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What's New Under the

Defense of Marriage Act?

A major reason that employee benefits, such as employer-provided healthcare and retirement plans, exist is that they provide a tax-advantaged way for an employer to provide additional compensation to an employee, her spouse, and their dependents. The Defense of Marriage Act ("DOMA") created a system whereby legally married same-sex couples were not able to enjoy the tax benefits available to legally married opposite-sex couples. Recent court decisions and federal guidance have radically changed this regime; however, there are still many open questions and areas of uncertainty in how these changes will affect benefit plans. In this article, I will walk through the known effects and try to untangle some of the likely effects of this swiftly changing landscape.

By Wyatt J. Holliday

BACKGROUND

In the June 2013 decision *U.S. v. Windsor*, the Supreme Court struck down Section 3 of DOMA, which defined "marriage" as between one man and one woman and "spouse" as the opposite-sex partner in a marriage. Prior to this decision, federal recognition of same-sex marriage was unlawful, even if such marriages were legal under state law.

It was unclear what the ripple effects of this decision would be because *Windsor* was about an estate-tax issue. Everyone agreed that *Windsor* would likely affect employee benefit plans subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), but there was very little agreement about exactly what those effects would be. The Internal Revenue Service ("IRS") provided some direction in Revenue Ruling 2013-17 ("Rule"), followed closely by the Department of Labor's Technical Release 2013-04.

As an introductory side note, the Court's decision did not affect DOMA Section 2, which allows states to define marriage and not to recognize same-sex marriages performed elsewhere. For the time being, Section 2 is still good law (though for how long, no one knows).

While both the IRS and the DOL (collectively "Agencies") have provided guidance about how plans must implement *Windsor*, the guidance unfortunately does not answer many questions and ends with a promise of

further guidance. However, there were some operational and administrative changes required immediately by the IRS's Rule, which applies prospectively September 16, 2013, as well as retrospectively in some cases, as laid out below.

WHAT YOU NEED TO KNOW

The Rule sets out three separate holdings that are effective for all federal tax purposes.

First, the terms "spouse," "husband and wife," "husband," and "wife" include the same-sex spouse of a marriage that is legal under state law; thus, any reference to any form or synonym of the word "spouse" should be read as gender-neutral. Further, "marriage" includes legal same-sex marriages under state law.

Secondly, the IRS adopts the "state of celebration" rule to determine the validity of a marriage. If a marriage is valid in the state or foreign jurisdiction in which it was performed, it is a legal marriage, even if it is not recognized or valid in the state where the married couple is domiciled.

Third, registered domestic partnerships, civil unions, and other formal relationships are not "marriages" unless they are recognized as such under state law.

Technical Release 2013-04 mirrors these holdings, emphasizing that they are consistent with *Windsor* and promote the uniform administration of ERISA employee benefit plans.

Health Plans

What *Windsor* means to Health Plans is in some ways an open question.

What is clear: the Rule allows employers to provide health coverage to same-sex spouses on a tax-free basis. Previously, employers were required to impute income and related federal taxes on an employee for the provision of same-sex health benefits. Indeed, the Frequently Asked Questions that accompanied the Rule address an employee's right to amend prior year returns within the statute of limitation to recover tax paid on the imputed value of same-sex spouse coverage. The Rule also indicated that a special procedure would be implemented for employers to recover Social Security and Medicare taxes paid on same-sex spousal benefits in the same time period.

Further, employers who sponsor cafeteria plans that allowed employees to purchase healthcare coverage for their same-sex spouse with after-tax dollars could allow purchase of coverage with pre-tax dollars.

Other possible effects are less clear. Neither ERISA nor healthcare reform under the Patient Protection and Affordable Care Act ("PPACA") requires health plans to provide spousal coverage. Some have read the Rule to mean that while a plan is not required to offer coverage to spouses, if it does, then it must offer coverage to same-sex spouses. Others have questioned whether the terms of a plan defining marriage will control. This particular question is not addressed directly in the Rule. Nearly a year later, the Agencies have yet to provide the promised additional guidance.

Retirement Plans

Qualified retirement plans, unlike health plans, are required by current federal law to provide spousal rights. Thus, the IRS guidance, adopting the "state of celebration" regime, means that any right a spouse currently possesses with respect to a qualified retirement plan is applicable to a same-sex spouse, effective September 16 of last year. The Rule also specifically cautions that this currently applies only prospectively.

These possibilities suggest three main issues for retirement plans. First, survivor benefits, such as qualified joint and survivor annuities ("QJSA") and qualified preretirement survivor annuities ("QPSA"), must be made available to legally married same-sex spouses. An open question is whether plans will be required to allow a retired participant in a same-sex marriage who would have otherwise been eligible to elect a QJSA to retroactively so elect. Secondly, same-sex spouses now have consent and waiver rights related to the designation of a non-spouse beneficiary, waiver of QPSA, and distribution other than as a QJSA, along with access to Qualified Domestic Relations Order ("QDRO") rights in the event of a divorce or dissolution. Administratively, plans must begin collecting beneficiary information about same-sex spouses and communicating about the necessity of spousal waivers regarding beneficiary designations. Finally, because the prior definition of marriage and spouse was found unconstitutional, there is an argument that restrictions based on the definition have always been unconstitutional and therefore all existing elections are invalid. The complete invalidation of all elections for legally married same-sex couples could be administratively burdensome for retirement plans. The IRS has the authority to make court decisions affecting tax law retroactive. Stay tuned for more guidance regarding the effects of *Windsor* on retirement plans.

An Open Door for Litigation Against Health Plans

Assuming the Agencies' guidance allows plans to define marriage and spouse, the *Windsor* decision will almost certainly be used in discrimination lawsuits against

plans. Plans will likely encounter discrimination suits based on the theory that because federal law may not define marriage to exclude same-sex marriage, entities existing on the basis of federal law – i.e. ERISA plans – may not withhold recognition of such marriages. ERISA shields plans from state insurance laws through broad preemption; they are beholden only to federal law. However, courts have often ruled that a body of state domestic relations laws are not pre-empted by ERISA. Further, because ERISA plans exist because of federal law, the argument will be that they must comply with federal definitions.

Challenges to states' laws could also affect ERISA plans. Attacks on DOMA Section 2, allowing states to decide whether or not to recognize same-sex marriages from other states, will argue that this section is also unconstitutional. This will only affect ERISA plans to the extent that the Agencies' guidance connects a plan's ability to define marriage with the ability of states to define marriage. Additionally, even if Section 2 survives, the states disallowing same-sex marriage will face direct challenges to their laws. After *Windsor*, a federal judge ordered Ohio (which does not recognize same-sex marriage) to accept a death certificate listing a terminally ill man in a legal same-sex marriage as "married" and his husband as "surviving spouse," on the basis of equal protection and due process. It thus seems that a position based in state law will likely end up in court anyway.

ACTION PLAN

The Agencies have provided some guidance on what changes the *Windsor* decision necessitates for ERISA plan administration. Where the Agencies have clearly spoken, plans must act to make sure they are in compliance. Where there is ambiguity, the Employee Benefits attorneys at Shumaker can help you to evaluate your situation based on a review of your benefit plan documents and the current interpretations of the law.

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