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Employee Benefits & Executive Compensation ADVISORY ■

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The Supreme Court DOMA Decision – Impact on Employee Benefit Plans

On June 26, 2013, the Supreme Court issued the long-awaited ruling in *United States v. Windsor*, which dealt with the constitutionality of Section 3 of the Defense of Marriage Act ("DOMA"). Section 3 of DOMA limited the terms "marriage" and "spouse" for federal law purposes to opposite-sex couples, thus requiring different treatment of legally married same-sex couples compared to legally married opposite-sex couples for some purposes relating to employee benefit plans under federal law. In *Windsor*, the Supreme Court held that Section 3 of DOMA is unconstitutional—requiring equal treatment for same and opposite-sex spouses under federal law.

Windsor did not address section 2 of DOMA, which provides that states are not required to recognize same-sex marriages legally entered into in other states. This could potentially impact the manner in which spouses are treated under federal law, such as if a same-sex couple legally married in one state moves to another state that does not recognize same-sex marriage. See below for more discussion regarding the definition of "spouse" under federal law after *Windsor*.

Windsor leaves many questions unanswered as to how the decision is to be implemented with respect to employee benefit plans. Key questions that, at this point, are not clearly resolved include when a plan is *required* to recognize a same-sex marriage and when a plan *may* (but is not required to) recognize a same-sex marriage. Further, the extent to which the decision will have retroactive effect is uncertain. Guidance on these issues from the Departments of Labor and Treasury is expected soon; in the meantime, however, employers may need to make decisions in particular cases as to how to treat same-sex married couples as well as take steps toward longer-term implementation efforts. Some flexibility may be needed until specific guidance relating to employee benefit plans is issued. Ultimately, some issues may be resolved in future litigation.

This advisory focuses on the impact of *Windsor* on employee benefit plans, including health and welfare plans and qualified plans and the issues that plan sponsors should be considering now in planning to address the impact of *Windsor*.

DEFINITION OF "SPOUSE" FOR PURPOSES OF FEDERAL LAW FOLLOWING WINDSOR

With the DOMA definition of "marriage" struck down, for federal law purposes whether a couple is married will be determined by applicable state law. At this point, which state's law applies is not clear. There is very little relevant authority, and none directly on point, in part because (other than Section 2 of DOMA) states are generally required to give full faith and credit to the laws of another state. For example, individual state laws vary as to the age at which persons can legally marry. However, a couple that is married in a state with a low age threshold is still considered married if they move to a state with a higher age threshold.

In the absence of guidance, the applicable state law for purposes of federal employee benefit requirements relating to spouses could include the following:

State of domicile: If a same-sex married couple resides in a state in which the marriage is recognized, i.e., a state in which same-sex marriages can be performed or a state that recognizes such marriages performed in another state, then these spouses should be treated as married for purposes of federal law.[1] The federal rule may ultimately be broader, however, than looking just to state of domicile.

Any state law: Because *Windsor* did not address Section 2 of DOMA, some states may choose, in reliance on that Section, not to recognize same-sex marriages performed in other states. Thus, for example, if a same-sex married couple moves to a state that does not recognize such marriages, the question arises as to whether that couple is still considered married for federal law purposes post-*Windsor*. While there is no direct precedent on this point, there is existing guidance that would support an interpretation that a same-sex marriage is considered valid if it is valid in *either* the state of domicile or where the marriage was performed.[2] Also, while not legally binding, President Obama has publicly stated that his personal view is that a marriage recognized in any state should be considered as legal for federal law purposes.[3] Guidance on this issue is expected to be issued soon.

