The Supreme Court's DOMA Decision: What Does it Mean for Employee Benefit Plans?

July 15, 2013 Mona Clee 650.335.7279

Fenwick FENWICK & WEST LLP

Section 3 of Defense of Marriage Act Held Unconstitutional

On June 26, 2013, in *U.S. v. Windsor,* the United States Supreme Court struck down the portion of the Defense of Marriage Act ("DOMA") that defined marriage as a legal union between one man and one woman. This decision will have a significant impact on the design and operation of employee benefit plans in states that permit same-sex marriage. Benefit plans covering employees in states that do not yet permit same-sex marriage may also be affected. However, because the Supreme Court struck down only a portion of DOMA, many questions remain concerning the impact of the decision on benefit plans, and further guidance is needed.

Before the *Windsor* ruling, federal law could not recognize same-sex marriages, even if legally entered into in states or countries in which same-sex marriages were permitted, and federal tax benefits could not be extended to same-sex spouses of employee benefit plan participants.

The Supreme Court held that Section 3 was unconstitutional on the grounds that it violated the basic due process and equal protection rights of same-sex couples who were legally married pursuant to the laws of their state of residence. However, the Court left Section 2 of DOMA intact. Under Section 2, states can still refuse to recognize same-sex marriages entered into in other states or jurisdictions.

To make matters more complicated, for purposes of determining eligibility for many federal benefits, federal law has traditionally looked to the law of the state in which an individual resides—not the law of the state in which an individual was married—to determine if such individual qualifies as a spouse for purposes of federal law. With Section 3 of DOMA invalidated, federal law can now treat as married any legally married same-sex individuals who still reside in a state permitting same-sex marriage. In the case of same-sex individuals who were legally married under the law of one state, but who have moved and now reside in a state that does not recognize same-sex marriage, it is not clear whether federal law can look back to the state of marriage in determining marital status. However, this may be changing – and changing rapidly.

In an announcement issued immediately after the *Windsor* decision, the Obama Administration provided that federal agencies will be directed to make federal employee benefits available to individuals in same-sex marriages, so long as such marriages were lawfully entered into in a state where same-sex marriages were legal—even if the federal employee and his or her same-sex spouse currently reside in a state that does not permit same-sex marriages. This may be an indication of the approach that future regulatory agency guidance will take regarding the administration of employee benefit plans post-*Windsor*.

In addition, on June 26, 2013, Senator Dianne Feinstein and Representative Jerry Nadler introduced the Respect for Marriage Act. This Act would repeal the surviving Section 2 of DOMA and require that for purposes of any federal law in which marital status is a factor, the federal government would have to recognize valid same-sex marriages entered into in states that permit such marriages.

DOMA and Employee Benefit Plans

So where does the *Windsor* decision leave employer-sponsored benefit plans? While qualified retirement plans and group health plans are subject to federal laws such as ERISA and the Internal Revenue Code, they are also established by employers located in states, many of which have passed their own "mini-DOMA" laws and do not currently recognize same-sex marriages.

The decision will clearly have a significant impact on the design and operation of benefit plans in states that permit same-sex marriage. Employer-sponsored benefit plans covering employees residing in states that do not

yet permit same-sex marriage may also be affected, depending on the content of future guidance. Multi-state employers who maintain a presence in states recognizing same-sex marriage and in mini-DOMA states will face complex challenges in operating their benefit plans. Many questions will remain unanswered until the Internal Revenue Service and the Department of Labor issue further guidance.

What Employers Should Do

The employee benefit questions arising from the *Windsor* decision are numerous and complex. While waiting for additional governmental guidance, there are steps that employers can take to prepare for the impact of the decision on their benefit plans.

Employers located in states that permit same-sex marriage. Employer sponsors of benefit plans located in these states should review their benefit plans to determine if the plans discriminate against same-sex spouses, and begin working with their benefit plan providers to revise the plans, if necessary, to ensure that same-sex spouses and opposite-sex spouses are treated equally. Such employers should also keep in mind that the *Windsor* decision applies only to same-sex *marriages* entered into in states where same-sex marriage is legal, not to domestic partnerships and civil unions that may be permitted in such states. Employers may still wish to review their benefit plans to ensure that employees who have entered into domestic partnerships or civil unions are also treated equally, wherever possible.

Qualified Retirement Plans (including 401(k) plans)

Qualified retirement plans maintained by employers in states that permit same-sex marriages should be reviewed and revised to determine that same-sex spouses and opposite sex spouses are treated equally. The following are just a few examples of the changes to qualified retirement plans that appear necessary. When additional federal agency guidance is available, more changes may be required.

- a plan participant with a same-sex spouse must now obtain the same-sex spouse's notarized consent to name a non-spouse beneficiary;
- if a plan participant dies, his or her same-sex spouse may delay distribution of the participant's plan benefit until the participant would have attained age 70-1/2;
- a plan participant with a same-sex spouse may take hardship withdrawals from a defined contribution plan (assuming that the plan permits such withdrawals) in connection with certain expenses incurred by the spouse;
- the same-sex spouse of a plan participant is entitled to a qualified joint and survivor annuity if such form of benefit is offered under the plan;
- if a plan participant dies, his or her same-sex spouse must be allowed to rollover the participant's plan benefit to another employer-sponsored qualified plan or to an IRA; and
- if a participant's same-sex marriage terminates, the participant's spouse will be considered an alternate payee under a qualified domestic relations order ("QDRO")

Health & Welfare Plans

Health and welfare plans maintained by employers in states permitting same-sex marriages should also be reviewed to determine that that same-sex spouses and opposite sex spouses are treated equally. Pending the receipt of further guidance, it is likely that the following changes must be made.

- if employer sponsors of group health plans offer coverage to their employees' spouses, they will be able to offer such coverage to same-sex spouses on a pre-tax basis;
- same-sex spouses will now be eligible for health care continuation coverage under COBRA and will be eligible for HIPAA special enrollment rights;
- an employee can now receive tax-free reimbursements from flexible spending accounts, health reimbursement arrangements, and health savings accounts for medical expenses incurred by a same-sex spouse.

Employers located in states that do not permit same-sex marriage. Employer sponsors of benefit plans located in states that do not currently permit same-sex marriage may still wish to determine if any of their employees have entered into same-sex marriages

in other jurisdictions and revise their plans to treat same-sex and opposite-sex spouses equally, to the extent possible. Such employers should also monitor forthcoming guidance, which may clarify whether federal law will look to the law of the state in which an individual was married to determine whether such individual is a spouse.

Employers will have to work with their benefit plan providers to revise their plan documents, which may add another layer of complexity to the undertaking. A provider in a mini-DOMA state, for example, may not wish to revise its plan documents to reflect equal treatment of same-sex spouses until future developments or guidance make such treatment mandatory. In the case of fully-insured group health plans, state insurance laws in mini-DOMA states may also affect the provider's ability to make such changes.

Ms. Clee is of counsel in the Corporate Group and in the Employee Benefits Group. Ms. Clee practices out of the firm's Mountain View, California, office. Her practice concentrates on ERISA and employee benefit matters, including 401(k) and other tax-qualified retirement plans, health and welfare plans and cafeteria plans, COBRA, HIPAA, and the role of employee benefit plans in mergers and acquisitions.