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Employee Benefits Challenges After the Supreme Court's DOMA Ruling

The ruling on Wednesday by the Supreme Court of the United States that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional immediately extends to legally married same-sex couples a host of federal benefits, including various spousal benefits under employer-sponsored benefit plans, that were previously available only to legally married opposite-sex couples. Section 3 of DOMA defined "marriage" for federal purposes as a union between a man and a woman. The Supreme Court decision in *United States v. Windsor* (No. 12-307 (June 26, 2013), available here) means that legally married same-sex couples must be treated for federal purposes the same as legally married opposite-sex couples. For employers, the ruling in *Windsor* raises a number of benefits issues, beginning with the need to amend any health or retirement plan that uses the DOMA definition of "spouse."

Because *Windsor* addressed only Section 3, the rest of DOMA remains in place, including Section 2 giving the states the right not to recognize same-sex marriages that may be legal in other states or territories. Currently, 12 states and the District of Columbia recognize same-sex marriage, while 38 states do not. This difference in state laws creates a new level of complexity for multistate employers.

Some of the benefits-related issues that employers need to address in the wake of *Windsor* include the following:

- health insurance benefits provided to same-sex spouses are no longer taxable to the employee at the federal level, and same-sex spouses should be treated the same as other spouses for health flexible spending accounts and health savings accounts—but employees in states that do not recognize same-sex marriage may be taxed on these benefits at the state level
- marriage of same-sex spouses should be recognized as a qualifying change in status event that permits the employee to add a new spouse to a health plan outside of the annual open enrollment period
- marriage of same-sex spouses should be recognized as a qualifying change in status event that permits the employee to change an election under a Section 125 cafeteria plan
- same-sex spouses are now entitled to full COBRA rights, and should be offered continuation coverage accordingly
- for retirement plans, a same-sex spouse is now entitled to the automatic survivor annuity rights provided to other surviving spouses (including any subsidized joint and survivor annuity benefits that

may be provided by an employer), and is an automatic deemed beneficiary so that the same-sex spouse's consent is now required for a participant's designation of someone other than the spouse as beneficiary

- Qualified domestic relations orders (QDROs) may now designate same-sex spouses as alternate payees.

- a surviving same-sex spouse will have the same right as a surviving opposite-sex spouse to delay distribution of required minimum distributions under a retirement plan.

However, there are a number of areas of uncertainty, particularly for multistate employers. For example, it is unclear whether legally married same-sex spouses are entitled to retroactive benefits under a health or retirement plan, such as death benefits for a deceased spouse or a spousal survivor annuity after benefits were previously paid to the employee's designated beneficiary. It may be arguable that the holding means the prior rule never validly applied and participants can make claims attributable to prior periods subject to applicable limitations periods. It also is uncertain how an employer should treat an employee who married a same-sex spouse in a state that recognizes same-sex marriage, but now lives or works in a state that does not—should the employer use the state of the marriage certificate, or the state of residence and/or employment? One approach to consider would be to define "spouse" in the plan based on the status in the contracting state (in other words, a couple that was validly married in state A would be treated as spouses under the plan even if they reside in a state that does not recognize the validity of the marriage in state A). Another issue is whether it will be discriminatory to offer benefits to same-sex spouses in states that recognize same-sex marriage but not in other states, or to continue to provide benefits to unmarried same-sex domestic partners but not to opposite-sex domestic partners.

We hope that the Internal Revenue Service, Department of Labor and other government agencies will issue guidance addressing these issues in the near future. However, whatever relief the government agencies consider may only be applicable to qualification and fiduciary matters and may not preclude participant benefit claims. Therefore, employers should not wait to review their plans, which in all likelihood will need to be amended to comply with federal laws by the end of the current plan year.

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