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Fall of the DOMA-n Empire: Practical Employee Benefits Implications

On June 26, the U.S. Supreme Court decided *United States v. Windsor*, striking down Section 3 of the federal Defense of Marriage Act (DOMA) as unconstitutional and holding that same-sex marriages recognized under state law must also be recognized for federal law purposes. The *Windsor* case raised questions regarding federalism, equal protection of same-sex couples, due process and jurisdiction under Article III of the Constitution. While conclusively establishing that the federal government may not discriminate against same-sex married couples, *Windsor* leaves unresolved many issues regarding the recognition of spousal rights and the interaction of state and federal law.

This Legal Alert supplements our earlier [Legal Alert](#) on the top 10 benefits issues raised by *Windsor* and includes a chart to aid employers in considering the broader implications of the case for their benefit plans.

Windsor Overview

Windsor was a federal tax refund case. The plaintiff, Edith Windsor, resided in New York with her longtime partner, Thea Spyer. In 2007, with Spyer in failing health and with no jurisdiction in the United States yet offering same-sex couples the right to marry, the couple married in Canada. New York recognized their marriage as valid under state law. Spyer died in 2009, leaving her entire estate to Windsor.

Normally, a surviving spouse can inherit her deceased spouse's estate free of federal estate tax, up to a certain dollar threshold. However, because Section 3 of DOMA defined "marriage" for federal purposes as "a legal union between one man and one woman," the federal estate tax exemption applied only to opposite-sex spouses, and Windsor could not claim the exemption. Instead, Windsor owed federal estate taxes of \$363,053—taxes she would not have owed if she were married to a man. Windsor paid the tax, and then sued for a refund, challenging DOMA's definition of marriage as a violation of her Fifth Amendment equal protection rights. The district court, and the U.S. Court of Appeals for the Second Circuit on appeal, agreed that the challenged provision was unconstitutional and ordered the United States to issue a refund.

In a 5-4 decision authored by Justice Anthony Kennedy, the Supreme Court first held that it had jurisdiction to consider the case despite the fact that the U. S. Department of Justice agreed with Windsor that the statute was unconstitutional and declined to defend it. On the merits, the Court affirmed the decision of the Second Circuit, holding Section 3 of DOMA unconstitutional as a "deprivation of the liberty of a person protected by the Fifth Amendment of the Constitution." In invalidating the federal statute, the Court acknowledged the traditional power of the states to define marriage, and confined its holding to marriages "lawful" under state law. In other words, same-sex couples are married for federal law purposes only to the extent that they are married for state law purposes.

Employee Benefits Implications

Windsor has significant implications for employee benefit plans. After *Windsor*, the definition of "spouse" under any federal law governing employee benefits must now be interpreted to include same-sex spouses recognized under state marriage laws. There are now 14 jurisdictions that issue (or will soon issue) marriage

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licenses to same-sex couples: California,¹ Connecticut, Delaware, the District of Columbia, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington. Less clear is how the federal government will treat same-sex couples who were legally married in one state, but who reside in a state that does not recognize same-sex marriage, or a state that, like DOMA, defines marriage as between a man and a woman.

Another issue not expressly addressed by the *Windsor* Court is the retroactive effect of the decision. Given the Court's decision to grant retroactive tax relief to Windsor in this case, it is reasonable to assume that courts and government agencies will apply the ruling in *Windsor* retroactively, interpreting federal statutes and regulations as if Section 3 of DOMA was never enacted. Retroactive application of the decision could open the door to numerous ex-post-facto claims relating to employer-sponsored benefit plans, including claims made by:

- Former employees currently receiving retirement plan distributions in the form of a single-life annuity, who may be entitled to a qualified joint and survivor annuity (QJSA) if they were married to a same-sex partner at the time of benefit commencement;
- Surviving same-sex spouses, who may have the right under the Employee Retirement Income Security Act (ERISA) to challenge retirement plan distributions made in a form other than a QJSA or a qualified pre-retirement survivor annuity without spousal consent;
- Divorced same-sex spouses who may seek to re-open divorce proceedings to request retroactive distribution of retirement benefits under a qualified domestic relations order;
- Same-sex spouses or former same-sex spouses and their children seeking retroactive COBRA election rights; and
- Employers and employees seeking a refund of income taxes and FICA taxes paid on income imputed on the value of health benefits previously provided to same-sex spouses.

In addition to potential retroactive claims that could result from *Windsor*, the decision raises a variety of general plan administration issues, including:

- Whether there will be relief from or a method of addressing disqualification concerns for retirement plans that did not treat same-sex spouses as spouses for QJSAs, spousal consent and other purposes;
- Whether spousal rights for married same-sex couples will be determined based on the law of the state of residency or the law of the state of marriage (irrespective of the state of residency); and
- Whether federal law will recognize as spouses same-sex couples married abroad, without regard to whether states recognize such a marriage.

We anticipate receiving guidance from federal agencies – most notably, the Internal Revenue Service – in the coming weeks on these issues. (Both the Internal Revenue Service and the Department of Justice, among other agencies, have issued statements that guidance will be forthcoming.) Pending such guidance, however, certain employee benefits matters warrant early consideration by plan sponsors in anticipation of plan document amendments and changes to administrative systems.

