

Supreme Court Finds DOMA to Be Unconstitutional -- Impact on Employers Explained

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On June 26, 2013, a majority of the Supreme Court held in *United States v. Windsor* that Section 3 of the Defense of Marriage Act (DOMA), which defined marriage for purposes of federal law as the union of a man and a woman, is unconstitutional. The majority explained that DOMA's attempt to supersede a state's recognition of same-sex marriage constituted a deprivation of due process and the principles of equal protection under the law. In finding DOMA unconstitutional, the Court recognized that the State of New York (the state at issue) had deemed same-sex marriages to be "worthy of dignity in the community equal with all other marriages" and that DOMA served no legitimate purpose other than to injure a class of people whom the state chose to protect.

Although *Windsor* involved the application of the estate tax, the Court's decision will impact over one thousand federal laws and regulations that refer to marital status. Among other areas, DOMA had deprived same-sex spouses of the rights and obligations conveyed upon opposite-sex spouses under federal laws relating to employer-sponsored benefit plans, federal income taxes, employer leave policies, and immigration. This created significant administrative burdens on employers by requiring them to treat employees with same-sex spouses differently than employees with opposite-sex spouses.

Employers operating in states that do not recognize same-sex marriage may see very few changes immediately. Notably, the decision did not address the validity of Section 2 of DOMA, which allows states not to recognize same-sex marriages performed in other states. Thus, left open is what happens when a same-sex couple, lawfully married in a state that recognizes same-sex marriage, moves to a state that does not. Also left open is what happens to a same-sex couple who lives in a state that does not recognize same-sex marriages, but who visits Massachusetts to get married and then returns home. Some federal agencies may need to, or opt to, clarify their regulations as to whether they will look to the state of residency or the state of the marriage celebration to determine if a couple is married for purposes of federal law.

For employers operating in Massachusetts and the other states that recognize same-sex marriage, the decision in *Windsor* should alleviate some of the burdens that existed under DOMA. Many employers had developed patch-work systems as to how to treat employees with same-sex spouses for purposes of taxes, benefits and employee leaves. After *Windsor*, employers operating in states like Massachusetts should be able to transition to treating all married employees in those states the same, regardless of whether they have a same-sex or opposite-sex spouse. Below are some of the most significant changes in the wake of *United States v. Windsor* that employers can expect in states that recognize same-sex marriage.

Federal Income Tax Withholdings

Under DOMA, employees with same-sex spouses were treated as single for purposes of federal income tax. In states that recognize same-sex marriage, this meant that employers were obligated to treat such employees as married for purposes of state income tax withholding but single under federal law. The decision in *Windsor* eliminates this problem, because in states that recognize same-sex marriage, these employees will now be treated as married for federal income tax purposes. Employers should remind employees that they may need to file a new Form W-4 to reflect their married filing status under federal law.

Employee Benefits

The Employee Retirement Income Security Act (ERISA) governs most private employer sponsored benefit plans. Because ERISA generally preempts state laws relating to employee benefit plans, DOMA meant that ERISA's protections for spouses, particularly under retirement plans, were only available to opposite-sex spouses. As to welfare plans such as group health plans, whether a plan had to cover same-sex

spouses depended on whether the plan was self-insured or not, because ERISA does not preempt a state's right to regulate insurance. Thus, states that recognize same-sex marriage often mandated that group health insurance contracts provide coverage for same-sex spouses. However, DOMA meant that such coverage was not entitled to the favorable tax treatment provided for coverage of opposite-sex spouses. Further, the combination of ERISA preemption and DOMA meant that employers offering self-insured plans could not be required to cover same-sex spouses. Below is an explanation of how the decision in *Windsor* will impact these issues.

Retirement Plans

QJSA AND QPSA

ERISA includes protections for the surviving spouse of a deceased participant in all defined benefit plans and some defined contribution plans. Qualified Joint and Survivor Annuities (QJSA) and Qualified Preretirement Survivor Annuities (QPSA) provide a surviving spouse access to an employee's retirement account after the employee's death. Under DOMA, some private employers chose to offer similar benefits to same-sex spouses, but they were not required to do so. With DOMA overturned, employers that offer qualifying retirement plans would be required to provide QJSAs and QPSAs to same-sex spouses in states recognizing same-sex marriage.

QDRO

In the event of a divorce, ERISA allows a former spouse to access a share of the employee's pension through a Qualified Domestic Relations Order (QDRO). DOMA prevented divorced same-sex spouses from having the same protection. A domestic relations order from a state court for a same-sex former spouse now may qualify as a QDRO if it meets the other statutory requirements.

