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FEDERAL LAW IMPACT OF THE U.S. SUPREME COURT'S DOMA DECISION

[Note that the following is only a very general summary of the impact on federal laws of the Supreme Court's DOMA decision, some aspects of which are awaiting regulatory clarification. Naturally, the following should not be viewed as legal advice for any particular situation, but instead should be viewed only as a starting point for additional discussion, and employers should monitor carefully developments in this area.]

1. Overview

Section 3 of the federal Defense of Marriage Act (DOMA), amended the Dictionary Act-a law defining terms used for over 1,000 federal laws and all federal regulations-to define "marriage" and "spouse" as excluding same gender partners.

On June 26, 2013, the Supreme Court (U.S. v. Windsor) ruled that Section 3 of DOMA is unconstitutional. The plaintiff in the case, Edith Windsor, had married Thea Syper in Canada in 2007, when they were residents of New York. New York recognized as valid same gender marriages from other countries. When Syper died in 2009, Windsor paid estate taxes of $363,053 and sought a refund (claiming the spousal estate tax exemption), which the Internal Revenue Service denied. Windsor brought this refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment to the U.S. Constitution. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that the Department of Justice no longer would defend the constitutionality of DOMA, Section 3. In response, the Bipartisan Legal Advisory Group of the House of Representatives voted to intervene in the litigation to defend the constitutionality of DOMA, Section 3. The federal District Court for the Second Circuit permitted the intervention, but ruled against the United States, finding DOMA, Section 3 unconstitutional and ordering the Treasury to refund the estate tax that had been paid by Windsor, with interest. The federal Court of Appeals for the Second Circuit affirmed this decision. The United States Treasury did not comply with the judgment. Both named parties in the suit (U.S. and Windsor) agreed with the ruling of the Second Circuit, but the Supreme Court decided there was a controversy that it was permitted to resolve.

The Supreme Court's DOMA decision means that the federal government will now look almost exclusively to state law to determine whether an individual is married, just as it did before DOMA was enacted. As a result, if an individual has a same gender spouse and resides in a state that recognizes that marriage, the federal government will recognize that marriage for purposes of federal law, including federal tax and ERISA law. Note that this does not apply to domestic partnerships, civil unions or similar relationships recognized as something other than "marriage" under State law.

Employer health plans are not required to cover spouses at all (even after the employer mandate rules of the Affordable Care Act take effect in 2015), so employers may still cover some spouses (e.g., opposite gender ones) but not others (e.g., same gender ones). (Of course, the practice

of covering only opposite gender spouses may result in Title VII claims and may create particular employee relations problems now that the DOMA decision has been issued.) If an employer covers same gender spouses, that coverage will enjoy the same tax treatment as opposite gender spouse coverage, so there no longer will be a need for those employers to determine the tax dependent/non-tax dependent status of every same gender spouse covered under their plans.

As a result of this decision, employers are likely to receive even more frequent questions about the definition of "spouse" under their benefit plans. Therefore, employers should confirm that their documents and communications contain a specific and clear definition of "spouse" and consider whether that definition should be changed in any way in light of the Supreme Court decision. (Similar questions will arise concerning the term "stepchildren" if it is used in benefit plans.)

Of course, the decision raises many questions, such as whether qualified retirement plans will be required to treat some/all same gender spouses as spouses under those plans, whether legally married same gender spouses who reside in States in which same gender marriage is not recognized are spouses under federal law, whether certain types of federal tax refunds for open years will be available to same gender spouses, whether employers have any obligation to issue amended Form W-2s for past years, and the like.

In the many cases in which "spouses" have federal statutory rights -- COBRA, FMLA, QPs, etc. – employers should start treating same gender spouses as spouses, probably on June 26, 2013. There may be some regulatory "transition relief" to protect employers who didn't react instantaneously, but that transition relief will not insulate an employer against a statutory claim by someone who became a spouse under 1000 different federal statutes on June 26 and wasn't treated accordingly.