Attached is a chart that highlights some key considerations for specific employee benefit arrangements. For retirement plans, the implications, such as the treatment of same-sex spouses for purposes of the QJSA rules, flow directly from federal law, and the primary question is which state law applies to determine the

¹ Also on June 26, the Supreme Court decided *Hollingsworth v. Perry*, which effectively reinstated California's 2008 legalization of same-sex marriage.

validity of a same-sex marriage and not whether plan terms recognize same-sex marriage. The same is true for some welfare plan rules, such as COBRA and special enrollment rights, as well as the federal tax treatment of benefits provided to same-sex spouses and their children. For other welfare plan rules, however, such as coverage under a cafeteria plan or the right to reimbursement under a dependent care or health care flexible spending account (FSA) or a health reimbursement account (HRA), the plan terms, any fiduciary interpretations of those terms and applicable protections of same-sex couples under state law may be relevant in determining the exact implications of the fall of DOMA for the plan.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Adam B. Cohen	202.383.0167	adam.cohen@sutherland.com
Mikka Gee Conway	202.383.0827	mikka.conway@sutherland.com
Carol T. McClarnon	202.383.0946	carol.mcclarnon@sutherland.com
Alice Murtos	404.853.8410	alice.murtos@sutherland.com
Joanna G. Myers	202.383.0237	joanna.myers@sutherland.com
Vanessa A. Scott	202.383.0215	vanessa.scott@sutherland.com
W. Mark Smith	202.383.0221	mark.smith@sutherland.com
William J. Walderman	202.383.0243	william.walderman@sutherland.com
Carol A. Weiser	202.383.0728	carol.weiser@sutherland.com

RETIREMENT PLANS	
Benefit or Provision Impacted	Potential Impact of Decision
Qualified Joint and Survivor Annuities (QJSAs)	<ul style="list-style-type: none"> ▪ Same-sex spouses will be considered “spouses” for purposes of determining the right to and calculating the QJSA benefit ▪ Spousal consent rights, including for plan loans, will apply to same-sex spouses ▪ A same-sex spouse’s survivor annuity under a QJSA will not be taken into account when determining maximum benefits under Code § 415(b)
Qualified Pre-retirement Survivor Annuities (QPSAs)	<ul style="list-style-type: none"> ▪ Same-sex spouses will be considered “spouses” for purposes of determining the right to and the calculation of the QPSA benefit and other spousal death benefits
Beneficiary Designations	<ul style="list-style-type: none"> ▪ Default spousal designations will apply to same-sex spouses
Minimum Required Distributions	<ul style="list-style-type: none"> ▪ Spousal deferral rules that apply to death benefits will also apply to same-sex spouses
Hardship Distributions	<ul style="list-style-type: none"> ▪ Plans that provide for hardship distributions for payment of a spouse’s medical, tuition, or funeral expenses must allow hardship distributions for expenses related to a same-sex spouse
Qualified Domestic Relations Orders (QDROs)	<ul style="list-style-type: none"> ▪ Plans will be required to honor QDROs that order the distribution of benefits to former same-sex spouses

WELFARE PLANS	
Benefit or Provision Impacted	Potential Impact of Decision
Taxation of Spousal Health Coverage	<ul style="list-style-type: none"> Value of a same-sex spouse's health insurance will not be treated as federal taxable income (though whether it will be treated as state taxable income depends on state law)
COBRA Coverage	<ul style="list-style-type: none"> Same-sex spouses and children of same-sex couples must be offered COBRA election rights
Special Enrollment Rights	<ul style="list-style-type: none"> Participants with same-sex spouses must be offered special enrollment rights upon marriage or birth of child Same-sex spouses who decline health coverage under their employer's plan due to coverage provided under a spouse's plan must be offered a special enrollment right under their plan when coverage under their spouse's plan ends Same-sex spouses must be offered a special enrollment right when coverage options under the plan are introduced or eliminated
Family and Medical Leave Act (FMLA)	<ul style="list-style-type: none"> Same-sex spouses may be entitled to FMLA leave in order to care for a same-sex spouse A "qualifying exigency" arising out of the fact that a same-sex spouse is on active military leave may trigger FMLA rights
Cafeteria Plans	<ul style="list-style-type: none"> Cafeteria plans likely must permit participation by same-sex spouses to the extent the plans permit participation by opposite-sex spouses (though, as noted above, it may depend on plan terms and the specifics of state law) Employees with same-sex spouses may be allowed to make corresponding changes to benefits upon marriage, divorce, legal separation, or annulment, or upon death of a same-sex spouse An unpaid leave of absence by a same-sex spouse may trigger the right to coverage changes Changes to a same-sex spouse's coverage under his or her health plan may permit corresponding changes to cafeteria plan elections A significant change in a same-sex spouse's residence or worksite may trigger the right to changes to cafeteria plan elections
Flexible Spending Account (FSA) Benefits	<ul style="list-style-type: none"> Expenses of same-sex spouses likely must be eligible for reimbursement under healthcare FSA arrangements Child care expenses for eligible children of same-sex spouses must be eligible for reimbursement under a dependent care FSA
Health Savings Account (HSA)/Health Reimbursement Account (HRA) Benefits	<ul style="list-style-type: none"> Expenses of same-sex spouses must be eligible for HSA reimbursements and likely must be eligible for HRA reimbursements Same-sex couples are eligible for two times the family contribution limit with respect to HSAs
Wellness Programs	<ul style="list-style-type: none"> Wellness programs made available to spouses likely must be made available to same-sex spouses