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The Impact of the U.S. Supreme Court's Defense of Marriage Act (DOMA) Decision on Employers

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Earlier this year, the **United States Supreme Court** held the **Defense of Marriage Act (DOMA)** to be unconstitutional to the extent it required federal law to ignore same-sex marriages licensed legally under the law of any state. The **U.S. Department of Labor (USDOL)** and the **Internal Revenue Service (IRS)** recently issued opinions in the wake of that decision regarding the treatment of **same-sex marriages** by employers.

The definition of "marriage," now including homosexual and lesbian partnerships deemed marriages by state law, primarily impacts employers in the area of employee benefits. According to the USDOL's recently published **Technical Release 2013-4,** the term "spouse" must be read to include all individuals who are lawfully married under state law, including such individuals married to others of the same sex who were legally married in a state that recognizes such marriages, even if the individuals are domiciled in a state that does not recognize such marriages. However, the term "spouse" does not include individuals in a state-recognized relationship that is not called or treated as a "marriage" under that state's law. Such formal relationships not deemed marriages include civil unions and domestic partnerships, even if those relationships come with the same rights and responsibilities as do marriages under the states' laws.

The USDOL Technical Release provides that a "spouse" under the Federal Family and Medical Leave Act (FMLA) includes any individual in a marriage that is recognized by the state in which the employee resides, rather than in which he or she was married. While employers are used to dealing with definitions unique to the FMLA, this inconsistent definition of "spouse" for FMLA purposes, as contrasted with the definition of "spouse" for other laws' purposes, is certain to give employers' FMLA administrators even more gray hair. Whether this inconsistency will be resolved in later iterations of the regulations remains to be seen.

In **Revenue Ruling 2013-17**, the IRS opines that same-sex couples will be considered married for purposes of the federal Internal Revenue Code if the couple's relationship qualifies as a "marriage" in any jurisdiction, within or outside the United States, in which they were married and that recognizes same-sex marriages. In such cases today, benefits provided to employees' partners in same-sex marriages are no longer treated as taxable to the employee, but are treated as non-taxable, just as they are for heterosexual, married employees. Employees in recognized same-sex marriages are

also now able to pay for their spouses' coverage under their employers' benefits plans on a pre-tax basis. Furthermore, same-sex married couples are allowed, under the ruling, to recoup any extra taxes the employee-spouses paid in prior tax years as a result of the "imputed income" problem they faced before the Supreme Court's decision.

While the IRS's revenue ruling is positive for same-sex married couples, the benefits of marriage for tax purposes are accompanied by the same disadvantages faced by heterosexual married couples, in particular the often criticized "marriage penalty."

In light of the Supreme Court's decision and the USDOL's and IRS's recent opinions, employers would be wise to remove gender-specific language from their new-hire orientation documents that ask for spousal information. Employers should also review their benefit plans and plan-related documents to ensure they account for the new rules in cases of same-sex marriages.

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