MINIMUM REQUIRED DISTRIBUTIONS

The Internal Revenue Code allows a spouse to defer the required minimum distribution of death benefit payments until April 1 of the year after the participant would have reached age 70 and 1/2. Same-sex spouses will now be eligible for this deferral.

Group Health Plans

HEALTH INSURANCE TAX EXEMPTIONS

As described above, states that recognize same-sex marriage were permitted under ERISA to require group health insurance contracts to cover same-sex spouses. Plus, employers were free to offer coverage for same-sex spouses voluntarily. Under either circumstance, DOMA created significant tax consequences. Generally, employer-provided health benefits for an employee's spouse or dependents are excludable from an employee's taxable income. However, DOMA meant that such coverage for same-sex spouses did not qualify for the favorable tax treatment. Employers were required to add the imputed value of a same-sex spouse's coverage to the employee's income. Some companies had grossed up employees' salaries to offset this tax impact, thereby increasing payroll taxes.

With the repeal of DOMA, employers will no longer have to impute as additional income the value of health insurance provided to an employee's same-sex spouse. Likewise, employees with same-sex spouses will no longer pay taxes on their spouse's health insurance under employer provided group health plans.

Self-Insured Plans

The repeal of DOMA does not change longstanding law regarding ERISA preemption. Thus, except in the area of insurance regulation, ERISA continues to preempt state laws that relate to employer-provided benefit plans. This may mean that even in states that recognize same-sex marriage, an employer that offers a self-insured health plan could decline to cover same-sex spouses. However, the impact of *Windsor* on self-insured plans is unclear, and we anticipate that there will be legal challenges to self-insured plans that cover only opposite-sex spouses in states that recognize same-sex marriage.

HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) governs the enrollment period for group health plans. If a person becomes a dependent through marriage after the open enrollment period, the employer must allow the dependent to enroll at the time of the marriage. DOMA excluded same-sex spouses from this protection, meaning that a group health plan was not obligated to provide a special enrollment period to an employee upon his or her same-sex marriage. With the repeal of DOMA, an employee's same-sex marriage will qualify for a special enrollment period in states that recognize such marriages. However, the repeal itself may not constitute a

qualifying event.

TAX FAVORED HEALTH PLANS

Health Care Spending Accounts, Flexible Spending Accounts, and Health Reimbursement Arrangements are tax-advantaged accounts that allow employees to set aside pre-tax income that can later be used for certain medical expenses. Employees can use these accounts for a spouse's qualifying medical expenses. With DOMA overturned, same-sex spouses will now be eligible for the benefits under these tax-advantaged arrangements.

COBRA

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers to offer employees, spouses, former spouses, and dependent children the option of continuing their group health plans when the coverage would otherwise terminate due to certain qualifying events.

Under DOMA, employers were not required to provide COBRA coverage to an employee's same-sex spouse, although they could elect to do so. Employers in states that recognize same-sex marriage will now be required to offer health care coverage through COBRA to otherwise qualified same-sex spouses.

Family Emergencies

The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) entitles eligible employees to take 12 weeks of unpaid, job-protected leave to care for a spouse that has a serious health condition. The FMLA also permits employees to take two different types of leaves in connection with a spouse who is in the military. Although many employers voluntarily provided leave for employees to care for a same-sex spouse, under DOMA, this leave was not covered by the FMLA and not subject to the protections of that law. An eligible employee will now be entitled to FMLA leave to care for a same-sex spouse or, under certain circumstances when a same-sex spouse is in the military, in the same manner as an employee with an opposite-sex spouse.

Preretirement Withdrawals from 401(k) plans

The Internal Revenue Code allows for a preretirement hardship distribution from a 401(k) for medical and certain other expenses. 401(k) plans are not required to allow for hardship distributions, but those that do must allow for withdrawal for the employee's spouse. This hardship distribution is taxable, but exempted from early withdrawal penalties. Currently, 401(k) plans may, but are not required, to allow hardship distributions for non-spouse, non-dependent beneficiaries, including same-sex spouses. After the Court's decision in *Windsor*, same-sex spouses will be able to take advantage of any hardship distribution provisions.

Immigration

Many American employers recruit highly-skilled professionals from foreign countries. To facilitate the immigration process for these individuals, U.S. Citizenship and Immigration Services allows American employers to sponsor certain highly skilled foreign nationals for permanent residency. A prospective employee's spouse can join them in line and apply for permanent residency as the prospective employee's dependent.

Although federal immigration law typically recognizes marriages that are acknowledged in the country of celebration, DOMA prevented immigration officials from recognizing same-sex marriages performed in a foreign country. Prospective employees with same-sex spouses were required to leave their spouses in their home country or to independently secure their spouse a visa. After DOMA, same-sex foreign nationals who were married in their home country should be considered married for immigration purposes.

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