



On June 26, 2013, the U.S. Supreme Court announced its decision in *United States v. Windsor*, declaring unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which defines "marriage" for purposes of all federal laws as the marriage between one man and one woman. As a result, for purposes of any federal law, including the Internal Revenue Code and Employee Retirement Income Security Act (ERISA), a same-sex couple who is legally married under state law must be treated as married.

For married same-sex couples living in one of the 13 states that allow same-sex marriage, the District of Columbia, or New Mexico (which recognizes same-sex marriages performed in other states, but does not allow same-sex marriage), the married same-sex couple must be treated the same as an opposite-sex married couple for federal law purposes. Unfortunately, at this time, it is not clear whether a legal same-sex marriage continues to be recognized for purposes of federal law if the same-sex couple moves to a state that does not recognize same-sex marriage. Section 2 of DOMA, which was not considered by the Supreme Court in the *Windsor* case, allows states and territories of the United States to deny recognition of same-sex marriages that originated in other states or territories. There has been no definitive statement from the Internal Revenue Service (IRS) or the Department of Labor (DOL) whether marital status is determined based on the state in which the marriage was performed or the state in which the couple currently resides.

Hopefully, the IRS and the DOL will issue guidance on this question in the near future. If existing IRS guidance on common-law marriage is applied, a same-sex marriage legally entered into in one state would remain a legal same-sex marriage for federal law purposes even if the couple moves to a state that does not recognize same-sex marriage for state law purposes. Similarly, the Department of Homeland Security issued guidance on July 1, 2013 stating that, as a general rule, a legally married same-sex couple who moves to a state that does not recognize same-sex marriage will still be treated as legally married by U.S. Citizenship and Immigration Services.

EFFECTIVE JULY 21, 2013

The decision in *Windsor* is technically effective on July 21, 2013 (25 days after the date the decision was announced). However, another aspect of the decision that is not yet clear is whether the decision has retroactive effect and the extent of any retroactive application. The IRS has the authority to apply the decision prospectively only; guidance on that point is expected shortly. Further, it is not clear the extent to which the DOL or other federal agencies with responsibility for benefit plan regulation can similarly elect to only apply the decision prospectively.

QUALIFIED RETIREMENT PLANS

For married same-sex couples living in states that allow or recognize those marriages, and to the extent same-sex marriages are recognized for federal law purposes, even if the same-sex marriage is not recognized for state law purposes, *Windsor* affects the administration of qualified retirement plans [pension plans, 401(k) plans, 403(b) plans, profit-sharing plans, etc.], including:

1. Plans must treat an employee's legal same-sex spouse as the employee's default beneficiary under the plan, and require the spouse's written consent if the employee names any other beneficiary.
2. Plans required to provide an annuity as the default form of benefit must pay benefits to an employee with a legal same-sex spouse in the form of a joint and survivor annuity, unless the employee affirmatively elects a different form of benefit (again, with the spouse's written consent).
3. An employee's qualified retirement plan benefits can be assigned to a legal same-sex spouse through a qualified domestic relations order.
4. The same-sex spouse of an employee will be able to elect spousal rollovers to his or her own IRA upon the death of the employee, enabling the surviving spouse to receive payments over his or her lifetime.

WELFARE BENEFIT PLANS

The effects of the decision on welfare benefit plans include:

1. An employee's contributions for group health plan coverage (medical, dental, vision) for the employee's legal same-sex spouse can be made on a pre-tax basis through a Code Section 125 cafeteria plan. However, if the state where the employee lives does not recognize the employee's same-sex marriage, the employee's contribution cannot be treated as a pre-tax contribution for state income tax purposes.
2. Legal same-sex spouses are eligible for health plan continuation coverage under Consolidated Omnibus Budget Reconciliation Act (COBRA) and Uniformed Services Employment and Reemployment Rights Act (USERRA) (to the extent the spouses are eligible for coverage under the group health plan).
3. An employee with a same-sex spouse will be able to contribute to dependent care flexible spending accounts (FSAs) at the same level as an employee with an opposite-sex spouse.
4. Total contributions to health savings accounts (HSAs) by same-sex spouses will now be limited to the annual maximum for a family taxpayers, which may be less than the total contributions that could have been made if either spouse was separately eligible to contribute the family maximum (for example, if one spouse has a child).

Importantly, federal law currently does not require an employer's welfare benefit plans to provide spousal coverage to same-sex spouses. An employer with a self-insured group health plan could still limit spousal coverage to opposite-sex spouses; federal law currently does not prohibit discrimination based on sexual orientation, and ERISA would pre-empt any state law prohibiting that discrimination in the self-insured group health plan. However, employers with fully-insured welfare benefit plans will be subject to state insurance laws, which may prohibit discrimination based on sexual orientation or may prohibit spousal coverage for same-sex spouses.

Employee Benefits Alert DOMA decision affects employee benefit plans

To find out more about potential effects on retirement plans and welfare benefit plans that may arise out of the *Windsor* decision, please contact:

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EMPLOYEE BENEFITS

Benefit programs should be a win-win for employers and employees. We strive to accomplish that goal in the design, implementation and operation of sophisticated benefit and executive compensation programs – qualified and non-qualified retirement programs and health and welfare plans. Our employee benefits team has a long track record of working to maximize the efficiency and economic feasibility of each program.