EMPLOYEE BENEFITS

THE U.S. SUPREME COURT RULES DEFENSE OF MARRIAGE ACT UNCONSTITUTIONAL: SIGNIFICANT IMPLICATIONS FOR EMPLOYEE BENEFIT PLANS

by Jordan Schreier

On June 26, 2013, in *U.S. v. Windsor*, the US Supreme Court held the federal Defense of Marriage Act ("DOMA") unconstitutional as a violation of the right to liberty found in the due process clause of the 5th Amendment to the U.S. Constitution.

DOMA was enacted by Congress in 1996. Section 3 of DOMA provides that for purposes of any federal law "marriage" means a legal union between one man and one woman, and "spouse" refers only to a person of the opposite-sex who is a husband or wife. In essence, DOMA prohibited federal law from recognizing same-sex marriages, even if permissible under state law. Currently 13 states (including California as a result of another Supreme Court ruling on the same day as *Windsor*) and the District of Columbia license same-sex marriages.

The Court's ruling that DOMA is unconstitutional means that the more than 1,000 federal laws and countless regulations and other federal authority that refer to spouses or marriage will now apply to individuals in legal same-sex marriages in most cases. Interestingly, Section 2 of DOMA, which allows states to refuse to recognize same-sex marriages performed under the laws of other states, was not challenged and remains federal law. Similarly, the ruling does not mean that states which do not permit same-sex marriages must now do so. It also does not change the federal laws that apply to individuals in domestic partnerships or civil unions since these individuals are not in legal marriages.

For employers sponsoring employee benefits plans, the plan and related document language, administration and cost-related implications may be significant. Prior to the Supreme Court's ruling, same-sex spouses were treated as unmarried for federal employee benefits purposes. Now same-sex couples will be treated as married for purposes of federal statutes such as the Internal Revenue Code, ERISA, the FMLA, ADA, ADEA, GINA, HIPAA, etc.

Common Employee Benefits Provisions Impacted by Windsor

The more common employee benefit provisions that are affected by the Windsor decision include:

- **Spousal Rights Under Qualified Retirement Plans** - Spouses have special beneficiary, distribution, consent and tax rights under qualified retirement plans that other beneficiaries do not have. For example, under defined benefit pension plans, a spouse has QJSA, QOSA and QPSA rights and in all qualified retirement plans and 403(b) plans, a spouse is automatically the participant's beneficiary unless the spouse permissibly waives beneficiary status. Same-sex spouses will now be treated as spouses for these purposes under qualified and other tax-favored retirement plans.
- **Qualified Domestic Relationship Orders** - Special rules govern retirement benefits awarded to opposite-sex spouses in connection with divorce and child support that do not apply to same-sex spouses. Same-sex spouses are now spouses for QDRO purposes.
- **Hardship Distributions and Rollovers** - Same-sex spouses will be able to roll over plan distributions to their own IRAs or employee benefit plan accounts rather than only to an inherited IRA. Also, same-sex spouses will now be treated as spouses for purposes of hardship distributions from 401(k) and 403(b) plans.
- **Nontaxable Health and Other Welfare Benefits** - The value of employer sponsored health and welfare benefits which cover opposite-sex spouses are generally nontaxable. Employees have generally been taxed on the health and welfare benefits provided to their same-sex spouses. Now same-sex spouses will be entitled to the same tax treatment as opposite-sex spouses.
- **HIPAA Special Enrollment Rights** - HIPAA requires an employer group health plan to allow an opposite-sex spouse to enroll in his or her spouse's employer's health plan when the opposite-sex spouse loses eligibility under his or her own employer's health plan coverage for certain reasons (e.g., loss of job, termination of plan). Same-sex spouses will now have special enrollment rights.
- **COBRA Rights** – Opposite-sex spouses who lose their right to an employer's group health plan due to certain qualifying events (e.g., death of employee, divorce from employee) have the right to continue plan coverage under COBRA. Same-sex spouses will now have COBRA rights.
- **Cafeteria Plans/HSAs/HRAs** - An employee is typically entitled to make mid-year election changes under a cafeteria plan due to changes in family status (e.g., marriage, divorce, spouse's change in employment impacting his or her plan eligibility). A same-sex spouse will now be considered a spouse for these purposes. Also, the eligible medical expenses incurred by a same-sex spouse will be reimbursable under a health flexible spending account plan. Same-sex spouses will also be treated as spouses for the dependent care spending account limits on earned income. Similarly, same-sex spouses will be spouses for health savings account and health reimbursement arrangement purposes.
- **Health Care Reform** - A same-sex spouse will be a spouse for all purposes under the Patient Protection and Affordable Care Act.

