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Now What? Employer Benefits Obligations Post-DOMA

By Stephen Miller, CEBS

On June 26, 2013, the U.S. Supreme Court, in United States v. Windsor, found unconstitutional Section 3 of the federal Defense of Marriage Act (DOMA), which had prohibited the federal government from acknowledging marriages between same-sex couples. Same-sex marriages were recognized as legal by 12 states and the District of Columbia at the time of the ruling.

In a related case, Hollingsworth v. Perry, the court ruled that those challenging a California state court decision that made same-sex marriage legal in California (by overturning a state ballot initiative known as Proposition 8) lacked standing to do so—a finding that will restore legal same-sex marriage in the state.

"The Windsor decision is as many expected," Roberta Chevlowe, senior counsel in law firm Proskauer's employee benefits practice center in New York, told SHRM Online. "While the court held that Section 3 of DOMA (which defines 'marriage' and 'spouse' as excluding same-sex partners) is unconstitutional on equal-protection grounds, the decision does not force same-sex marriage on the states, which appear to continue to be free to define marriage as they wish and not recognize same-sex marriage."

For employers, "the Windsor decision means that there is much work to do with regard to the employer's benefit plans, even for employers who do not operate in states that recognize same-sex marriage," Chevlowe added. "On the health benefits side, among other things, employers will need to revisit the definition of 'spouse' in their plans to ensure that the definition is consistent with the employer's intent, in light of the decision. Employers may also need to cease imputing income to employees for the value of the health benefits they provide to same-sex spouses. With regard to qualified pensions, plan language and procedures will need to be considered because same-sex spouses have additional rights to federally protected benefits."

In addition, "Employers should expect that employees will immediately start asking questions about their rights with regard to various employee benefits, and employers will need to consider carefully the scope of the decision and various issues relating to the implementation and effective date of the decision with regard to these issues," Chevlowe said.

Expanded Obligations

In an e-mail, Todd Solomon, an employee benefits partner at law firm McDermott Will & Emery LLP in Chicago, identified the following as key benefits implications for private-sector organizations (but not necessarily state government and church employers) now that Section 3 of DOMA has been struck down.

For a legally married couple who live in a state where same-sex marriage is recognized:

- **Federal laws governing employee benefit plans** will require companies to treat employees' same-sex and opposite-sex spouses equally for purposes of the benefits extended to spouses.
- **Employers with self-insured welfare plans** (meaning benefits are paid out of the company's general assets) may not have to extend spousal-benefit coverage to same-sex spouses, because federal law does not require spousal welfare-benefit coverage and because state insurance law mandates do not apply to self-insured plans. However, employers that continue to provide benefit coverage only to opposite-sex spouses "are almost certain to face legal challenges under federal discrimination law," Solomon advised.
- **Employees will no longer have to pay federal income taxes on the income imputed** for an employer's contribution to a same-sex spouse's medical, dental or vision coverage. And workers can pay for same-sex spouses' coverage on a pretax basis under a Section 125 plan.

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- **Businesses will have to offer COBRA** continuation coverage to same-sex spouses.
- **Employers with pension plans** will be required to recognize same-sex spouses for purposes of determining surviving-spouse annuities. Same-sex spouses must also agree to receive payment of their deceased spouse's pension benefits in a form other than a 50 percent joint and survivor annuity, with the same-sex spouse as the beneficiary.
- **Organizations with 401(k) plans** will have to recognize same-sex spouses for purposes of determining death benefits, and same-sex spouses must consent to beneficiary designations.
- **Employees must be permitted to take family and medical leave** to care for an ill same-sex spouse.

"The above rules only apply to same-sex spouses who were married in and live in a state where same-sex marriage is legal," Solomon clarified. "The big open question is what happens to same-sex spouses who live in states such as Florida or Texas," which don't recognize same-sex marriages. "No one can answer the question until additional guidance is issued. It is possible that the answer can vary for different purposes—for example, state of residence will likely carry the day for tax filing and imputed income purposes, but it is possible the IRS could say that 'state of celebration' governs for pension plan purposes. In the meantime, it appears that employers can choose either approach, but it will be imperative to amend plans to add clear plan language to document the employer's approach."

The decision "will affect retirement plan administration because plans will have to obtain the consent of the same-sex spouse to permit a waiver of the qualified joint and survivor annuity (QJSA) form of benefit or for any other purposes for which the consent of an opposite-sex spouse is required," in states that recognize same-sex marriages, concurred Leslye Laderman and Marjorie Martin, principals at Buck Consultants LLC. "It is unclear from the Windsor ruling whether employers will be required, or permitted in the case of the QJSA, to recognize same-sex spouses of employees living in states that do not recognize same-sex marriages as spouses for purposes of these laws. Additional guidance is needed."

