

# Benefits for Domestic and Same-Sex Partners in a Post-DOMA World: What's New and What's Next?

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## Symposium

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## Federal Law

- Federal DOMA (enacted in 1996) (110 Stat. 2419; PL 104-199)
  - Section 3 provided that, for purposes of federal law, 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.
  - Section 2 allows states to refuse to recognize other states’ same-sex marriages.
  - The U.S. Supreme Court ruled Section 3 of DOMA unconstitutional in June 2013 (*United States v. Windsor*, 570 U.S. 12 (2013)). Section 2 was untouched.

## Federal Law *(continued)*

- Federal DOMA (enacted in 1996) (110 Stat. 2419; PL 104-199)
  - In July 2013 in the *Windsor* case, the Supreme Court ruled that Section 3 of DOMA was unconstitutional “as a deprivation of the liberty of the person protected by the Fifth Amendment.”
  - **Section 2 of DOMA remains valid law.** Section 2 of DOMA stipulates that no state shall be required to recognize a same-sex relationship that is considered a legal marriage in another state, or to recognize a right or claim arising from such a relationship.
    - A vast majority of states have passed mini-DOMAs, which prevent the states from recognizing same-sex marriages performed in other states.
  - Same-sex partners in a civil union or domestic partnership will not be recognized under federal law and will not be afforded federal spousal benefits or protections.

# State Laws

## ■ Same-Sex Marriage

- Legal in Massachusetts (2004), Connecticut (2008), Iowa (2009), Vermont (2009), New Hampshire (2010), Washington, D.C. (2010), New York (2011), Washington (2012), Maine (2012), Maryland (2012), Rhode Island (2013), Delaware (2013), Minnesota (2013), California (2013), New Jersey (2013), Hawaii (2013), New Mexico (2013), Illinois (2014), Oregon (2014), Pennsylvania (2014), and Wisconsin (2014).
- Federal courts in Arkansas, Florida, Idaho, Indiana, Kentucky, Ohio, Michigan, Oklahoma, Texas, Utah, Virginia, and Wisconsin found each state's ban on same-sex marriage unconstitutional. The rulings have been stayed pending appeal. Marriages took place in Arkansas, Michigan and Utah prior to the stay of the lower court rulings. The Wisconsin federal court's ruling has not yet been stayed, but the court will consider staying its ruling. The Kentucky ruling applies only to the recognition of out-of-state same-sex marriages.
- Same-sex marriage is also legal in many countries outside of the United States.
- All states other than those listed above do not recognize same-sex marriages.

# Which State's Law Matters?

- “State of Residence” vs. “State of Celebration”
  - IRS Notice 2014-19 permits retirement plans to be administered using a State of Residence rule beginning June 26, 2013, and requires retirement plans to be administered using a State of Celebration rule beginning September 16, 2013.
  - DOL is using a State of Celebration rule for purposes of interpreting ERISA.
  - DOL is using a State of Residence rule for FMLA coverage, but intends to adopt a State of Celebration rule in the future (guidance has not yet been issued).

# Impact on Health and Welfare Plans

- Insured Plans

- Same-sex spouses must be extended spousal benefit coverage under insured medical, dental or vision plans in states that allow same-sex marriage.
- HHS issued guidance in March 2014 requiring insurers to offer the same coverage to same-sex spouses that is offered to opposite-sex spouses. Employers in states where same-sex marriage is not legal, however, may continue to have discretion regarding whether or not to offer coverage to same-sex spouses.

## Impact on Health and Welfare Plans *(continued)*

- Self-Insured Plans

- Same-sex spouses technically are not required to be extended spousal benefit coverage under self-insured plans because federal law does not require spousal welfare benefit coverage and state insurance law mandates do not apply.
- Employers may face significant risk of legal challenges under federal discrimination law if any self-insured plans that continue to provide coverage only to opposite-sex spouses.

## Impact on Health and Welfare Plans *(continued)*

- Medical/Dental/Vision Plan Coverage
  - Allow “change in status”/HIPAA special enrollment
  - COBRA now covers same-sex spouses
- Taxation of Medical/Dental/Vision Benefits
  - Stop imputing income for legal spouses
  - Allow payment of premiums on a pre-tax basis
  - HSA/FSA reimbursements allowed for same-sex spouses
- Should employers “require” marriage and eliminate domestic partner benefits? Some employers are doing this now that same-sex marriage is legal in many states.
  - IFEBP Survey—only 1% of employers have dropped coverage
  - Why not? Company recognizes all family types (60%), same-sex marriage is not recognized in the employer’s state (39%).

# Impact on Retirement Plans

## ■ Defined Contribution Plans

- Participants can name any party as beneficiary
  - A same-sex spouse must consent to the designation of any beneficiary. A beneficiary designation without the spouse's consent is invalid.
  - A participant's same-sex spouse will be the default beneficiary in the event the participant dies without having named a beneficiary. This means that certain previously-named beneficiaries will be trumped.

## Impact on Retirement Plans *(continued)*

### ■ Defined Contribution Plans

- A participant will be able to obtain a hardship withdrawal for IRS-recognized expenses related to a same-sex spouse if the plan permits optional hardship withdrawals.
  - Pension Protection Act of 2006 provided hardship withdrawal rights for domestic partners and same-sex spouses who are named beneficiaries under the plan. The hardship withdrawal provision is optional and only takes effect if the plan sponsor chooses to implement it.
- A same-sex spouse may need to consent to plan loans if the plan offers optional loans and requires spousal consent.

