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Supreme Court Oral Arguments on DOMA, Proposition 8: Potential Employee Benefit Plan Implications

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On March 26 and 27, 2013, the Supreme Court of the United States heard oral arguments in cases challenging the constitutionality of the federal Defense of Marriage Act (DOMA) and California's Proposition 8. A Supreme Court ruling in either case may have significant implications for employee benefit plans given the many federally mandated spousal benefits that currently do not extend to same-sex spouses in light of DOMA.

Background on DOMA

DOMA is the controversial law at the center of national debate over the legalization of same-sex marriage. Congress enacted DOMA in 1996, before any state had legalized same-sex marriage, but at a time when a number of states seemed ready to do so through judicial or legislative means. DOMA was enacted primarily in response to concern that states opposed to legalizing same-sex marriage would be required to legally recognize such marriages performed in other states under the Full Faith and Credit Clause of the U.S. Constitution. DOMA has two key provisions:

- Section 2 of DOMA stipulates that no state shall be required to recognize a same-sex relationship that is considered a legal marriage in another state, or to recognize a right or claim arising from such a relationship.

- Section 3 of DOMA provides that for all purposes of federal law, the word "marriage" means "only 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 wife."

The DOMA Case Before the Supreme Court

In February 2011, Attorney General Eric Holder issued a public letter on behalf of President Obama informing the speaker of the House of Representatives that the U.S. Department of Justice (DOJ) would no longer defend the constitutionality of Section 3 of DOMA. The letter stated that the DOJ would continue to enforce Section 3 of DOMA until such time as it is repealed by the legislature or the "judicial branch renders a definitive verdict against the law's constitutionality." (Click here for more information.) In response, the Bipartisan Legal Advisory Group (BLAG) of the U.S. House of Representatives retained legal counsel to continue to defend the constitutionality of DOMA.

The Supreme Court heard oral arguments on March 27, 2013, in the case of *United States v. Windsor*, which challenges Section 3 of DOMA. Windsor is the surviving spouse of a same-sex couple who had been together for 44 years and had legally married in Toronto in 2007. Although the couple's marriage was legally recognized in their home state of New York, Windsor was forced to pay $350,000 in federal estate taxes after her spouse died—taxes she would not have had to pay if she had been married to an opposite-sex spouse. Windsor argued that DOMA violates the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution because it recognizes opposite-sex marriages, but not those of same-sex couples.

Both the U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit agreed with Windsor that Section 3 of DOMA is unconstitutional. The district court ruled in June 2012 that Section 3 of DOMA lacked a rational basis to support the unequal treatment of opposite-sex and same-sex spouses. The Second Circuit ruled in October 2012 that Section 3 of DOMA must be examined with intermediate scrutiny. To withstand intermediate scrutiny, Section 3 of DOMA must be "substantially related to an important government interest." Substantially related requires the legislature's rationale for enactment of the classification to be "exceedingly persuasive." The Second Circuit found that Section 3 of DOMA was not substantially related to an important government interest and therefore was an unconstitutional violation of the Equal Protection Clause. (Including Windsor, seven federal courts have ruled that DOMA is unconstitutional.)

The Supreme Court agreed to hear *Windsor* in December 2012. The oral arguments on March 27, 2013, focused on the three issues that the Supreme Court is considering with respect to Section 3 of DOMA. First, the Supreme Court is considering whether it has jurisdiction to hear *Windsor* given that the Obama administration agrees with Windsor that Section 3 of DOMA is unconstitutional. Second, the Supreme Court is considering whether BLAG has standing to defend Section 3 of DOMA on behalf of the federal government. To have standing to defend Section 3 of DOMA, BLAG must be harmed by the Supreme Court finding Section 3 of DOMA to be unconstitutional. Finally, the Supreme Court is considering whether Section 3 of DOMA is an unconstitutional violation of the Equal Protection Clause as found by the Second Circuit. If the Supreme Court determines that it

lacks jurisdiction to decide *Windsor* or that BLAG lacks standing to defend Windsor, it likely will not rule on the fundamental question of the constitutionality of Section 3 of DOMA.

Employee Benefit Plan Implications of Windsor

The Supreme Court's ruling in Windsor likely will result in one of three outcomes:

1. *The Supreme Court will decline to rule on the constitutionality of Section 3 of DOMA.*

The Supreme Court could decline to rule on the constitutionality of Section 3 of DOMA, possibly because it lacks jurisdiction to hear the case or because BLAG lacks standing to defend DOMA. In the event of such a ruling, the Supreme Court presumably will use the same standing rationale to overturn the lower court decisions. Section 3 of DOMA therefore likely will remain valid law, and only opposite-sex marriages will continue to be recognized under federal law. The impact on employee benefit plans will be similar to the effect of the Supreme Court finding Section 3 of DOMA to be constitutional (as discussed below), although legal challenges to the constitutionality of Section 3 of DOMA will certainly continue.

2. *Section 3 of DOMA will be found to be constitutional.*

If the Supreme Court finds Section 3 of DOMA to be constitutional, employers generally will continue to have great latitude in deciding whether to extend benefits to employees' same-sex spouses, although the benefits that are offered will continue to be governed by complex federal laws and regulations.

