



## UPDATE Employee Benefits and Compensation

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# Supreme Court Same-Sex Marriage Ruling Significantly Affects Employee Benefit Plans

This week, the United States Supreme Court issued a landmark opinion in the case of *United States v. Windsor*. The case centered around Section 3 of the Defense of Marriage Act (DOMA), a federal law enacted in 1996, which defines "marriage" as the legal union between one man and one woman and "spouse" as only a person of the opposite sex who is a husband or a wife. These definitions apply for purposes of all federal laws and have had the effect of denying access to federal benefits, and the protection of federal laws, to same-sex spouses. In *Windsor*, the Court found that Section 3 of DOMA violated basic due process and equal protection principles and was thus unconstitutional. The Court reasoned that the definition and regulation of marriage has historically been within the authority of each state, and DOMA's deviation from this tradition "operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."

The effect of the decision is that same-sex marriages that are legal under state law will now be recognized for purposes of federal law. Same-sex marriage is currently legal in nine states—Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Washington, Maine, and Maryland—and in the District of Columbia. It will soon be legal in three additional states, Rhode Island, Delaware, and Minnesota, and California will soon be added to this list as the result of the Court's decision this week in the case of *Hollingsworth v. Perry*, which addresses California's anti-same-sex marriage ballot initiative known as Proposition 8.

The implications of this decision may be staggeringly far reaching. Although the *Windsor* plaintiff's claim involves the federal estate tax, the Government Accountability Office reports that there are over 1,000 federal laws under which benefits, rights, and privileges are contingent on marital status or under which marital status is a factor. Because employee benefit plans are generally governed by two federal laws, ERISA and the Internal Revenue Code (Code), this decision could have significant implications for plan sponsors and their employees who are legally married to a same-sex spouse.

### CONSEQUENCES OF THE COURT'S RULING

The following is a brief summary of some, but certainly not all, of the ways employee benefit

plans may be affected by the *Windsor* decision. For purposes of this summary, a "same-sex spouse" refers to an individual who is legally married to a person of the same sex in a state where such marriages are permitted by law.

The decision could have some major tax implications for employers in terms of both tax reporting and tax withholding and for employees with regard to inclusion in amounts in income and payroll taxes. Some possibilities include the following:

- **Tax Treatment of Insurance Premiums.** Prior to *Windsor*, plan participants obtaining health care coverage for a same-sex spouse were unable to pay for the portion of coverage attributable to such spouse on a pretax basis, and any employer contributions towards such coverage were treated as wages includible in income and subject to payroll taxes. Following *Windsor*, these premiums may be paid on a pretax basis, and employer contributions may be excluded from income and payroll taxes.
- **Reimbursement and Spending Accounts.** Employees can now use a Health Savings Account (HSA), Health Reimbursement Arrangement (HRA), or Flexible Spending Account (FSA) to pay for their same-sex spouse's medical expenses with pretax dollars unless an HRA or FSA specifically prohibits such reimbursement.
- **Retirement Plans.** Retirement plan provisions applicable to spouses, including the right to roll over death benefits to another plan and an expanded right to delay payment of a death benefit, may now apply to a same-sex spouse.

The decision also permits recognition of existing federal rights previously extended only to opposite-sex spouses. Some possibilities include the following:

- **Spousal Consent.** The Code requires spousal consent if a participant wishes to name someone other than the spouse as a retirement plan beneficiary. This consent should now apply to a same-sex spouse.
- **Benefit Rights Following Divorce.** The Code permits a former spouse to obtain a right to a portion of a participant's retirement plan benefits through a qualified domestic relations order. These orders would now appear to be enforceable with respect to same-sex spouses.
- **Death Benefits.** The Code requires that a spouse have certain death benefit rights, including, with respect to some plans, qualified joint and survivor annuities and preretirement survivor annuities. These death benefit rights may now be available to same-sex spouses.
- **Hardship Distributions.** The Code permits early withdrawals known as "hardship distributions" in specific cases of financial hardship, some of which involve expenses of the participant's spouse. These withdrawals may now be taken to pay for a same-sex spouse's permissible hardship expenses.
- **Cafeteria Plan Elections.** The Code only permits midyear cafeteria plan election changes if a "change in status" occurs. A same-sex spouse should now be recognized for purposes of these rules.
- **COBRA and HIPAA.** A same-sex spouse should now be entitled to COBRA

continuation coverage following a qualifying event and special enrollment rights under HIPAA.

## WHAT NOW?

At this point, there are more questions than answers about what the Court's ruling will mean for employee benefit plans. Although certain changes will need to be made to employee benefit plans, there is no guidance as of yet on *how* these changes will be made. It is expected that the Internal Revenue Service and the Department of Labor will each need to issue guidance about when and how changes must be made, including whether any retroactive changes are required or permitted and how to address tax withholding and other midyear changes. Guidance is also needed on what an employer must do if some or all of its operations are in a state that does not recognize same-sex marriage. Also, third-party administrators, payroll service providers, insurers, and other plan service providers will need to update their systems, documents, and policies to accommodate the new status of same-sex spouses.

## NEXT STEPS

Although much is uncertain, it is obvious that change is coming. For that reason, employers may want to begin discussions now with their third-party administrators, insurers, payroll providers, and legal counsel about what comes next. Employers may also want to consider how they will communicate these changes to their employees and address the inevitable employee inquiries arising from the tremendous attention this case has received in the media and other public forums.

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