State law as provided in the plan: In the absence of guidance at the federal level, some plan sponsors may consider defining "spouse" in the plan or by reference to a particular state law specified in the plan. It is common today for plans to include a choice of law provision, and such provisions are generally recognized to the extent that the state law is not preempted by ERISA. While there are arguments that would support such an approach, there are also obstacles. For example, such an approach may not be possible when guidance is issued. This is most likely to be the case where there is a benefit conferred upon spouses under federal law, such as COBRA rights to covered spouses or in the case of the qualified joint and survivor annuity requirements applicable to qualified plans. Note, that, where federal law does not require that plans provide benefits to spouses and such rights are based on plan provisions alone, there may be more leeway with respect to the definition of spouse under plan terms. This issue is discussed further below under issues for Health and Welfare Plans.

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1 States that allow same-sex marriages: California, Connecticut, Delaware (as of July 1, 2013), Iowa, Maine, Maryland, Massachusetts, Minnesota (as of August 1, 2013), New Hampshire, New York, Rhode Island (as of August 1, 2013), Vermont, Washington, and the District of Columbia.

2 For example, the IRS currently recognizes a common law marriage if it satisfies the common law marriage requirements of the state in which the couple currently lives *or the state in which the common law marriage began.* IRS Publication 17, "Your Federal Income Tax"; see also Rev. Rul. 58-66. Also, some have cited to *Von Tersch v. Commissioner*, 47 T.C. 415 (1967) to stand for the proposition that the law of the state of residence controls; however, we believe that is only one interpretation of the *Von Tersh* ruling.

3 Remarks by President Obama and President Sall of the Republic of Senegal at Joint Press Conference (June 27, 2013), available at http://www.whitehouse.gov/the-press-office/2013/06/27/remarks-president-obama-and-president-sall-republic-senegal-joint-press-

Practice Pointer: *Windsor* did not address domestic partnerships or civil unions. Thus, the pre-*Windsor* law continues to apply to such situations.

ISSUES FOR HEALTH AND WELFARE PLANS

The following table highlights provisions applicable to health and welfare plans and the treatment of same-sex spouses under DOMA and post-*Windsor*.

Practice Pointer: While in most cases the post-*Windsor* tax treatment of health and welfare benefits will be more favorable to the same-sex spouse than previously, this will not always be the case. For example, under DOMA each same-sex spouse could have their own HSA. Post-*Windsor*, the rules that apportion the maximum contribution between spouses will apply to same-sex spouses.

In looking at the table, please refer to the discussion above with respect to the federal definition of spouse and marriage under Windsor.

Provision	Prior Treatment of Same-Sex Spouses Under DOMA	Effect of *Windsor*
Tax Treatment of Health Benefits	The federal tax treatment for employer-provided health benefits did not apply to same-sex spouses, unless the spouse qualified as a dependent for federal tax purposes. Thus, for example, group health plans covering same-sex spouses were required to impute income to the employee based upon the value of employer-provided coverage.	A same-sex spouse receives the same federal tax treatment as an opposite-sex spouse, including: • Employer provided health coverage for a spouse is excludable from gross income and wages for payroll tax purposes; • Employees may pay their share of the cost of coverage (e.g. medical, dental, vision) for the spouse with pre-tax salary reductions through a Code Section 125 cafeteria plan; • Change in status events affecting a spouse will permit an employee to make corresponding mid-year election changes under the cafeteria plan in accordance with Code Section 125; • Health care benefits provided to a same-sex spouse through a VEBA will no longer be considered "disqualified benefits" subject to the de minimis rule; • Medical care expenses incurred by a spouse are reimbursable on a tax free basis through a Health FSA, HSA or HRA. ; • Earned income of the spouse is taken into consideration when determining the maximum tax free benefits available under a dependent care assistance plan. Moreover, the employment status of a spouse will impact the eligibility of child care expenses under a dependent care assistance plan.