2. Court Decisions After Windsor

Some courts already have begun to issue opinions that impact these issues. It is likely that the courts will be involved in these decisions until enforceable standards are implemented through legislation, the courts or applicable regulations.

3. Federal Agency Guidance

On August 9, 2013, the Department of Labor issued guidance (updating Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act) stating that "spouse" under the Family and Medical Leave Act rules means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage and same gender marriage.

Note that this DOL FMLA guidance uses the "State of residence" approach of prior FMLA guidance rather than the "State of ceremony" approach that many commentators expected would be the theme of regulatory guidance issued after the Supreme Court's DOMA decision. (The Secretary of Labor did note that further DOMA-related FMLA guidance might be issued.)

Therefore, until further guidance is issued, employers will need to determine the State of residence of their employees with same gender spouses in order to determine whether those employees' spouses are spouses for FMLA purposes.

Specifically, FMLA-eligible employees residing in one of the 13 States recognizing same gender marriage (along with Washington, D.C.) who are married to same gender spouses may now take FMLA leave to care for a spouse suffering a serious health condition or for activities related to a spouse's military deployment.

Employers with employees who reside in States that recognize same gender marriage should revise their FMLA procedures and documents immediately.

On August 29, 2013, the IRS issued guidance (Revenue Ruling 2013-17), and on September 18, 2013, the DOL issued guidance (Technical Release No. 2013-04), stating that same gender couples who are legally married under the law of the State or foreign jurisdiction in which the marriage ceremony took place will be treated as married for all federal tax purposes. (This is similar to the approach the IRS takes with respect to common law marriages. Note that this new IRS approach does not apply to domestic partnerships, civil unions or similar relationships recognized under State law.)

This guidance applies to all federal tax rules for which marriage is a factor, "including filing status, claiming personal and dependency exemptions, taking the standard deduction, employee benefits, contributing to an IRA and claiming the earned income tax credit or child tax credit."

Employers now have clear IRS guidance on the federal tax – including employee benefits -- impact on their employees of the Supreme Court's DOMA decision, and they should take prompt steps to ensure that they are treating same gender spouses as spouses for federal tax purposes – using the "location of ceremony" rule. This also means that any child of an employee's same gender spouse is now a stepchild of the employee for purposes of federal tax law and therefore is eligible for non-taxable health coverage to the same extent as other stepchildren.

(Some curiosities for some of our East Coast clients: In Rhode Island, Vermont, Connecticut and New Hampshire, civil unions were automatically converted to "marriages" when those States legalized same gender marriage. Therefore, an employee from one of those States may present a civil union certificate, rather than a marriage certificate, to provide evidence of a valid same gender marriage. In Delaware, which also has legalized same gender marriages, civil unions are not being converted automatically to marriages until July 1, 2014, so employers will need to be mindful of that special rule as they update their records concerning which employees are married.)

On September 23, 2013, the IRS issued guidance (Notice 2013-61) providing special administrative procedures for employers who want to correct overpayments of employment taxes for 2013 and prior open years for certain benefits provided and remuneration paid to same gender spouses. These procedures are optional and no employer is required to follow these procedures. Note that an employee can file for a refund of any overpayment of employment taxes (and income taxes) for 2013 and prior open years without employer involvement in the process.

2013 Alternatives: 1. Repay or reimburse the employee for the overcollection for the first three quarters of 2013 no later than the due date of the third quarter Form 941 (October 31, 2013) and reduce the amount reported for the third quarter accordingly. 2. Repay or reimburse the employee for the overcollection for the first three quarters of 2013 no later than December 31, 2013 and reduce the amount reported for the fourth quarter accordingly. 3. File one Form 941-X for the fourth quarter of 2013 (writing WINDSOR in dark, bold letters across the top of the form) to correct overcollection for all of 2013, and repay/reimburse employees for the overcollection or, for refund

claims, obtain written consents from employees.

