

7/17/13

## ALERTS!

### When US Supreme Court Overturned Section 3 of DOMA, the Impact on Employee Benefit Plans was Huge!!!

Now that we have had some time to digest and reflect on the June 26, 2013 US Supreme Court decision to overturn Section 3 of the Defense of Marriage Act (DOMA), let's take a look at the impact that it had on employee benefit plans.

**What was the Decision:** The Supreme Court, in *U.S. v. Windsor*, ruled that Section 3 of the federal Defense of Marriage Act ("DOMA") is unconstitutional. That section of DOMA provided that only persons of the opposite sex could be recognized as "spouses" and "married" for purposes of federal law. According to legal scholars, DOMA's definitions of "marriage" and "spouse" impacted more than 1,300 federal laws, including the Internal Revenue Code ("IRC") and the Employee Retirement Income Security Act of 1974 ("ERISA"), which regulate employer sponsored retirement and health and welfare benefit plans. Because DOMA limited the definition of "marriage" and "spouse" under the IRC and ERISA to only opposite-sex couples, same-sex couples that were legally married under the laws of their respective states were subject to differential legal protections and tax treatment of spousal retirement and health care benefits.

**Impact of Decision on Employee Benefit Plans:** By holding that Section 3 of DOMA is unconstitutional, the Court's decision means that the complexities associated with the differential treatment of opposite sex and same-sex couples must come to an end, at least in those states that allow or recognize same-sex marriages. This is because the terms "spouse" and "marriage" as used in federal laws, such as the IRC, ERISA, COBRA, the Family and Medical Act ("FMLA") must now include a same-sex spouse residing in a state where such marriages are legal.

**Note:** It should be noted that currently, licenses for same-sex marriages may be issued in California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington and the District of Columbia. Rhode Island, Delaware and Minnesota passed same-sex marriage legislation in 2013. Delaware's law takes effect on July 1, 2013; Rhode Island and Minnesota's laws take effect on August 1, 2013. An area of likely future controversy involves employees who were married to same-sex partners in states that permitted such marriages, but who now reside in states where such marriages are not recognized, such as Texas. Section 2 of DOMA – which was not at issue before the Supreme Court, allows states to refuse to recognize the validity of same-sex marriages that were legally performed in other states.

**The Bottom Line:** The Court’s DOMA ruling means that employers offering retirement and health and welfare benefit plans will need to closely examine their plan documents, payroll systems, and compliance practices to determine if amendments are required to change the definition of a “spouse” or “marriage,” and/or to reflect similar treatment of both opposite-sex and same-sex married couples in those states that permit or recognize same-sex marriages. This could require extensive revision to, among other things, retirement plan documents, health plan documents, COBRA and FMLA policies, and an employer’s income tax withholding and employment tax payroll practices. Additionally, whether any changes have to be made retroactively is another area of concern for plan sponsors, and we expect federal regulators to issue guidance on this issue.

**Summary of Impact on Plans:** The chart below provides a high level overview of issues involving qualified retirement and health and welfare plans that plan sponsors will need to consider. We would be pleased to work with you and your legal counsel on plan amendments, policies and procedures, and participant communications. **(This chart does not address Domestic Partners situations, which is another whole area of consideration.)**

	DOMA	Post-DOMA
<b>I. Retirement Plans</b>		
A. Pension Plans – QJSA (Qualified Plans & ERISA 403(b))	Same-sex spouse treated as non-spouse beneficiary – not required to consent to single life annuity, lump sum, etc. payouts (though plan may require)	Same-sex spouse now entitled to 50% survivor annuity protection (and participant may elect 75% survivor annuity), unless consent to form of payout other than QJSA.
B. Pension Plans – QPSA (Qualified Plans & ERISA 403(b))	Same-sex spouse not treated as spouse for qualified pre-retirement survivor annuity protection (though plan may allow)	Same-sex spouse now entitled to 50% survivor annuity protection unless consent to waive (where plan does not subsidize cost)
C. 401(k) Plans – Payment of Account Balance at Death	Same –sex spouse treated as non-spouse beneficiary – not required to consent to another beneficiary designated by participant.	Same-sex spouse now entitled to 100% of account balance at death unless consent to another beneficiary.
D. Hardship Distributions (401(k) and 403(b) Plans)	If plan allows, participant may designate same-sex spouse as primary beneficiary when electing hardship distribution for medical, tuition and funeral expenses of such spouse.	Plans now required to recognize same-sex spouse as primary beneficiary for purposes of these hardship distributions
E. Rollovers (all Plans)	Same-sex spouse may make direct rollover only to an inherited IRA	Same-sex spouse now able to roll over plan distribution to own IRA or employer plan account
F. QDROs (all Plans)	Same-sex spouse does not have rights of “alternate payees” to obtain QDROs awarding share of participant’s benefits	Same-sex spouse now will be able to obtain QDRO if state law recognizes the rights of same-sex spouse (or, is entitled to share in community property states)

<b>II. Health and Welfare Plans</b>		
A. Health Care Coverage (Including Dental and Vision)	Plans that provide for coverage of (non-dependent) same-sex spouse must impute taxable income equal to the value of the coverage	Same-sex spouse may be covered on a tax-free basis the same as opposite-sex spouse
B. Pre-Tax Reimbursements Under HRAs, Flexible Benefit Plans and Health Savings Accounts	Employee may not pay for health coverage of same-sex spouse with pre-tax dollars or reimburse medical expenses from such accounts (Note: HRAs may reimburse for expenses of a same-sex spouse, if the value of coverage is imputed to the employee's income)	Employee may use pre-tax dollars to pay for health, dental and vision coverage – or medical expenses – of same-sex spouse, without imputation of income.
C. Employment Taxes	Social security (FICA) and federal unemployment (FUTA) taxes payable on imputed income associated with coverage of same-sex spouse	No FICA or FUTA tax on employer-provided, including from pre-tax flex spending account, coverage of same-sex spouse
D. COBRA	Same-sex spouse covered as dependent not entitled to spousal COBRA rights	Same-sex spouse may be entitled to full COBRA rights (up to 36 months of coverage) in the event of participant's termination of employment, divorce or legal separation
E. HIPAA Special Enrollment Rights	Same-sex spouse not entitled to special enrollment rights	Same-sex spouse may be immediately added to employee's coverage, including where spouse loses coverage under another plan
F. Dependent Care Assistance	Employee may not use dependent care account (DCAP / FSA) to pay for care of dependent same-sex spouse on pre-tax basis	Employee now able to use DCAP dollars, on pre-tax basis, to pay for care of same-sex dependent (subject to dollar cap or, if less, earned income of same-sex spouse)

Source: Prepared in collaboration with the Groom Law Group, Washington, DC