Provision	Prior Treatment of Same-Sex Spouses Under DOMA	Effect of *Windsor*
HIPAA Special Enrollments	HIPAA special enrollment rights did not apply with respect to a same-sex spouse covered by the plan.	Employees who marry a same-sex spouse during the year will now have a special enrollment right to enroll the employee and the spouse under the employee's group health plan, to the extent the spouse is otherwise eligible for coverage under the plan. Likewise, an employee whose same-sex spouse loses eligibility for other group health coverage will have a special enrollment right under HIPAA to the extent otherwise eligible under the plan. ***Windsor* does not require coverage of a same-sex spouse** and to the extent same-sex spouses are not eligible under the plan, then there is no HIPAA special enrollment right. Nevertheless, employers who do not currently offer same-sex spousal coverage will need to carefully consider whether to offer such coverage. See "Do employers have to offer coverage to same-sex spouses" below for a more detailed discussion.
COBRA Continuation Coverage	A same-sex spouse was not entitled to COBRA rights as a "spouse"	Same-sex spouses will now qualify as "qualified beneficiaries" under COBRA who are independently entitled to COBRA if coverage is lost due to a qualifying event.
FMLA	The FMLA allows eligible employees to take leave to care for a spouse with a serious health condition (as defined by the FMLA). Under DOMA, "spouse" was limited to opposite-sex spouses, so employees were not entitled to FMLA leave to care for a same-sex spouse with a serious health condition.	Employees may now be entitled to FMLA leave to care for a same-sex spouse who has a serious health condition as defined by FMLA.
Medicare Secondary Payor Rules	Same-sex spouses were not treated as a spouse.	Same-sex spouses will now be treated as a spouse for purposes of Medicare's secondary payor rules. This means that plans that cover a same-sex spouse of an active employee will now be primary to Medicare for as long as that employee is in "current employment status".

Provision	Prior Treatment of Same-Sex Spouses Under DOMA	Effect of *Windsor*
Dependent Care Assistance	Same-sex spouses were not treated as a spouse for purposes of applying the exclusion for dependent care assistance under Code section 129.	The earned income of a same-sex spouse will be taken into account in determining the maximum income. A same-sex spouse who is incapable of caring for himself or herself can be a qualifying individual for purposes of the exclusion.

Can a Plan Offer Equivalent Benefits to Same-Sex Spouses Even if the Marriage is Not Recognized for Federal Law Purposes?

Generally yes, but the tax result may be different. Pre-*Windsor*, DOMA generally did not prohibit the offering of health and welfare benefits to same-sex spouses and some employers extended benefits, such as health coverage, to same-sex spouses and others, such as domestic partners. Federal law did, however, govern certain aspects of the benefits offered, such as the federal tax treatment. If federal guidance, when issued, does not recognize some same-sex marriages (e.g., by looking to state of domicile), then the pre-*Windsor* law and practice on this issue should still apply. Pre-*Windsor* law with respect to other coverage of other persons who are not spouses, such as domestic partners, was not affected by the Supreme Court decision and should also continue to apply.

Do Plans Have to Offer Coverage to Same-Sex Spouses?

Generally no, but be careful on this point. Eligibility for health and welfare plan benefits is generally determined by the plan sponsor and the terms of the plan. There is no federal rule that requires employers to provide health and welfare benefits to spouses in general and *Windsor* does not specifically require employers to offer benefits to same-sex spouses. As discussed, above, however, if benefits are offered to same-sex spouses, then federal law will extend certain provisions to such spouses, such as COBRA rights. In addition, in the case of fully-insured health coverage, state law provisions may apply to the health insurance coverage that is offered under the plan.

Even though *Windsor* does not mandate coverage for a same-sex spouse, the decision may prompt claims for discrimination under state and local laws against employers who treat same-sex spouses differently from opposite-sex spouses. The extent to which the typical defenses to such claims (e.g. preemption of state law by ERISA) will be weakened by *Windsor* is unclear at this point.

Employers should review current plan documents to determine how spouse is defined under the plan, the implications of the definition with respect to same-sex spouses, and whether a plan amendment is necessary to effectuate the employer's intent with respect to coverage of such spouses.