Prior open years alternative: File one Form 941-X for the fourth quarter of each year (writing WINDSOR in dark, bold letters across the top of the form) to make a claim or adjustment for all four quarters of the year. File, and provide to employees, Forms W-2c (correction of W-2), repay/reimburse employees for the overcollection or, for refund claims, obtain written consents from employees.

These alternative administrative procedures only apply to correct overwithheld employment taxes. Each employee must file for any applicable income tax refund for overpaid income taxes.

4. Consequences for Executive and Employee Benefit Programs Subject to Federal Law

Welfare Benefit Plans. For purposes of welfare plans, the main significance of the Supreme Court DOMA decision is for eligibility for health coverage and other benefits that are available to dependents and the tax treatment of such benefits. The DOMA decision does not require any private employer's plan to offer any type of coverage to same gender spouses but current plan language may automatically make them eligible.

However, even if a plan does not offer coverage to same gender spouses, in many cases, a child of an employee's same gender spouse generally will now be a stepchild of the employee, meaning that the child must be offered coverage to the same extent as other stepchildren (at least for medical coverage) until they reach age 26, to comply with the Affordable Care Act's dependent coverage mandate. This also means that any child of an employee's same gender spouse is now a stepchild of the employee for purposes of federal tax law and therefore is eligible for non-taxable health coverage to the same extent as other stepchildren. In addition, based on previous guidance provided by the IRS, medical coverage generally must be offered to a child of an employee's civil union partner or registered domestic partner if the employee resides in a state that recognizes the child as the stepchild of the employee because that child would also be considered a stepchild for purposes of federal tax law.

Eligible expenses of same gender spouses and any children who are considered stepchildren under applicable state law also can now be paid from a health care flexible spending account or a health savings account or health reimbursement arrangement.

For purposes of a dependent care FSA, an employee's eligibility for benefits may be limited based on a spouse's income or based on whether the spouse works.

In addition, eligible dependent care expenses of a child (under age 13) of a same gender spouse or a civil union partner or a registered domestic partner are eligible for reimbursement if the child is a stepchild of the employee under applicable state law.

For life insurance or disability benefits, any death benefits that may be payable may also be affected by the change in the federal government's recognition of same gender spouses, depending on the terms of the plan or insurance contract.

COBRA Issues. For COBRA purposes, an employee's same gender spouse can now become a qualified beneficiary (at least for qualifying events occurring on or after June 26, 2013) just like any opposite gender spouse. Also, any child of a same gender spouse or a civil union partner or a

registered domestic partner who is considered the stepchild of the employee in the state where the employee resides also may become a qualified beneficiary.

HIPAA Special Enrollment Rights Issues. An employee's marriage generally creates special enrollment rights to enroll the employee (if not already enrolled), the new spouse and any other dependents in medical coverage following the date of the marriage. This now applies to same gender marriages that are recognized for federal law purposes.

Tax-Qualified Retirement Plans. For retirement plans, the main consequences of the Supreme Court DOMA decision relate to death benefits. To the extent that a spouse is designated by the terms of the plan as a participant's beneficiary, the decision means that a same gender spouse is now treated the same as an opposite gender spouse, at least to the extent that the same gender spouse is recognized as a spouse under federal law. Administrative procedures should be revised to recognize same gender spouses as spouses whenever appropriate based on federal law.

Executive Deferred Compensation Plans. Most executive deferred compensation programs are designed to be exempt from federal law. These plans generally mention spouse only in providing that a surviving spouse would be a participant's death beneficiary if there is no living designated beneficiary. These plans can include a definition of spouse which is broader or narrower than under federal law.

Fringe Benefits. Certain fringe benefits, such as employee discounts or certain tuition benefits or dependent life insurance coverage valued at less than $2,000, are available as nontaxable benefits to spouses of employees, so those benefits also would now be available to same gender spouses who are treated as spouses for purposes of federal tax law.