

June 26, 2013

The Supreme Court's Same-Sex Marriage Ruling Requires A Review of Employee Benefit Plans

On June 26, 2013, in the case of *United States v. Windsor*, the United States Supreme Court ruled that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional. This ruling requires employers to review their retirement and welfare benefit plan documents to determine if the definition of "spouse" should be revised.

Section 3 of DOMA defined "marriage" for purposes of all federal laws as a legal union between one man and one woman as husband and wife, and it defined "spouse" as a person of the opposite sex who is a husband or wife. By ruling Section 3 of DOMA as unconstitutional, the definitions of "spouse" and "marriage" under applicable state law now apply. In essence, this ruling means that federal benefits and protections provided to opposite-sex spouses apply to same-sex spouses if same sex marriage is recognized under applicable state law. If applicable state law defines spouse as including a member of the same sex, then provisions in employee benefit plans pertaining to a spouse includes an employee's same-sex spouse.

The definition of spouse is highly relevant in a number of employee benefits contexts. For example, with regard to tax-qualified retirement plans:

- Qualified Joint and Survivor Annuity: Under a defined benefit pension plan or money purchase pension plan, a spouse is entitled to receive a qualified joint and survivor annuity if the participant dies after retirement. The participant may not elect any other benefit form at retirement, and may not designate any other beneficiary, unless the spouse consents to the election. Likewise, a spouse is entitled to receive a qualified pre-retirement survivor annuity if the participant dies before retirement.
- Beneficiary Status: Under a defined contribution plan, the spouse is the default beneficiary for the participant's account. The participant may not designate any other beneficiary, unless the spouse consents to the election.
- Hardship Withdrawals: Under a section 401(k) plan, the spouse's medical or educational needs can justify a participant's hardship withdrawal.
- Age 70½ Required Minimum Distributions: In some cases, a surviving spouse is entitled to defer distributions for a longer period than a non-spouse beneficiary, following the death of the participant.
- Qualified Domestic Relations Order ("QDRO"): A former spouse may be entitled to a portion of a participant's tax-qualified retirement benefits, under a domestic relations order issued by a state court.

With regard to welfare plans:

- Health Plan Coverage: Group health plans typically allow employees to elect coverage for the employee's spouse. For companies that already offer health plan coverage to same-sex spouses, and same sex marriage is recognized under applicable state law, the employer contribution to coverage would become tax-free and the employee contribution could be paid with pre-tax dollars.
- COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985): A spouse is entitled to COBRA continuation coverage following a qualifying event (such as divorce or employment termination).

- HIPAA (Health Insurance Portability and Accountability Act of 1996, as amended): A spouse is entitled to special enrollment rights under HIPAA (such as after marrying the employee).
- Health Reimbursement Plans: A spouse's expenses can be reimbursed under a FSA (flexible spending arrangement), HSA (health savings account), or HRA (health reimbursement arrangement), if the plan so permits.
- Cafeteria Plans: A spouse is recognized under the change-in-status election rules.

Which state law is applicable is not yet settled. Section 2 of DOMA says that a state (which does not allow same sex marriage) is not required to recognize a same sex marriage ceremony performed in another state (which allows same-sex marriage). Section 2 was not at issue before the Supreme Court and so for the moment, it is still enforceable. Approximately 12 states (such as New York) and the District of Columbia recognize same-sex marriage but the remainder of states (such as Michigan) do not. Accordingly, same-sex couples who marry in New York and reside in Michigan would not have their marriage recognized under Michigan law. Presumably- although it is not entirely clear at this point in time in the absence of regulatory or legislative guidance - the same-sex spouse would not be recognized as a spouse for federal law employee benefits provisions. By contrast, if the same-sex couple resided in New York, the same-sex couple would be recognized as a spouse for federal law employee benefits provisions.

However, many times plan documents specify that one particular state's law applies in the absence of federal law applying. If the specified state law does not recognize same-sex marriage, yet a plan participant resides in a state recognizing same-sex marriage, it is unclear how this potential inconsistency will be resolved. Internal Revenue Service and/or U.S. Department of Labor guidance addressing this issue (as well as the issue of same sex couples marrying in one state and then residing in another state which does not recognize the marriage) would be helpful, in light of the Supreme Court's ruling.

In sum, employers must now review their employee benefit plan documents to determine if "spouse" is defined in a manner consistent with applicable state law - if not, documents must be amended and plan operational procedures must be updated to comply.¹

If you have any questions regarding the Supreme Court's decision, please contact the author of this Client Alert or a member of the Butzel Long Employee Benefits Practice Group.

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¹ For example, a tax-qualified retirement plan sponsored by a New York employer covering employees residing in New York which defines a "spouse" solely as a person of the opposite-sex must be revised.

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