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With DOMA Ruled Unconstitutional, Employers Need Benefit Plan and Policy Guidance

The U.S. Supreme Court recently held in *United States v. Windsor* that Section 3 of the Defense of Marriage Act (DOMA), which was enacted in 1996 and defined “marriage” and “spouse” for federal law purposes as being between one man and one woman, violates the Fifth Amendment to the Constitution because it deprives persons of their personal liberties protected by the Constitution. Thus, same-sex couples who are lawfully married under state law must be afforded the same federal rights and protections as lawfully married opposite-sex couples. The June 26, 2013, decision raises numerous issues relating to the design and administration of employer-sponsored benefit plans and related employment policies and practices.

Prior to *Windsor*, employers could rely on federal law in extending coverage and benefits to spouses of employees and in reporting and withholding taxes on such coverage and did not have to consider the patchwork of state laws that were contrary to DOMA unless they voluntarily chose to extend benefits to same-sex spouses or domestic partners. For employers that had already extended benefits to same-sex spouses, *Windsor* may simplify plan administration. For others, *Windsor* likely has brought additional complexities.

The following is a nonexclusive list of some of the issues raised by the Supreme Court’s decision that will need to be considered by employers and plan sponsors:

1. Group health and other benefit programs that provide spousal coverage may have to extend coverage to couples lawfully married in a state that recognizes same-sex marriage.

2. For employers that voluntarily extended coverage to same-sex spouses, payroll and tax reporting systems will need to be revised to end the imputation of income to the covered employee for such coverage.
3. The definition of “child” may need to be revised to include children of a same-sex spouse for benefit program purposes.
4. Plan sponsors will need to evaluate how the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Health Insurance Portability and Accountability Act (HIPAA) and flex-plan reimbursements will be affected.
5. Pension and retirement plan provisions and administrative processes will need to be reviewed and revised to ensure that the spousal protections required by the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA) (for example, qualified joint and survivor annuity requirements, beneficiary designation rules, minimum required distribution, and qualified domestic relations orders) are extended to same-sex married spouses.
6. Plan sponsors may wish to review their policies as they relate to coverage for domestic partners and partners in civil unions.
7. Employers must consider the potential impact on Family Medical Leave Act (FMLA) and other employment policies.

The *Windsor* opinion did not address many key issues relevant to employee benefit plan administration. We expect that regulators, including the Internal Revenue Service, the Department of Labor and possibly state agencies, will issue guidance very soon in response to the *Windsor* decision, which will help plan sponsors understand how their employee benefit plans must adapt without DOMA’s definitions of spouse and marriage. Some areas of uncertainty that guidance may address include:

- A. What is the retroactive impact of *Windsor*? For example, will same-sex spouses be entitled to benefits, such as spousal death benefits, that were paid or began prior to *Windsor* but were available under the plan only to spouses as defined by DOMA?

- B. Which state's law should the plan administrator use to determine the validity of the same-sex marriage? Possibilities include the state in which the marriage occurred, the state in which the couple resides, the state in which the employer is located, or the state law identified in the plan as governing the terms of the plan.
- C. May a plan define "spouse" to exclude same-sex spouses for certain purposes?
- D. Is an employer and/or employee entitled to a refund of taxes paid on benefits to same-sex spouses prior to *Windsor*?

Some issues raised by *Windsor*, particularly those involving the pre-*Windsor* rights of same-sex spouses, may be litigated and settled by court decisions, in addition to or notwithstanding administrative guidance. In other words, the full impact of *Windsor* may not be known for years.

What This Means to You

We are helping plan sponsors and administrators take some steps while waiting for additional guidance. First, inventory the benefit plans and programs that are potentially affected by *Windsor's* ruling that DOMA's definitions of "marriage" and "spouse" are unconstitutional. Second, consider whether the plans should be amended either to expand or contract the plan definitions of "marriage" and "spouse" consistent with employer objectives and policies. Third, understand and research as necessary the marriage laws in each state in which covered employees work and reside. Fourth, revisit the tax reporting impact of *Windsor* on benefits provided to same-sex spouses and their children and identify systems changes that may be required.

Contact Information

For more information concerning this or other issues affecting employee benefits, please contact your Husch Blackwell attorney or one of our Employee Benefits & Executive Compensation attorneys.