Effective Date Issues for Health and Welfare Plans

Prospective Implementation

There is no specific effective date for the decision, and full implementation on a prospective basis is dependent on guidance that has yet to be issued. At a minimum, plan sponsors should be prepared to begin implementing the tax implications of the *Windsor* decision as soon as administratively feasible, with respect to same-sex spouses that are currently covered under the plan, including the following:

- Employers who currently offer coverage to same-sex spouses should stop imputing income on the value of health coverage provided to same-sex spouses as soon as is administratively feasible;
- Health FSAs and HRAs should begin to reimburse the medical care expenses of a same-sex spouse of a participant unless the plan has specifically excluded same-sex spouses (see above for a discussion on whether plans must extend coverage to same-sex spouses);
- Employers should begin to allow election changes as a result change in status events that impact a same-sex spouse to the extent the election changes are otherwise permitted by Code Section 125;
- The impact of the ruling on dependent care assistance plans should be communicated to dependent care assistance plan participants.

Retroactivity

Although we do not yet know how the IRS will proceed, the IRS could give the Court's decision retroactive effect and require employers who imputed the value of same-sex spousal coverage in the employee's income to seek FICA refunds and issue amended W-2s in accordance with IRS rules—potentially for all open years (e.g., 3 years). Such action by the IRS is not without precedent.[4] Indeed, *Windsor* involved retroactive application of a tax law to the plaintiff in the case. However, until such time as the IRS issues guidance, we believe it is reasonable not to attempt to apply the new rule retroactively, as doing so could create numerous administrative difficulties if the IRS does not apply it retroactively.

An employer could also face claims from participants whose prior requests for enrollment of (or reimbursement for) a same-sex spouse were initially denied based on the then applicable federal law. At this point it is unclear how such claims would be treated by the courts, but given that DOMA was in effect since the Clinton administration, we believe that reasonable reliance on DOMA should be considered a strong defense.

That still leaves unanswered the question—could an employer voluntarily apply the ruling retroactively? An employer could presumably apply the decision retroactively on a voluntary basis to certain benefits. Thus, the employer may be able to request FICA/FUTA refunds in accordance with IRS rules (and so could employees who had imputed income for same-sex spousal coverage). To the extent otherwise permitted by the plan, an employer may be able to retroactively enroll same-sex spouses and/or reimburse previously denied expenses.

Action Items for Health and Welfare Plan Administration

In light of the above, we suggest that employers consider the following:

- As a threshold matter, employers who sponsor health and welfare plans that offer same-sex or domestic partner coverage should begin the process to identifying all same-sex spouses covered under the plan as a "spouse"-- as opposed to a domestic partner. This will enable the employer to begin applying the proper tax treatment under federal law once it is determined how the IRS will ultimately define a spouse (i.e. legally married in any state or only in the state in which they currently reside). The changes that will be needed to enrollment systems and auditing process for should be considered.

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[4] *See* IRS Notice 2013-8, which provided a special administrative procedure for employers to follow as a result of a retroactive increase in the monthly transit benefit exclusion under Code § 132(f)(2)(A).

- If same-sex spouse coverage is currently offered, the employer should consider whether to apply the rule retroactively or prospectively—assuming retroactive treatment is not required.
- Review the definition of "spouse" under the plan to determine implications of the current decision and whether a plan amendment is desired.
- If same-sex spousal coverage is not offered, consider the potential legal implications of not offering coverage to same-sex spouses.

ISSUES FOR QUALIFIED PLANS

The definition of "spouse" can have a profound impact on the administration of a qualified plan. For example, spousal status is significant when creating or changing a beneficiary designation or in electing an optional form of benefit. Under DOMA, only opposite-sex spouses were entitled to the spousal protections under ERISA, and these protections could not be extended on the same basis to same-sex spouses. This changes under Windsor. The following table highlights the types of plan provisions that are impacted by spousal status.

Please refer to the discussion above with respect to the federal definition of spouse and marriage under Windsor.

