

Same-Sex Marriage Requires Changes to Employee Benefit Plans

Following the invalidation of the Defense of Marriage Act, employers need to implement changes now and should prepare for others once formal government guidance is received. Employers should also consider implications for domestic partners.

As a result of the US Supreme Court decision in *United States v. Windsor*, 570 U.S. ___ (2013), US employers will have to make changes to their retirement and welfare plans, and the administration of such plans. Although the decision has some immediate effects, others remain unclear. Therefore, while waiting for the government to issue formal guidance, employers should review their plans, find out which of their employees have same-sex spouses and think about how broadly (beyond what is legally required) they want to extend coverage to this group.

Before the *Windsor* decision, same-sex marriages could not be recognized for federal law purposes. Instead, the Defense of Marriage Act (DOMA) required that for all federal law purposes, the term “spouse” only applied in the context of a marriage between a man and a woman. As a result, same-sex spouses did not have the same rights as opposite sex spouses did under employee benefit plans, unless the plan specifically provided for them.

Additionally, although many employers voluntarily extended welfare plan coverage to same-sex spouses, civil union partners and domestic partners, DOMA complicated the administration of these plans, as benefits for those individuals were treated differently than for opposite sex spouses for state and federal tax purposes. Some employers grossed employees up for the extra taxes in order to provide a tax neutral benefit, but this also compounded the administrative challenges.

After *Windsor*, ambiguity remains about whether or not any welfare plan must offer coverage to same-sex spouses. However, insured plans in states that recognize such marriages will likely automatically provide for that coverage. Self-insured plans may not be required to do so under current law but may want to in order to preserve uniform treatment across states and to avoid potential liability for treating same-sex and opposite sex spouses differently.

Today, same-sex marriages are allowed in California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington and the District of Columbia. Minnesota and Rhode Island will join that list on August 1, 2013. Although other states allow civil unions or domestic partnerships with similar or equivalent rights, and many employers extend benefits to those partners, the *Windsor* decision does not apply to them. However, future government guidance might address those relationships as well.

The following sets forth a quick checklist of items the *Windsor* decision raises for same-sex spouses:

Welfare Plans

- **End of Imputed Income.** Employer-paid coverage is now available on a federal tax-free basis, so there will be no imputed income. Additionally, the employee's share of the premium for the spouse can be paid on a pre-tax basis.
- **Eligible Reimbursements.** Expenses are eligible for reimbursement under employees' flexible spending accounts, health reimbursement accounts and health savings accounts.
- **HSA Limits Apply Jointly.** Contributions to health savings accounts are capped at the limit for married couples. Also, a spouse's health plan coverage will now be considered for HSA eligibility.
- **Default Beneficiary.** A same-sex spouse will qualify as a spouse under any plans (e.g., life insurance) which provide that the spouse is the default beneficiary or otherwise provide for spousal benefits (e.g., retiree health and life).
- **COBRA.** Same-sex spouses are now entitled to COBRA notices and continuation coverage rights.
- **Dependent Care.** Income earned by a same-sex spouse will be included in determining limits under dependent care plans.

Qualified Retirement Plans

Under qualified retirement plans, same-sex spouses:

- Will be entitled to receive survivor annuity notices and rights
- Will be the default beneficiary and have the right to consent before anyone else is named as the beneficiary
- Must be considered in the calculation and timing of required minimum distributions at age 70½
- Must be able to obtain Qualified Domestic Relations Orders
- May roll over eligible survivor benefits to an IRA
- Must have needs considered for availability of hardship withdrawals
- Will be required to consent to participant loans where consent is required under a plan.

Additionally, the recognition of same-sex spouses marriages will affect when employees are credited with service for certain medical leaves related to the spouse and may affect the funding of defined benefit plans to the extent the addition of these spouses changes actuarial assumptions.

Nonqualified Plans

To the extent spouses have any rights under nonqualified plans, such as being the default beneficiary or receiving survivor annuities under supplemental executive retirement plans and top-hat defined benefit plans, they are available to same-sex spouses.

Immediate Action Items

Employers should:

- Immediately stop imputing income for welfare plan benefits received by same-sex spouses
- Establish procedures for determining the marital status of same-sex couples
- Review benefit plans to determine if any of them limit the definition of “spouse” to opposite sex spouses
- Provide initial COBRA notices to same-sex spouses and COBRA elections upon the divorce of same-sex spouses
- Notify employees regarding new tax treatment for health benefits, the default beneficiary status of same-sex spouse and ability to make changes in welfare benefit elections for future same-sex marriages, divorces, etc.
- Consider whether to allow immediate welfare plan election changes for those employees who had a same-sex spouse before the *Windsor* decision was issued on June 26, 2013

Future Action Items

Employers should:

- Consider whether to continue offering same-sex domestic partner benefits in states that allow same-sex marriage
- Consider how the *Windsor* decision will affect same-sex couples when the employee is transferred from a state that recognizes same-sex marriage to one that does not
- Consider whether to file for FICA tax refunds for prior years. For 2013, the employer may true-up future FICA liability for overpayments already made in 2013.
- Wait for guidance on whether the *Windsor* decision will apply retroactively, resulting in grants of retroactive benefits

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