



U.S. Supreme Court Strikes Down Portion of DOMA as Unconstitutional: The Impact of the Decision on Employee Benefit Plans

On June 26th, the U.S. Supreme Court issued its ruling in *United States v. Windsor*. In a 5-4 decision, the Court concluded that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional as applied to lawful marriages. This decision has an extremely widespread impact, as it affects more than 1,000 federal statutes and related regulations, rulings and guidance. Among many other things, this ruling will affect employee benefit plans, the employers maintaining them and the individuals participating in them. This Alert provides a brief background regarding DOMA, the potential impact of the Supreme Court's ruling on employee benefit plans, unanswered questions and steps employers should take to prepare to ensure that their plans comply with applicable law in light of the ruling.

Background

DOMA was enacted in 1996, after a number of states began contemplating making marriages between same-sex couples legal. Section 3 of DOMA effectively implemented a federal definition of "marriage" and "spouse" by providing that, for purposes of interpreting any federal statute, or any federal bureau or agency's regulation, ruling or guidance with respect to a federal statute, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." Thus, regardless of whether a same-sex couple was legally married under state law, they could not be treated as being married or spouses for the purpose of any federal law for which those terms were relevant. Now, parties to a lawful marriage can be treated as married under federal law.

It is important to note that the *Windsor* case did not involve Section 2 of DOMA, which provides in essence that no state, territory, or possession of the United States, or Indian tribe, is required to treat as married a same-sex couple that was treated as married under the laws of another state, territory, possession or tribe. Thus, for example, if a same-sex couple that was married in Massachusetts (which recognizes same-sex marriage) moved to Florida (which does not recognize same-sex marriage), Florida would not be required to recognize the couple as married.

Effect on Employee Benefit Plans

Most employee benefit plans are subject to rules and requirements under the Internal Revenue Code of 1986 as amended (the Code) and the Employee Retirement Income Security Act of 1974, as amended (ERISA). In various respects, these statutes contain provisions that apply in the event a plan participant has a “spouse.” Neither the Code, nor ERISA nor the regulations issued under them, contain a definition of the term “spouse.” Nevertheless, for the purpose of applying the provisions relating to spouses, it has long been the practice to treat as spouses, for purposes of ERISA and the Code, individuals who were spouses under applicable state law, subject to the limitation on same-sex spouses imposed by Section 3 of DOMA. In many cases, however, a plan will contain its own specific definition of “spouse” that will govern the administration of the plan to the extent not inconsistent with applicable law.

Now that Section 3 of DOMA has been ruled unconstitutional with respect to lawful marriages, various aspects of the administration of employee benefit plans may be expected to change with respect to lawfully married same-sex spouses. The following are the key benefit rules that can be expected to be affected by the unconstitutionality of Section 3 of DOMA.

Qualified Retirement Plans

- > *Death Benefit Protection for Same-Sex Spouses.* In the absence of Section 3 of DOMA, spouses of participants in both defined contribution plans (such as 401(k) plans) and money purchase and defined benefit pension plans may be expected to have some protection upon the death of a same-sex spouse who participated in the plan.
 - Under a defined contribution plan, the same-sex spouse of a participant may be required to be the death beneficiary of the participant’s entire plan account, unless the same-sex spouse consents in writing to the designation of a different beneficiary.
 - Defined benefit and money purchase pension plans must provide a “qualified preretirement survivor annuity” and a “qualified joint and survivor annuity” with respect to the benefits of a married participant. Unless he or she consents in writing otherwise, the same-sex spouse of a participant may be required to be the annuitant in the case of the preretirement survivor annuity and the contingent annuitant under the joint and survivor annuity.
- > *Division of Plan Benefits in Divorce.* In the event of the divorce of a same-sex married couple – as is the case of a divorce of an opposite-sex couple – a court may issue a “qualified domestic relations order” (or QDRO). To the extent it apportions retirement plan benefits, a retirement plan may be required to follow the terms of the QDRO.
- > *Timing of Required Distributions Following the Death of the Participant.* The Code requires that a participant’s benefit be distributed within a specified time after the death of the participant. For

the purpose of satisfying this requirement, if a same-sex spouse is the death beneficiary, distributions may be able to be deferred until the time when the participant would have attained age 70-1/2, rather than being required to be made within five years, or commence within one year, of the participant's death.