## Impact on Retirement Plans *(continued)*

### ■ Defined Benefit Plans

- Generally must offer married participants payment in the form of a qualified joint and survivor annuity (QJSA) with pre-retirement spousal death benefit (QPSA) coverage.
  - A same-sex spouse must consent to payment in a form other than the QJSA with the same-sex spouse as the annuitant. An election without the spouse's consent is invalid.
  - A same-sex spouse must be offered a QPSA if the participant dies prior to benefit commencement.
- The addition of same-sex spouses may impact the plan's funding requirements if there are employer-subsidized benefits. Employers may want to consult with the plan's actuary.

## Impact on Retirement Plans *(continued)*

### ■ All Retirement Plans

#### – QDROs

- Same-sex spouses who divorce may enter into a qualified domestic relations order (QDRO) to divide retirement plan assets. QDROs are generally not available to unmarried same-sex partners.

#### – Rollovers

- Same-sex spouses will have the right to directly roll over eligible rollover distributions and must be notified of their rollover rights.
- The Pension Protection Act of 2006 (PL 109-280) provided rollover rights to an inherited IRA effective in 2010 for domestic partners and same-sex spouses who are named beneficiaries under the plan.

#### – Required Minimum Distributions

- Required minimum distributions may need to be recalculated now that the participant has a legal spouse and can be delayed for a surviving same-sex spouse.

## Impact on Retirement Plans *(continued)*

### ■ Retroactive Implications

- Amendments are required for plans that define “marriage” by reference to DOMA or “spouse” as an individual of the opposite-sex. Plans also must be amended if same-sex spouses will be recognized for plan purposes prior to June 26, 2013.
- Amendments are not required for plans that define “marriage” or “spouse” in a manner that is not inconsistent with *Windsor*. But an amendment may be desirable depending on how retroactive claims will be handled.
- All *Windsor*-related amendments generally must be adopted by December 31, 2014.

# Impact on Other Benefits

- Consider same-sex spouse eligibility for other benefits:
  - Bereavement leave
  - Moving expenses
  - Tuition reimbursement
  - Employee discounts
  - Employee assistance programs (EAPs)
  - Deferred compensation plans
  - Leave under the Family and Medical Leave Act to care for the illness of a same-sex spouse (state of celebration rule under proposed regulations)

# Federal and State Tax Issues

## ■ Federal Tax Issues

- Employees will no longer pay federal income and employment tax for income imputed on the fair market value of employer-provided benefit coverage for a same-sex spouse (regardless of whether the couple resides in a state where same-sex marriage is legal or recognized).
- Employees can pay for same-sex spouse's coverage using pre-tax contributions under a Section 125 cafeteria plan (26 U.S.C. § 125).
- Employees can take tax-free reimbursements from flexible spending accounts (FSAs), health reimbursement accounts (HRAs) and health savings accounts (HSAs).
- Favorable federal tax treatment will not extend to unmarried same-sex partners unless the partner meets the Tax Code definition of "dependent" (26 U.S.C. § 125).

## Federal and State Tax Issues *(continued)*

### ■ State Tax Issues

- The problem is a disconnect between state tax codes (frequently linked to the federal Tax Code) and states' bans on same-sex marriage.
- **DOMA states:** In DOMA states that do not recognize same-sex relationships, employers may need to impute income for state tax purposes (as was previously required under federal law) for the fair market value of coverage for a same-sex spouse or partner. Employees in these state must pay for the same-sex spouse or partner's coverage using after-tax (for state purposes) dollars.
- **Other states:** In non-DOMA states that recognize same-sex marriages or that have special laws favoring same-sex couples, employees do not pay state income tax on the fair market value of coverage for a same-sex spouse or partner. Employees in these states must be permitted to pay for the same-sex spouse or partner's coverage using pre-tax (federal and state) dollars.

## Federal and State Tax Issues *(continued)*

### ■ Retroactive Implications

- 2013 imputed income should have been “reversed” when W-2s were issued in January 2014.
- Employers may request a refund or adjustment of payroll taxes paid on imputed income for same-sex spousal benefit coverage for open tax years (usually three years).
- IFEBP Survey—only 9% of employers filed for a FICA and FUTA taxes paid on past benefits to same-sex couples.
- Employees may elect to file amended tax returns to claim refunds on income and employment taxes paid on same-sex spousal benefits in prior open tax years (usually three years).
- Employers will likely receive employee requests for corrected W-2s or information about the amount imputed in their income in prior years.

## Next Steps

- Review current benefits extended to same-sex spouses and partners to identify benefits now required to be extended to same-sex spouses under federal law.
- Review employee benefit plans, summary plan descriptions (SPDs), employee policies and other documentation to determine whether definitions of “spouse” need to be clarified. Windsor-related retirement plan amendments must be adopted by December 31, 2014.
- Prepare employee communications to advise employees on the benefits available to same-sex spouses and partners (e.g., e-mail to participants regarding 401(k) beneficiary issue).
- Review payroll procedures to ensure the value benefits extended to same-sex spouses and partners is properly reported for federal and state tax purposes (prepare tax certification form and review proof procedures).
- Watch for additional interpretive guidance from the Internal Revenue Service and other government agencies. And watch for court cases on the matter.