Employers in certain states may be required under state insurance law mandates to extend medical, dental or vision coverage to employees' same-sex spouses. The only exceptions to these state insurance law requirements are if the employer's plan does not provide spousal coverage (which is rare), the plan is self-insured (*i.e.*, benefits are paid out of the company's general assets) or the plan is insured with an insurance contract issued in a state without such requirements.

Employers that have not already reviewed their employee benefit plan offerings for same-sex spouses and partners should do so. Employers should review the "spouse" definition under their benefit plans to clarify whether coverage will be provided to employees' same-sex spouses and partners. In addition, employers offering benefits to employees' same-sex spouses and partners should review their payroll procedures to ensure that the value of such benefits is properly reported for federal and state income tax purposes. Because of DOMA, employers must impute the fair market value of employer-provided coverage for a same-sex spouse or partner as taxable income to the employee for federal and most state income tax purposes. States that have legalized same-sex marriage, civil unions or domestic partnerships likely take a different approach and exempt the value of this coverage from the employee's taxable income.

3. *Section 3 of DOMA will be found to be unconstitutional.*

If the Supreme Court finds Section 3 of DOMA to be unconstitutional, federal benefits and protections currently afforded to opposite-sex spouses presumably will be extended to same-sex couples who have married in those states where same-sex marriage has been legalized. Specifically, federal laws governing employee benefit plans would require employers to treat employees' same-sex and opposite-sex spouses equally for purposes of the benefits that the employer extends to spouses. For example:

- In the retirement plan context, employers with pension and 401(k) plans would be required to recognize same-sex spouses for purposes of determining surviving spouse annuities or death benefits under their retirement plans.

- In the welfare plan context, federal income tax treatment of health coverage for an employee's same-sex spouse also would change such that employees would no longer have to be taxed on the income imputed for the employer's contribution to the same-sex spouse's coverage, and COBRA continuation would be required to be offered to same-sex spouses. Employers also would be required to permit employees to take family and medical leave to care for the illness of a same-sex spouse.

Such a ruling by the Supreme Court in *Windsor* presumably would require the federal government to clarify if and how federal law will defer to state marriage laws. Same-sex marriage currently is legal only in nine states and the District of Columbia, and

will become legal in Rhode Island on August 1, 2013. Thirty states have state constitutional amendments (similar to Proposition 8 in California), and eight states have statutory laws prohibiting the recognition of same-sex marriage. Because Section 2 of DOMA is not at issue before the Supreme Court, states where laws or constitutional amendments have been passed prohibiting the recognition of same-sex marriage will not be required to recognize such marriages entered into in states where same-sex marriage has been legalized. As a result, without further legislative or judicial action, a same-sex couple who marries in a state where same-sex marriage has been legalized but resides in a state that does not recognize the couple's same-sex marriage presumably would not be recognized as legal spouses under federal law. Therefore same-sex couples in the 38 states that prohibit recognition of same-sex marriages would not be entitled to the federal benefits and protections currently afforded to opposite-sex spouses even if they have legally married elsewhere. Further, same-sex couples who have entered into civil unions or domestic partnerships may not be afforded any federal benefits or protections since federal law does not recognize such unions.

Note that employers with self-insured welfare plans would not be *required* to extend spousal benefit coverage to same-sex spouses, because federal law does not require spousal welfare benefit coverage and because state insurance law mandates would not apply to a self-insured plan. However, employers that continue to provide benefit coverage only to opposite-sex spouses risk legal challenges under federal discrimination laws.

The Proposition 8 Case Before the Supreme Court

Proposition 8 is the controversial amendment to the California state constitution that provides that "only marriage between a man and a woman is valid or recognized in California." Same-sex marriage became legal in California on May 15, 2008, after the California Supreme Court ruled that state laws limiting marriage to opposite-sex couples violated the state constitutional rights of same-sex couples. The ruling overturned an existing state statute that prohibited recognition of same-sex marriages in California. Same-sex marriage became legal in California on June 17, 2008, but immediately halted on November 4, 2008, after a slim majority of state voters approved Proposition 8. California continues to recognize same-sex marriages performed between June 17 and November 4, 2008. California's domestic partnership laws remained in place throughout the short-lived legalization of same-sex marriage and continue to be a means for same-sex couples to receive the rights and protections of spouses under state law.

The Supreme Court heard oral arguments on March 26, 2013, in the case of *Hollingsworth v. Perry*, which challenges the constitutionality of Proposition 8 under the U.S. Constitution. *Hollingsworth* was filed by the American Foundation for Equal Rights on behalf of two same-sex couples who were denied the ability to marry after the passage of Proposition 8. The plaintiffs sought to prove that Proposition 8 violates the fundamental guarantees under the Due Process and Equal Protection guarantees of the 14th Amendment to the U.S. Constitution without serving any legitimate state purpose. The plaintiffs argued that because they are denied the right to marry, they are left with the "separate-but-unequal" option of registering as domestic partners, and therefore asked that Proposition 8 and any other state laws that restrict marriage to opposite-sex couples be invalidated because they are unconstitutional. *Hollingsworth* was the first federal challenge to state laws banning same-sex marriage.