Health Plans

- > *Income Tax Consequences of Employer-Provided Health Coverage.* If an employer provides health plan coverage for same-sex spouses and subsidizes the cost of that coverage, DOMA caused the subsidy amount to create imputed income for the employee unless the same-sex spouse qualified as the employee's tax dependent. After *Windsor*, the employer subsidy may be excluded from gross income regardless of dependent status.
- > *Pre-Tax Payment of Cost of Spousal Coverage.* The cost to an employee of health plan coverage for a same-sex spouse may now be able to be paid on a pre-tax basis through a Section 125 plan, even if the spouse is not the employee's tax dependent.
- > *Use of Flexible Spending Account and Health Savings Account Funds.* FSA and HSA funds may now be able to be used for same-sex spouse's expenses, even if the spouse is not employee's tax dependent.
- > *Change in Section 125 Plan (Cafeteria Plan) Elections.* Same-sex marriage and divorce may constitute a change in status that would allow a participant to change his or her election of certain coverage under a cafeteria plan.
- > *HIPAA Special Enrollment Rights.* Upon marrying a same-sex spouse, an employee may have HIPAA special enrollment rights entitling him or her to enroll the new spouse in the employer's health plan.
- > *Rights to Continuation Coverage under COBRA.* A same-sex spouse may have the right to elect COBRA continuation coverage upon divorce and an independent right to COBRA coverage on the employee-spouse's loss of coverage on termination of employment or a reduction in hours of work.

Open Questions

A number of important issues relating to the impact of the *Windsor* case on the administration of employee benefit plans remain unanswered. Perhaps the three most significant questions are:

1. To what extent might the decision in *Windsor* be required to be given retroactive effect?
2. How soon must employers and plan administrators adapt benefit plan operations to reflect the effect of the *Windsor* decision?
3. If a same-sex couple marries in a state that recognizes same-sex marriages and later relocates to a state that does not recognize same-sex marriages, is the employee considered married for employee benefit plan purposes?

This last question is a particularly intriguing one in light of the fact that Section 2 of DOMA was not at issue in the case and, therefore, under that provision, one state still is not obligated to recognize a marriage that is valid in another state.

Because of these questions, we would advise employers to proceed thoughtfully but cautiously. President Obama has been reported as saying that lawyers in his administration are working out the details of what the Supreme Court rulings will mean. In addition, Secretary Sebelius is quoted as having said “[t]he Department of Health and Human Services will work with the Department of Justice to review all relevant federal statutes and ensure this decision is implemented swiftly and smoothly.” We will continue to monitor these issues so as to be able to provide additional meaningful guidance as quickly as possible.

Action Steps for Employers

Notwithstanding the unanswered questions relating to the scope and impact of the *Windsor* decision, employers should still take steps now to be able to respond as promptly as possible as these questions are answered.

First and foremost, an employer should identify each of its plans under which the marital status of an employee or plan participant is relevant. Each plan document will need to be reviewed to determine how the term “spouse” is defined and to identify any other potentially relevant provisions. The employer can then analyze how the plan would operate under its current terms following the Supreme Court’s decision and determine whether any changes are needed either to bring the plan into compliance with applicable law or to reflect the manner in which the employer wants the plan to operate.

Further, each employer maintaining benefit plans subject to ERISA has in place a functioning fiduciary, such as a benefits administration committee, who is available to decide questions that may arise concerning the operations of the plan following the Supreme Court’s decision. The employer needs to be certain that there is a process in place for responding to what may be considered claims for benefits in a manner that complies with ERISA’s fiduciary duty standards.

In addition, implementation of any changes to benefit plans and employee policies will likely be a “multidisciplinary” effort. Accordingly, an employer should identify the appropriate personnel from human resources, payroll, finance, tax and accounting functions who are responsible for this implementation effort so that they can be prepared to act promptly upon the issuance of relevant guidance.

This *GT Alert* was prepared by **Ian Herbert**. Questions about this information can be directed to:

- > [Ian Herbert](mailto:herberti@gtlaw.com) | 703.749.1302 | herberti@gtlaw.com
- > Or your [Greenberg Traurig](#) attorney

Albany 518.689.1400	Denver 303.572.6500	New York 212.801.9200	Silicon Valley 650.328.8500
Amsterdam + 31 20 301 7300	Fort Lauderdale 954.765.0500	Orange County 949.732.6500	Tallahassee 850.222.6891
Atlanta 678.553.2100	Houston 713.374.3500	Orlando 407.420.1000	Tampa 813.318.5700
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Boston 617.310.6000	Los Angeles 310.586.7700	Sacramento 916.442.1111	Warsaw[~] +48 22 690 6100
Chicago 312.456.8400	Mexico City⁺ +52 55 5029.0000	San Francisco 415.655.1300	Washington, D.C. 202.331.3100
Dallas 214.665.3600	Miami 305.579.0500	Seoul[∞] 82-2-369-1000	West Palm Beach 561.650.7900
Delaware 302.661.7000	New Jersey 973.360.7900	Shanghai +86 21 6391 6633	White Plains 914.286.2900

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