Provision	Prior Treatment of Same-Sex Spouses Under DOMA	Effect of *Windsor*[5]
QJSA and Optional Forms of Benefit (Pension Plans)	Persons with a same-sex spouse were treated as single. Same-sex spouse was not entitled to receive a QJSA as a default form of benefit and the consent rules with respect to optional forms of benefit did not apply. Plans were prohibited from giving spousal consent rights to same-sex spouses.	Participants married to a same-sex spouse treated as married. Thus, such spouses will be entitled to receive a QJSA and consent of the same-sex spouse will be required for optional forms of benefit.
Beneficiary Designations (401(k) Plans and other DC Plans)	Participant with a same-sex spouse was treated as single and could name any beneficiary; spousal consent rules did not apply (and could not be applied) to same-sex spouses.	The consent of the same-sex spouse will be required for the participant to name a different beneficiary. Prior beneficiary designations are now void unless the spouse is the beneficiary.
Payments in the Absence of a Beneficiary Designation (401(k) Plans and other DC Plans)	Spouse was entitled to at least 50% and typically 100% of distributions; same-sex spouse was not considered a spouse for this purpose.	Same-sex spouses are entitled to receive payment on the same basis as opposite-sex spouses.
Qualified Pre-Retirement Survivor Annuity (Pension Plans)	Participant was treated as single and the same-sex spouse was not entitled to receive a pre-retirement survivor annuity if the participant died before retiring. In some cases, there was no death benefit at all.	Same-sex spouse will be entitled to a pre-retirement survivor annuity.

[5] The term "same-sex spouse" used in this chart refers only to those same-sex spouses recognized as such by the plan and/or federal law under *Windsor*. See discussion above as to which same-sex marriages will be recognized.

Provision	Prior Treatment of Same-Sex Spouses Under DOMA	Effect of *Windsor*[5]
Required Minimum Distributions	In calculating the RMD for a deceased participant, the opposite-sex spouse had several options in determining the timing of the minimum distribution. RMD regulations permit the use of a different distribution table to compute minimum distribution of married participants. Same-sex spouses could be designated beneficiaries but were not eligible for favorable treatment available to opposite-sex spouses.	Same-sex spouses will now be eligible for the same favorable treatment as opposite-sex spouses.
Hardship Distributions	If a plan permits hardship distributions, a married participant could designate a spouse as the primary beneficiary for distributions to cover tuition, medical, and/or funeral expenses. Distributions to cover such expenses for same-sex spouses did not qualify as hardship distributions unless the same-sex spouse qualified as a dependent.	Distributions to cover such expenses for same-sex spouses may now qualify as hardship distributions without the need for the same-sex spouse to qualify as a dependent.
Rollovers	Spouse beneficiary able to rollover distributions to spouse's own IRA or to an employer plan account. Same-sex spouse could make a direct rollover only to an inherited IRA.	Same-sex spouses now have the same rollover options as opposite-sex spouses.
Loans	Spousal consent required for plan loans in some qualified retirement plans. This rule did not apply to same-sex spouses.	Spousal consent from same-sex spouse now required on the same basis as the opposite-sex spouse.
QDROs	Spouse or former spouse could be an "alternate payee" under a domestic relations order. This did not apply to same-sex spouses unless they qualified as dependents.	Same-sex spouses may now be able to obtain a QDRO without qualifying as dependents.

Provision	Prior Treatment of Same-Sex Spouses Under DOMA	Effect of *Windsor*[5]
Prohibited Transaction Rules	A spouse is treated as a "family member" in determining whether there is a disqualified person. Same-sex spouses are not automatically "family members" for determination of disqualified person status.	Same-sex spouses are now family members and can be disqualified persons on the same basis as opposite-sex spouses. Certain previously permitted transactions may now be prohibited transactions.
Attribution Rules	Spouse is considered to own employer stock held by the employee, for certain purposes. For example, the spouse of a 5% owner is considered to be a 5% owner in identifying a highly compensated employees and for top hat purposes. The same-sex spouse of a 5% owner is not considered to be a 5% owner by attribution.	Same-sex spouses are now subject to the same attribution rules as opposite-sex spouses.

