

July 9, 2013

DOMA Decisions Impact on Welfare Plan Administration

The Supreme Court's same-sex marriage decisions struck down a key provision of the Defense of Marriage Act (DOMA) which stated that marriage must be between a man and a woman. The result is those states that recognize same-sex marriage must treat same-sex spouses the same as opposite-sex spouses. But the DOMA ruling does not force same-sex marriage on states that do not recognize same-sex marriage and does not require them to issue same-sex marriage licenses or recognize same-sex marriages performed elsewhere.

The DOMA rulings will have a significant impact on employer-sponsored welfare benefit design and administration. Companies will need to carefully evaluate their plans in light of these decisions and determine what actions need to be taken, and what areas might need further clarification from the agencies or the courts. From a welfare benefit perspective, the rulings impact the design and taxation of group health benefits, COBRA health coverage elections, and special enrollment rights under HIPAA. As a result of the decisions, employers will need to revisit their plan "spouse" definitions and domestic partner policies, and update tax reporting systems, enrollment forms, beneficiary forms, SPDs, and other communications.

The Decisions

DOMA, enacted in 1996, provided that the word "marriage" in any federal context (including for employee benefits) means only "a union of a man and a woman." On June 26th, opinions were issued in two cases related to the legal status of same-sex marriage:

- In [U.S. v. Windsor](#), Section 3 of DOMA, which bars federal recognition of same-sex marriages, was found to be unconstitutional. Section 3 defined the terms "marriage" and "spouse" as excluding same-sex partners for purposes of the federal tax code, ERISA, and more than 1,000 other federal laws. The majority of the Court ruled that Section 3 violates the Constitution's equal protection clause by singling out a class of persons entitled to marry under state law. The result is "marriage" and "spouse" must now include same-sex partners legally wed under state law for purposes of the application of federal laws. However, Section 2 of DOMA, which provides that states do not have to recognize same-sex marriages performed in other states, was not found unconstitutional and remains in effect.
- In [Hollingsworth v. Perry](#), the Court found that it did not have jurisdiction to decide on California's voter ban on same-sex marriage (Proposition 8), which prohibits same-sex marriage in California. As a result, Proposition 8 still stands in California, but the specific parties to the case may marry. Further action by judges or state officials may be needed to determine the impact on other Californians, although many believe that California will ultimately interpret this decision to allow same-sex marriage in California.

Employers must now be mindful of significant variations in state laws regarding same-sex couples.

States that Allow Same-Sex Marriage

The Supreme Court ruling means that same-sex married couples should have the same benefits and rights that opposite-sex married couples have under federal law. Current states allowing same-sex marriage include Connecticut, Delaware (starting July 1), the District of Columbia, Iowa, Maine, Maryland, Massachusetts, Minnesota (Aug. 1), New Hampshire, New York, Rhode Island (Aug. 1), Vermont, and Washington (California remains uncertain). The application of the tax and ERISA rules in these states are now very clear. Same-sex spouses must be treated the same as opposite-sex spouses. This means for a legally married couple who were married in and live in a state where same-sex marriage is recognized:

- companies must treat employees' same-sex and opposite-sex spouses equally for purposes of the benefits extended to spouses (insured plans are already accustomed to covering same-sex spouses in states that recognize same-sex marriage);
- employers sponsoring self-insured welfare plans 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, legal challenges under federal discrimination law will likely be filed);
- employees will no longer have to pay federal income taxes on the income imputed for an employer's contribution to a non-tax dependent same-sex spouse's medical, dental or vision coverage;
- workers can pay for same-sex spouses' coverage on a pretax basis under a Section 125 plan;
- employers must reimburse qualifying expenses of same-sex spouses for health FSAs, HSA, HRAs and for DCAP plans;
- businesses will have to offer COBRA continuation coverage to same-sex spouses and provide HIPAA special enrollment rights to spouses;
- employees must be permitted to take family and medical leave to care for an ill same-sex spouse; and
- employees who are legally married to same-sex partners will want to consider possible retroactivity issues for IRS and employment tax refunds, and amend their W-4 forms, updating their tax filing status as "married."

States that Do Not Allow Same-Sex Marriage

The Supreme Court ruling does not guarantee federal benefits and rights for same-sex and opposite-sex partnerships that states and plans may recognize, such as domestic partnerships and civil unions. Therefore, the DOMA ruling does not force same-sex marriage on the other 38 states and does not require them to issue same-sex marriage licenses or recognize same-sex marriages performed elsewhere. In these states, the tax and imputed income rules for domestic partner/civil union couples remains the same (the DOMA rulings only apply to same-sex marriages, not domestic partner/civil union partnerships). However, the rulings do raise important questions for employers regarding how to treat same-sex spouses who were married in a state that recognizes same-sex marriage and then move to a state, such as New Jersey or Pennsylvania, which do not recognize same-sex marriages. Additional guidance is needed to know for sure, but state of residence will likely apply for tax filing and imputed income purposes. IRS guidelines are expected to be developed and more lawsuits are expected to be filed that deal with the state-to-state gray areas. In the meantime, plans that cover domestic/civil union partners should revisit those policies and decide whether to extend benefits to someone now wishing to get married.

Employer Benefits Obligations Post-DOMA

All employers, even those who are not in states that recognize same-sex marriage, will need to take appropriate actions. Key benefits implication steps include:

- consider carefully the scope of the decision and various issues relating to the implementation and effective date of the decision with regard to various issues;
- review plan eligibility rules to determine whether amendments may be needed to take into account benefit and administration changes in response to the Court's decisions;
- decide whether to keep or modify eligibility rules related to same-sex married couples, domestic partners, partners in civil unions, and their dependents;
- review plan recordkeeping to determine whether plan participants are married (as opposed to being in domestic partnerships or civil unions) and where they reside; and
- be prepared to field employee questions about their rights with regard to various employee benefits.

The DOMA decisions have wide-ranging implications for employee benefit plans. The [President has directed](#) his administration to review relevant federal statutes and the IRS has stated that it will issue guidance on the impact of the Court's DOMA decisions in the near future. Other agencies (such as DOL) may also issue guidance. While it is advisable to begin reviewing elements such as plan eligibility descriptions and related definitions, plan sponsors may want to wait until agency guidance becomes available before taking action.

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