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Supreme Court Strikes Down Defense of Marriage Act (DOMA) Provision

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The Supreme Court of the United States announced on June 26, 2013 a landmark decision that will have far-reaching implications for employers across the country. In *United States v. Windsor*, the Supreme Court invalidated a provision of the Federal Defense of Marriage Act (DOMA) which defined marriage as between a man and woman for purposes of federal law.

Passed in 1996, section 3 of DOMA provided that, for purposes of *all* federal laws, the word 'marriage' is restricted to "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." Though applicable to all federal laws, DOMA has had a considerable impact on employers and employees in particular. In effect, DOMA allowed employers to treat same-sex marriages differently than opposite-sex marriages – even where same-sex marriage was recognized under state law – for purposes of administering or providing benefits to spouses under federal law. Thus, while Employee Retirement Income Security Act (ERISA) traditionally left the definition of marriage to the states, the passage of DOMA limited the definition of marriage under ERISA to that between a man and a woman. Similarly, while the Family and Medical Leave Act (FMLA) provides for mandatory leave in certain cases to care for a "spouse," because of DOMA employers had no obligation to provide FMLA leave to care for same-sex spouses.

Writing for a 5-4 Majority, Justice Anthony Kennedy in *Windsor* explained that section 3 of DOMA violated the 5th Amendment of the United States Constitution by denying "equal liberty" to same-sex couples lawfully married under state law. He writes:

> DOMA's principal effect is to identify a subset of state sanctioned marriages and make them unequal. . . . By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.

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Importantly, the Court did not disturb section 2 of DOMA which leaves it up to each state whether to recognize same-sex marriages from other jurisdictions. In addition, please note that the Court did not find a fundamental, constitutional right to marriage. Accordingly, the decision to recognize same-sex marriages is still left to each state.

For employers in Massachusetts and other states which recognize same-sex marriages it is important to immediately review and update policies and practices to reflect this ruling. In short, where benefits are provided under federal law to opposite-sex married couples – such as health or retirement benefits under ERISA or certain types of FMLA leave – these benefits should, in most cases, equally be provided to same-sex married couples. In addition, employers in these states who already provide certain benefits – such as health insurance – to same-sex spouses should be aware of the tax implications of this decision. After today's decision, such benefits will no longer constitute "imputed income," as they did before, for federal income tax purposes.

Because of the large number of federal laws DOMA affected, it is important to carefully consult with legal counsel and plan providers moving forward. Whether in a state which recognizes same-sex marriage or not, we recommend a careful review of all policies and practices which may provide benefits based on marital status in order to ensure compliance with this ruling.

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If you have any questions about this issue, or are interested in discussing these proposed changes further, please contact the attorney responsible for your account, or call (617) 479-5000.

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