

## Federal Government Refuses to Defend Defense of Marriage Act - Now What?

March 10, 2011

The federal government is no longer defending the constitutionality of Section 3 of the Federal Defense of Marriage Act, which declares that under federal law, the word "marriage" means only a legal union between one man and one woman as husband and wife. A press release was issued by the attorney general to explain the change in position.

On February 23, 2011, United States Attorney General Eric Holder issued a [press release](#) indicating that the federal government will no longer defend the constitutionality of Section 3 of the Federal Defense of Marriage Act (DOMA). Section 3 of DOMA provides that for all purposes under 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. Although the president had previously opposed DOMA and supported its repeal, the administration had defended it in court on several previous occasions. As a result, part of the Department of Justice's press release was to explain the change in position.

This press release has already received a significant amount of attention and national press, but what does it mean for employers and employee benefit plans?

### What the Press Release *Does* Mean

The fact that the president and the attorney general have called Section 3 of the federal DOMA unconstitutional and will no longer defend its constitutionality in court is of huge symbolic significance, signaling a shift in federal policy that is consistent with the recent congressional repeal of the military's "Don't Ask, Don't Tell" policy. In addition to this symbolic shift, DOMA has now lost a significant (and obviously very influential) defender in pending federal court proceedings challenging Section 3 of DOMA. While it will certainly take some time for the current (and future) DOMA challenges to work their way through the federal court system, this recent development might signal a higher possibility that DOMA will be held unconstitutional by the United States Supreme Court. (As discussed [in our prior newsletters](#), cases challenging DOMA continue to work their way through the court systems and seem destined to result in a Supreme Court decision.) This ultimately would mean that same-sex couples can receive all of the over 1,100 federal rights and benefits that opposite-sex couples receive, such tax free health benefits, social security benefits and governmental pension and health benefits.

### **What the Press Release *Does Not* Mean**

Despite the obvious symbolic value of the attorney general's press release, the release by itself does not change the existing federal law which still defines marriage as between one man and one woman and spouse as a person of the opposite sex. Therefore, until DOMA is officially held to be unconstitutional by the United States Supreme Court or repealed by Congress, same-sex couples are not entitled to any of the benefits that opposite-sex married couples are entitled to under federal law, and states are still authorized to refuse to recognize same-sex marriages validly performed in other states where such unions have been legalized.

In addition, it is important to note that the Department of Justice's press release was limited to Section 3 of DOMA, which defines marriage for purposes of federal law. The press release does not speak to the constitutionality of Section 2 of DOMA, which provides that states may refuse to recognize same-sex marriages performed in other states where such unions have been legalized. At this point, 41 states have their own defense of marriage provisions specifically refusing to recognize same-sex marriages that are validly performed in other states or countries. For example, a state such as Michigan is not required to recognize a same-sex marriage validly performed in Massachusetts, even though the state of Michigan would recognize a marriage between opposite-sex partners that was performed in Massachusetts.

If Section 3 of DOMA is ultimately found to be unconstitutional, Section 2 of DOMA may still remain intact. Under this scenario, same-sex couples married and living in the relatively few states that recognize same-sex marriage would be entitled to federal law benefits currently provided to opposite-sex couples, while at the same time same-sex couples living in the majority of states that do not recognize same-sex marriage would continue to be denied these same federal rights and privileges. As a result, employers maintaining group health plans would still have to impute income for many employees covering same-sex partners, and any same-sex spouses would not be entitled to protection under the qualified joint and survivor annuity provisions of Section 417 of the Internal Revenue Code that govern benefits under employer-sponsored pension plans. Therefore, unless all of DOMA is overturned, employers will still face additional administrative burdens in applying their benefit programs to same-sex spouses and partners.

### **So What's Next?**

Employers should continue to closely monitor the federal cases involving the constitutionality of DOMA. The federal government's decision not to defend Section 3 of DOMA will undoubtedly have a significant impact on the results of those cases. Nevertheless, DOMA is still the law until further notice.

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