

New Employee Benefits Rules for Some Same-Sex Marriages

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On June 26, 2013, the United States Supreme Court invalidated the provision of the federal Defense of Marriage Act ("DOMA") that had previously recognized only opposite-sex marriages for certain purposes under federal law (*United States of America v. Windsor*, 570 U.S. ____ (2013)).

As a result, certain married same-sex couples will now be treated the same as married opposite-sex couples for certain federal law purposes, including various rights and features under employer-sponsored pension and welfare benefit plans, as described below.

These newly gained rights and features appear at this time to be available only to married same-sex couples **who reside in a state that has legalized same-sex marriage.**¹ It is not clear whether such rights and features extend also to married same-sex couples who reside in jurisdictions which have not legalized same-sex marriage.

Effect of the Decision on Employee Benefit Plans

In general, and subject to additional guidance from the federal agencies charged with reviewing the impact of the *Windsor* decision, employee benefit plans covering a member of a married same-sex couple should treat that couple in the same way it treats a married opposite-sex couple, but only if the couple **resides in a state that has legalized same-sex marriage.** For example:

- The same-sex spouse of a health plan participant would now be entitled to coverage (if the plan provides spousal coverage) on a tax-free basis, and would also have COBRA continuation and HIPAA special enrollment rights.
- The same-sex spouse's qualifying expenses would now be covered under a flexible spending arrangement that provides coverage for spousal expenses.
- The same-sex spouse of a tax-qualified retirement plan participant would now be the automatic death beneficiary under the plan, and would also be the automatic beneficiary of a survivor annuity under a plan that provides a "qualified joint and survivor annuity." Such spouse would also need to consent to a participant's election to waive that form of benefit.

Open Issues

The decision leaves open a number of questions that will hopefully be resolved by agency guidance and/or subsequent court decisions. Chief among these issues are the following:

- **Retroactivity.** Will the decision be applied retroactively and require plans to revisit and perhaps change their treatment of same-sex spouses in prior periods?
- **Residency.** How will the decision affect the treatment of lawfully married same-sex couples who reside in states that do not recognize same-sex marriage? Even after the *Windsor* decision, federal law still permits states to refuse to recognize same-sex marriages performed in other states. It is not clear whether benefit plans may continue to refuse these rights and features to legally married same-sex couples residing in states that do not recognize same-sex marriages performed in other states.

What Employers Should Do Now

Plans with married-same sex couples who reside in states that have legalized same-sex marriage should consider the following steps:

- **Welfare Plans:**
 - Updating plan provisions that are inconsistent with the *Windsor* holding (e.g., changing a "spouse" definition that explicitly references DOMA or requires opposite-sex status);
 - Ceasing the imputation of income to participants for coverage of same-sex spouses;
 - Considering conforming amendments with respect to COBRA, FMLA, HIPAA special enrollment rights, and rules relating to changes in cafeteria plan elections, to the extent these provisions exclude consideration of same-sex spouses; and
 - Revising flexible spending arrangements, health reimbursement arrangements and health savings accounts that offer spousal coverage to the extent these programs exclude consideration of same-sex spouses.

- **Pension Plans:**

At this point, it is not clear what, if any, steps must be taken with respect to treatment of lawfully married same-sex couples who reside in jurisdictions that have not legalized same-sex marriage. We hope to receive more guidance from appropriate governmental agencies on how plans should treat such couples.

- Updating plan provisions that that are inconsistent with the *Windsor* holding (e.g., changing a "spouse" definition that explicitly references DOMA or requires opposite-sex status); and
- Considering conforming amendments with respect to qualified joint and survivor

annuities, qualified preretirement survivor annuities, required minimum distributions, qualified domestic relations orders, hardship distributions and Code Section 415 limitations to the extent these provisions currently exclude consideration of same-sex spouses.

¹Thirteen states along with the District of Columbia currently permit same-sex marriages: California (entered into before November 5, 2008, and presumably after June 26, 2013), Connecticut, Delaware (takes effect July 1), Iowa, Maine, Maryland, Massachusetts, Minnesota (takes effect August 1), New Hampshire, New York, Rhode Island (takes effect August 1), Vermont and Washington.

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