Effective Date Issues for Qualified Plans

Prospective Implementation

Implementing *Windsor* with respect to qualified plans will require changes in plan administration and may also require plan amendments.

While some plan amendments may be necessary, the *Windsor* decision does not necessarily require plan sponsors to amend their plans immediately. For a calendar year plan, most amendments can be executed by the end of the year on a retroactive basis, or possibly even as late as the filing deadline of the plan sponsor's tax return for 2013. The IRS and Department of Labor may provide more specific timing on required plan amendments.

However, all plan sponsors, should evaluate their plan's operation and review the current definition of "spouse." Participant communications such as SPDs should also be reviewed and updated. Even if your plan does not need to be amended, you should start preparing now to implement the new definition of "spouse." The question may arise in advance of regulatory or other administrative guidance, for example, as individuals retire and make benefit elections.

Retroactivity

The issue of retroactivity is critical, but currently uncertain. For example, it is not clear whether new elections with respect to benefits in pay status will be required or permitted.

For example, consider a retiree who entered pay status 5 years ago with a 50% joint and survivor pension, with his daughter as the contingent annuitant. The consent of the same-sex spouse would not have been obtained at the time (and in fact, *could not* have been legally obtained). Now, the same-sex spouse claims the right to be the beneficiary of this joint annuity benefit.

Based on past precedent, the IRS may provide a reasonable approach that recognizes the difficulty of retroactive application. Certainly this was the case following the 2004 Supreme Court *Heinz* decision. In that decision, the Supreme Court held that expanding the types of employment that would result in a participant's suspension of

benefits violated Code Section 411(d)(6). The IRS acted to limit the retroactive effect of the *Heinz* decision by stating the IRS would not disqualify a plan solely because of a plan amendment that was adopted before June 7, 2004 (the date of the *Heinz* decision) if the amendment violated Code Sec. 411(d)(6) by adding or expanding a suspension of benefit provision. In addition, the IRS gave employers until January 1, 2007 to adopt amendments retroactively to June 7, 2004.[6]

We recognize that retroactive relief by the IRS would not necessarily apply to participant litigation under ERISA or any other law. But we believe qualified retirement plans will have some defenses available if such claims are made.

It is not possible in this advisory to evaluate every situation in which a retroactive claim could occur. It may not presently be recommended to reach out to participants and offer to review past determinations with respect to benefits already in pay status. However, such a decision may depend on the type of benefit. For example, it may be feasible to revisit the beneficiary designation with respect to a 10 year certain and life annuity, while a joint and survivor annuity would represent a different challenge. If a same-sex spouse files a claim involving a significant monetary amount, a court action for interpleader could be an effective solution. We would be pleased to discuss specific situations with clients.

Action Items for Qualified Plan Administration

As we await further guidance on implementation of the Windsor decision, while there are various alternatives to consider, the following recommendations are designed to minimize the plan sponsor's administrative burden and require the least amount of procedural change:

- Determine changes to plan administration and documents that will be needed to implement the anticipated changes to federal definition of a spouse. As discussed above, a likely definition is that federal law will consider as married anyone who is legally married under state law, i.e., where the person lives or where the marriage was performed.
- Rely on participants to self-report their marital status. This is the process many plans currently use in which employers and plan administrators do not confirm or verify an individual's marital status. The burden falls on the participant to declare truthfully whether he or she is legally married. The plan will look exclusively to its records and the distribution or other forms completed by the participant to determine the participant's marital status. This should provide protection to the plan against disqualification and other claims in the event the participant's representation with respect to status is not true.
- Each qualified plan should ensure its records match up to other records maintained by the plan sponsor. Health and welfare plans occasionally perform audits of dependents, and if such an audit is performed, the qualified plan records showing marital status should be updated accordingly.

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6 See Rev. Proc. 2005-23.

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