Important Issues Remain

Despite Section 3 of DOMA being declared unconstitutional, the work for employers in responding to the ruling has just begun. There are many complicated issues employers will have to address in the days and weeks ahead. For example:

- **Effective Date** - Do plans have to immediately recognize same-sex spouses as spouses for plan purposes? For example, if an

employee dies today, does his or her same-sex spouse have pension qualified joint and survivor annuity and COBRA rights or will there be some transition period before plans will have to implement the change in federal legal status?

- **Retroactivity** - Will same-sex spouses have any retroactive rights to benefits? For example, if an employee died the day, month or year before the *Windsor* ruling, will he or she have retroactive qualified joint and survivor annuity or COBRA rights? Will an employer be subject to lawsuits for failure to pay retroactive benefits and will fiduciaries face potential breach of fiduciary duty claims related to failure to administer retroactive same-sex spouse benefits? Can an employer seek a refund of employment taxes paid on imputed income on behalf of an employee in a same-sex marriage?

- **Same-Sex Spouses in Non-Marriage Equality States** - What happens if a same-sex couple moves to a state that either does not permit or has not authorized same-sex marriage? Certain non-marriage equality states may recognize a same-sex marriage from another state and some may not. What is legally required is a complicated constitutional question. Some federal agencies (e.g., IRS) look to the laws of the state in which an individual resides to determine his or her marital status. If that is the standard following *Windsor*, it could result in some individuals in same-sex marriages being treated as spouses and some not, depending on the state in which they reside.

- **Plan Terms** - Many plans have defined spouse by referring to federal law generally. Despite the *Windsor* ruling, can a plan maintain a single, uniform plan term which defines spouse as opposite-sex only? Does doing so violate state law in those states which permit same-sex marriages or does ERISA preempt state law?

- **Administration Issues** - Plans that have been imputing income and withholding payroll taxes on an employee whose same-sex spouse has been covered by a welfare plan such as a group health plan, should no longer impute or withhold. It is not yet clear how the mid-year ruling that DOMA is unconstitutional impacts the timing and value of an employer's withholding and imputation of taxes.

Next Steps

Employers will need to pay close attention to guidance that is expected from the relevant federal agencies on some of these interpretational questions. In the meantime, employers should immediately review the definition of spouse and marriage in each employee benefit plan, identify employees who are in legal same-sex marriages and consider what definition of spouse the employer wants to use in its plans going forward.

For plans that recognize same-sex marriages, employers will need to revise their administrative procedures in areas such as COBRA, QDROs, special enrollment, etc. to make sure that same-sex spouses are treated the same as opposite-sex spouses. Employers should consider whether they will notify employees of the change in the law and advise employees to let the employer know of any same-sex marriages (and request a marriage certificate as proof). Employers may also need to consider whether they will send out special notices to same-sex spouses they do know about, such as a general COBRA notice to those same-sex spouses covered by a group health plan. Some employers may want to consider filing for a refund of payroll taxes on the imputed income for same-sex spouses for years that are still open under the statute of limitations.

Dickinson Wright's employee benefits practice team will continue to follow developments in this rapidly changing area and will send out periodic Alerts on significant information as it becomes available. In the meantime, we are available to assist businesses as they begin to address the many issues resulting from the *Windsor* decision. Please contact the author of this Alert, any member of the employee benefits practice team or your regular Dickinson Wright attorney for guidance.

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[1] The states that permit same-sex marriages are California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington. However, note that Minnesota and Rhode Island's marriage equality laws, while approved, become effective later this summer.

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