The case was initially filed against several state government officials, including then-Governor Arnold Schwarzenegger and then-Attorney-General Jerry Brown, and the two county clerks who denied marriage licenses to the plaintiff couples. Brown was subsequently elected governor. However, because both Schwarzenegger and Brown declined to defend the constitutionality of Proposition 8, the U.S. District Court for the Northern District of California permitted the original proponents of Proposition 8 to intervene as defendants. Dennis Hollingsworth leads the organization ProtectMarriage.com.

Both the district court and the U.S. Court of Appeals for the Ninth Circuit agreed that Proposition 8 is unconstitutional. In June 2010, the district court ruled that Proposition 8 violates the U.S. Constitution because the ban on same-sex marriage "fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license." Domestic partnerships, in the district court's opinion, are not the functional equivalent of marriage, since marriage is widely regarded as the definitive expression of love and commitment in the United States, and domestic partnerships lack that same social meaning. In February 2012, the Ninth Circuit ruled that Proposition 8 was unconstitutional. The Ninth Circuit limited the issue to whether California had a legitimate reason to remove same-sex couples' right to the official status of "marriage," rather than the substitute label of "domestic partnership." The Ninth Circuit found no such legitimate reason, stating "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."

In December 2012, the Supreme Court agreed to hear *Hollingsworth* at the same time that it agreed to hear *Windsor*. The oral arguments on March 26, 2013, focused on whether Proposition 8 is an unconstitutional violation of the Equal Protection Clause as found by the Ninth Circuit. The Supreme Court also is considering whether the organization ProtectMarriage.com has standing to defend the constitutionality of Proposition 8, similar to the standing issue in *Windsor*. The issue of standing again depends on whether ProtectMarriage.com would be harmed by the Supreme Court finding Proposition 8 to be unconstitutional.

Employee Benefit Plan Implications of Hollingsworth

Although the Supreme Court could issue a broad ruling in *Hollingsworth* that would decide the constitutionality of all state laws banning recognition of same-sex marriage, to the extent the Supreme Court issues a ruling in *Hollingsworth*, a narrow ruling limited to Proposition 8 is expected. The employee benefit plan implications of the Supreme Court's ruling in *Hollingsworth* therefore likely will be limited to employers in California and employers with employees who are residents of California.

To the extent the Supreme Court issues a ruling in *Hollingsworth*, the Supreme Court's ruling in *Hollingsworth* likely will result in one of four outcomes:

1. *The Supreme Court will decline to rule on the constitutionality of Proposition 8.*

The Supreme Court could decline to rule on the constitutionality of Proposition 8, possibly because ProtectMarriage.com lacks standing to defend the constitutionality of Proposition 8. In the event of such a ruling, the Supreme Court presumably will use the same standing rationale to overturn the lower court decisions. Proposition 8 therefore will likely remain valid law, and only opposite-sex marriages will continue to be recognized under California law. The impact on employee benefit plans will be similar to the effect of the Supreme Court finding Proposition 8 to be constitutional (as discussed below).

2. *All state laws or constitutional amendments prohibiting recognition of same-sex marriage will be found to be unconstitutional.*

Although such an outcome is unlikely given the limited scope of the Proposition 8 challenge in *Hollingsworth*, the Supreme Court could issue a broader decision finding any state law or constitutional amendment that prohibits recognition of same-sex marriages to be unconstitutional. Such a ruling would have a significant impact for employers U.S.-wide, because same-sex marriage would become legal in the 38 states with state laws or constitutional amendments currently banning recognition of same-sex marriage.

3. *Proposition 8 will be found to be constitutional.*

If the Supreme Court finds Proposition 8 to be constitutional, only same-sex marriages performed between June 17 and November 4, 2008, will be recognized in California. The impact on employee benefit plans will not be as significant as in the federal context because same-sex couples can continue to enter into spousal-equivalent domestic partnerships in order to receive the rights and benefits afforded to legal spouses under state law. Employers in California are already subject to the state insurance law mandates, which require medical, dental and vision coverage to be extended to domestic partners if the plan is insured in the state and provides coverage for other employees' opposite-sex spouses.

4. *Proposition 8 will be found to be unconstitutional.*

If the Supreme Court finds Proposition 8 to be unconstitutional, same-sex marriage will again be legal and recognized in California. Employers in California will be required to extend spousal benefits to all spouses, even if the employer is not already subject to the state insurance law mandates requiring coverage for domestic partners. However, such a ruling would not extend spousal rights and benefits afforded under federal law to same-sex spouses in California unless the Supreme Court also finds Section 3 of DOMA to be unconstitutional.

Next Steps

The Supreme Court is expected to issue any rulings on *Windsor* and *Hollingsworth* in June 2013. Employers should prepare to quickly analyze the impact that these rulings may have on the benefits that employers may or must offer to same-sex spouses of their employees.

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