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LEGAL ALERT

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Top 10 Considerations for Employee Benefit Plans After *Windsor*

Yesterday's U.S. Supreme Court decision in *United States v. Windsor* struck down Section 3 of the federal Defense of Marriage Act (DOMA) as unconstitutional, and held that the federal government must recognize and accept same-sex marriages recognized under state law. As a result of the *Windsor* decision, 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.

The decision raises the threshold question of which state's marriage law will control: a couple's state of residency or the state in which the same-sex marriage was performed. Although the Internal Revenue Service generally recognizes the law of the state of residency for tax purposes, it may adopt a "state of celebration" rule to ensure consistent implementation of *Windsor* nationwide. In either case, the decision will trigger significant changes in the way employee benefits are delivered and administered for thousands of employees.

This list highlights the "top 10" considerations for employee benefit plans following the *Windsor* decision:

1. Generally, spousal provisions in an employer's employee benefit plans, including qualified retirement plans, welfare plans and fringe benefit plans, should apply to same-sex spouses in the same manner as they are applied to opposite-sex spouses.

2. There may be an exception to the general rule above in the case of welfare plans and fringe benefits that define covered "spouses" by reference to the law of a state that does not recognize same-sex spouses or such plans that do not clearly define the term "spouse." In these cases, plan administrators may still have the authority to interpret the term "spouse" to exclude same-sex spouses. However, it is unclear whether such interpretation would enjoy *Firestone* deference,[1] or might now be considered "arbitrary and capricious" if challenged in litigation following the *Windsor* decision.

3. Any plan or benefit policy amendment or interpretation that relates to spouses—including prospective verification of spousal status—should be applied to opposite-sex couples in the same manner as same-sex spouses.

4. Plans that do not currently offer spousal benefits at all will not be required to offer spousal benefits as a result of the *Windsor* decision.

5. For qualified retirement plans, there are implications for application of qualified joint and survivor annuity rules, Internal Revenue Code (Code) section 415 maximums, minimum required distributions, and qualified domestic relations orders. The implications for health plans include the need to offer COBRA to same-sex spouses.

[1] *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989) (requiring de novo review of a plan's denial of benefits unless the plan language gives the plan administrator discretionary authority to determine eligibility for benefits and to construe the terms of the plan, in which case a deferential abuse of discretion standard applies).

6. Welfare plans that currently offer benefits to same-sex spouses of employees and impute income on the value of the benefit to the employee for federal tax purposes will no longer need to do so. This may require amendments to plan documents and communication materials.

7. Welfare plans that do not impute income on the value of benefits provided to same-sex spouses for state tax purposes in states that allow (or recognize) same-sex marriage will continue this practice. In states that do not allow (nor recognize) same-sex marriage, welfare plans will continue to impute income on the value of benefits provided to same-sex spouses for state tax purposes.

8. It is unclear whether the *Windsor* decision will have a retroactive impact. Guidance on this issue from federal agencies is anticipated in the coming days and weeks. However, a retroactive application by agencies, such as the Internal Revenue Service (e.g., if the Service reads the Code as if Section 3 of DOMA was never enacted) could be costly, even for plans that currently provide same-sex spousal benefits.[2]

9. Employers will no longer be required to pay FICA taxes on the value of welfare benefits provided to a same-sex spouse. Employers that currently offer same-sex benefits should consider whether they should seek a refund for FICA taxes paid on those benefits during the past three years.

10. The *Windsor* decision does not require employers to recognize rights granted under "marriage-like" relationships, such as domestic partnerships and civil unions.

Many issues regarding the impact of the *Windsor* decision on benefit plans remain uncertain, particularly the extent of its retroactive impact. Plan sponsors should carefully consider whether prudence dictates caution when considering plan document amendments or changes to benefits policies in the absence of clear agency guidance. Nonetheless, plan sponsors should now begin identifying document provisions, communication materials and administrative systems that will warrant re-evaluation in the wake of this decision.

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[2] Section 2 of DOMA, which allows states to choose whether or not to recognize same-sex marriages performed in other states, was not at issue in *Windsor* and has not been ruled unconstitutional. As a result, a retroactive interpretation of *Windsor* may have an impact only in states that recognize same-sex spouses if federal agencies look to the state of residency rather than the state of marriage for determining marital status and, by extension, spousal rights.