

NEWSLETTER

July 2013

DOMA Decision Requires Benefit Plan Action

On June 26, 2013 the Supreme Court held in the *Windsor* decision that Section 3 of the Defense of Marriage Act of 1996 (“DOMA”) unconstitutionally encroached on states’ rights to regulate marriage. Section 3 of DOMA prohibited for purposes of federal law the recognition of same-sex marriages. Prior to the ruling, DOMA provided a uniform definition of “spouse” and “marriage” for federal law purposes (e.g., ERISA, Internal Revenue Code, COBRA, FMLA, etc.), allowing plans to treat same-sex couples the same throughout the country. Now that the Supreme Court has struck down Section 3 of DOMA, plans must rely on state laws as they work to expand federally protected rights and benefits to treat same-sex spouses equally.

The *Windsor* decision raises significant benefits questions including:

- Is there a retroactive tax effect?
- Is there a retroactive ERISA effect? For example, does a same-sex spouse who may have been denied COBRA benefits have a claim for retroactive coverage?
- What happens when a same-sex couple is lawfully married in one state but works in a state that does not recognize the marriage?
- What happens when a same-sex couple is lawfully married in one state but resides in a state that does not recognize the marriage?

Until guidance is forthcoming, the following tables summarize potential benefit plan provisions that may be impacted.

Benefit Plan Impact

Without guidance to the contrary, it appears that a same-sex spouse is now eligible for the following:

Retirement Plans

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| ➤ Qualified Pre-Retirement Survivor Annuity | |
| ➤ Qualified Joint and Survivor Annuity | This would require consent to his or her spouse’s election of an alternative form of payment. |
| ➤ Default Beneficiary | This applies to defined contribution retirement plans too, and requires consent to the designation of an alternative beneficiary. |
| ➤ Qualified Domestic Relations Order | |



Retirement Plans

- Hardship Distributions A same-sex spouse's medical and educational costs can now serve as the basis for a hardship distribution.
- Required Minimum Distributions Same-sex spouses may now defer required minimum distributions until April 1 of the year in which their spouse would have turned 70½.

Health and Welfare Plans

- Coverage State insurance laws in states that recognize same-sex marriage already require fully-insured plans in those states to offer coverage to same-sex spouses to the same extent offered to opposite-sex spouses. Because ERISA does not require spousal coverage and self-insured plans are not subject to state insurance laws, a plan arguably could continue to deny same-sex couples coverage under a self-insured plan. Such treatment however, might be challenged.
- Taxability Same-sex spouses will no longer have income imputed on plan-paid or subsidized coverage.
- Special Enrollment Marriage to, or divorce from, a same-sex spouse is now a special HIPAA enrollment event under plans offering spousal coverage. An open question is whether the *Windsor* decision itself is a special enrollment event since a same-sex couple did not become a "spouse" for special enrollment purposes until Section 3 of DOMA was struck down. Federal guidance on this issue is likely forthcoming.
- COBRA Same-sex spouses now have COBRA rights.
- Expense Reimbursement and Election Changes Eligible medical expenses incurred by same-sex spouses are now reimbursable under health care flexible spending accounts (FSAs), health reimbursement accounts (HRAs) and health savings accounts (HSAs). Mid-year election changes are now permitted due to events involving the same-sex spouse. Same-sex spouses who are not gainfully employed will now cause their member spouses to be ineligible for dependent care flexible spending accounts.
- Family and Medical Leave Act Same-sex spouses are now entitled to Family and Medical Leave Act rights.

Deadlines

The *Windsor* holding is effective July 21, 2013.

Next Steps

There is no doubt that *Windsor* creates a host of benefits issues as set forth in the charts above. Prompt communications should help allay concerns. As to the more challenging and unsettled issues, plans should begin to assess the options and make changes only after thoughtfully considering their impact and advice from Fund Counsel.

There are several actions plans should consider:

All Plans

1. Take an inventory of all plans that might be affected and review existing plan terms to determine areas impacted and alternatives available.
2. Decide how the plans should determine whether a same-sex marriage is lawful under state law (e.g., the participant's state of residence or the state in which the marriage was performed).
3. Address member concerns by promptly distributing a participant communication outlining the plan's same-sex marriage game plan for benefits.
4. Review plan documents to determine whether an amendment is required to offer same-sex spousal coverage when desired or required.
5. Decide whether to amend each plan individually, or whether a "snap on" amendment is appropriate to address particular matters until future guidance clarifies all of *Windsor's* impacts.
6. Amend summary plan descriptions and issue summaries of material modifications as required.
7. Decide whether changes should be prospective or retroactive.

Welfare Plans

1. Decide whether to offer special mid-2013 same-sex spouse enrollment rights, or whether to wait for forthcoming government guidance.
2. Decide whether domestic partner and civil union coverage remains appropriate or if it needs refinement.
3. If currently imputing income on plan-paid benefits provided to same-sex spouses:
 - Stop the practice if not required for opposite-sex spouse coverage.
 - Stop providing unnecessary tax-gross ups for health coverage provided to such spouses (consider how to handle past gross-ups and imputed pay for 2013 and prior years).
 - Decide whether to file a refund claim for payroll taxes paid on account of previously imputed income. This could be a significant refund claim depending on the level of plan subsidy and the number of same-sex spouse participants.

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