Retroactive Benefits

Another question is whether employees can claim benefits retroactively—for instance, seeking past tax relief for spousal health care benefits—if they've been married to their same-sex spouse in a state that recognizes same-sex marriage. Solomon observed: "It is certainly not clear yet, but I would think employees should be able to amend tax returns for open years to claim refunds. And employers should be able to get refunds of FICA taxes for prior open years."

Retroactivity "is one of the most important practical questions facing employers and plan sponsors" following the DOMA ruling, added Joanne Youn, an ERISA and benefits law attorney at Caplin & Drysdale in Washington, D.C. "While the court did not specifically address retroactivity broadly, the decision arose out of a claim for refund of estate taxes paid by a same sex-spouse in a prior tax year. The IRS has authority under existing law to grant relief from retroactivity; however, even if it were to do so, its authority would not extend to other statutes affecting employee benefits, such as ERISA."

The decision references the fact that "over 1,000 federal laws contain provisions specifically applicable to spouses that may be affected and should be coordinated," Youn noted. "Therefore, I would expect that additional guidance will be issued in the coming months."

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Deferring to State Law

Rita F. Lin, a partner at Morrison Foerster in San Francisco, said that many federal laws governing spousal benefits do not contain a statutory definition indicating which law governs whether an individual is “married.”

“Typically, federal laws defer to state law on this issue,” Lin explained, “but it will often be an open question under choice-of-law principles whether the applicable state law is the law of the state in which the couple was married or the state in which the couple currently resides. Some federal statutes (e.g., Social Security) look to whether a couple is married at the time that benefits are sought, which may suggest that the law of the state of current residence will apply. Others (in the immigration context) look to the state where the couple was married.”

Lin revealed that there are “rumors that the administration may be considering an executive order that directs federal agencies, in interpreting federal statutes, to treat the state where the marriage celebration occurred as the governing state for purposes of determining whether couples are married.” She added: “I would note that, though there may be some short-term confusion, this is not technically a new issue. The states vary in their definitions of marriage on issues like common-law marriage, first-cousin marriage and age of eligibility, so this could always be an issue when married couples move to a new state that does not recognize their marriage. Of course, the issue is now going to be presented on a much larger scale than before, so we may see an attempt to resolve this in a more uniform fashion.”

Presidential Action

Similarly, Hunter T. Carter, a litigation partner at Arent Fox in New York and Washington, D.C., said: “The president is crucial to implement the Supreme Court decision overturning DOMA, and employers will be watching to see what the president does. Everywhere he can do so, President Obama is expected to approve regulations and interpretations that apply the term ‘spouse’ to same-sex couples who were legally married, regardless where the couple was from or has moved.”

Changing regulations that define “spouse" may take longer than an executive order, Carter said, “but again, President Obama will be crucial. Currently, the IRS and Social Security determine marriage status by where the couple lives, not where they married, so anyone in the 38 states that don't yet recognize or allow same-sex marriage will be unmarried for IRS and Social Security purposes until regulations can be changed. This is true even though they are otherwise identical to their neighbors who may have married in another state, like New York, which also allows same-sex marriage. Other agencies will not need to change, like the Defense Department, which interprets marital status based on where the couple was married.”

Adjusting Systems, Awaiting Guidance

“The impact of the ruling may be very broad, potentially affecting hundreds of laws and regulations upon which payroll, HR and employee benefits systems are based. Additionally, its effect may not be clear until the various federal and state regulatory authorities issue revised guidance,” commented payroll and benefits administrator ADP, which is assessing the impact of the ruling on federal laws including the Internal Revenue Code, COBRA and the Family and Medical Leave Act (FMLA).

Pointing to unresolved issues facing plan sponsors that operate nationally, Scott Macey, president of the ERISA Industry Committee (ERIC), which advocates for employers, issued a comment noting:

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"[The] rulings by the U.S. Supreme Court could have a significant impact on the way employee benefit plans are administered. Companies will need to carefully evaluate their plans in light of these decisions…

"Notably, the decisions leave many issues unanswered. Among the issues that will need to be addressed further include how quickly plans will need to act as a result of the Court's decisions and the best methods for implementing these changes. Employers clearly will want to review their current plans and policies with respect to same-sex spouses to determine whether they are in compliance with applicable post-decision rules, determine what actions need to be taken, and what areas might need further clarification from the federal government or the courts."

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