging and unsettled issues, employers should begin to assess the options and make changes only after thoughtfully considering their impact.

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1 *See United States v. Windsor*, No. 12-307 (U.S. June 26, 2013).

2 Section 3 of DOMA provides that "[i]n determining the meaning of Any act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."

3 In a similar situation, the Department of Labor permitted a special enrollment period when the Patient Protection and Affordable Care Act expanded coverage of minors to age 26. Thus, it is conceivable that a similar special enrollment period would be permitted here.

4 Income imputation will remain a concern if an employee works in a state that does not recognize same sex marriages, at least until Section 2 of DOMA is repealed or held unconstitutional.

5 Revenue Ruling 58-66.

6 *See Hollingsworth v. Perry*, No. 12-144 (U.S. June 26, 2013).

7 It remains to be seen whether one or more groups will challenge California's decision to permit same-sex marriage under, for example, Section 3.5 of the California Constitution, which provides: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power [to] declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional."