

Clients & Friends Memo

Employee Benefits after *Windsor*

August 27, 2013

I. Introduction

On June 26, 2013, the United States Supreme Court declared Section 3 of the federal Defense of Marriage Act (“DOMA”) unconstitutional.¹ Section 3 of DOMA, which defined “spouse” and “marriage” for all provisions of federal law, provided that a “spouse” was “a person of the opposite sex who is a husband or wife” and “marriage” was a “legal union between one man and one woman as husband and wife.” However, the Supreme Court did not consider the validity of Section 2 of DOMA, which gives states the right to deny recognition of same-sex marriages valid in other states; accordingly, Section 2 remains in effect. The removal of Section 3 and the retention of Section 2 have broad implications for employee benefit plans and raise many questions regarding the choice of law between states that do and do not recognize same-sex marriage, whether any benefits are retroactive, and what position the Internal Revenue Service (“IRS”) will take on the recognition of same-sex marriage for Federal tax purposes.

II. State of Residence or Place of Celebration

- After *Windsor*, the definition of “spouse” and “marriage” is governed exclusively by state law.
- President Obama has directed US Attorney General Eric Holder to work with the other members of his Cabinet to review all relevant federal statutes to ensure that *Windsor*, “including its implications for Federal benefits and obligations, is implemented swiftly and smoothly.”² However, because the U.S. Department of Veterans Affairs and the Social Security Administration have statutorily defined state of residence rules,³ Congress likely must act to establish a place of celebration rule for these agencies.

¹ [Windsor v. United States](#), Sup Ct. Dket. No. 12-307 (2013); 570 U.S. ___ (2013).

² *Statement by the President on the Supreme Court Ruling on the Defense of Marriage Act*, available at <http://www.whitehouse.gov/doma-statement>.

³ The Social Security Act provides that an applicant’s family status with respect to an insured individual is determined by reference to the domicile of the insured individual at the time an application for benefits is filed, or, if such person is dead, the courts of the state in which he or she was domiciled at the time of death, would find that the applicant and such insured

- On August 2, 2013, the Office of Personnel Management (“OPM”) declared that the state of celebration would govern for purposes of survivor annuities under the Civil Service Retirement System (“CSRS”) and the Federal Employee’s Retirement System (“FERS”) for retirees who enter into same-sex marriages in retirement.⁴
- On August 14, 2013, the U.S. Department of Defense announced that it would extend benefits to same-sex spouses of uniformed service members and Department of Defense civilian employees (retroactive to June 26, 2013, the date of the *Windsor* decision). This announcement does not affect veterans, whose benefits are administered by the Department of Veterans’ Affairs and, as noted above, has a statutorily defined state of residence rule for determining marital status.
- The IRS is expected to issue guidance on whether it will look to the state of residence or to the place of celebration to determine whether a same-sex couple is married for federal income tax purposes.⁵ This means that whether a married couple of the same sex qualifies for federal income tax-favored employee benefits may be dependent on a couple’s state of residence, in which case same-sex spouses married in a jurisdiction that recognizes same-sex marriage but residing in a state that does not recognize same-sex marriage could be denied federal income tax-favored employee benefits (while similar same-sex spouses residing in states that do recognize same-sex marriage would be entitled to such benefits).
- The Respect for Marriage Act was recently reintroduced in the House and Senate.⁶ If enacted, all federal laws where marital status is a factor would look to the laws of the place of celebration, rather than a couple’s state of residence, to determine a couple’s marital status.

III. Employee Benefits in States that Recognize Same-Sex Marriage

Until the IRS issues guidance on the subject, *Windsor* will require employee benefit plans in states that recognize same-sex marriage to provide identical benefits to all married employees, provided that the place of celebration and state of residence both recognize same-sex marriage. This change likely has the following effects:

individual were validly married at the time of such application, or if the insured is dead, at the time he or she died. See 42 U.S.C. 416(h). The statute governing veterans’ benefits provides that, in determining whether or not a person is or was the spouse of a veteran, the marriage is proven as valid according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued. See 38 U.S.C. 103(c).

- ⁴ To elect a survivor annuity under CSRS or FERS, a retiree must write to the OPM and send a copy of their marriage certificate with the date of the marriage and name of the spouse. Elections under CSRS and FERS are irrevocable and should be carefully considered.
- ⁵ In *Rev. Rul. 58-68*, 1958-1 C.B. 60 (dealing with the recognition of a common-law marriage in a state that requires a marriage ceremony) the IRS adopted a place of celebration rule. Uncertainty remains in the same-sex marriage context and a reaffirmation of the place of celebration rule or a statement that the applicable state law is the state of residence from the IRS is necessary.
- ⁶ H.R. 2523; S. 1236.

- A. Employee benefit plans that currently offer benefits to same-sex spouses:
- The value of employer-provided health and welfare coverage for same-sex spouses is no longer imputed as taxable income for Federal tax purposes. Employees will no longer have to pay for such coverage to same-sex spouses on an after-tax basis.
 - Employees must receive tax-free reimbursement for expenses incurred for same-sex spouses under flexible spending accounts, health savings accounts, and health reimbursement accounts.
 - Upon the occurrence of a COBRA qualifying event, same-sex spouses are now eligible for COBRA coverage.
 - Employees are entitled to benefits under the Family and Medical Leave Act (“FMLA”) for their same-sex spouses.⁷
 - Same-sex spouses are now entitled to retirement plan benefits under defined benefit plans.
- B. Employer benefit plans that do not currently offer benefits to their employees’ spouses but choose to do so in the future must then also provide identical benefits to employees’ same-sex spouses.

IV. Employee Benefits in States that Do Not Recognize Same-Sex Marriage

Because Section 2 of DOMA was not at issue in *Windsor* and thus remains in effect, employee benefit plans in states that do not recognize same-sex marriage may not be required to provide same-sex spouses of married employees with benefits identical to those provided to opposite-sex spouses of married employees. As noted earlier, the IRS is expected to issue guidance on whether the law of the state of residence or the law of the place of celebration controls who may receive spousal benefits. Until such guidance is issued, certain considerations should be kept in mind:⁸

- State-insured and self-insured health benefit plans may not be required to provide benefits to same-sex spouses who otherwise qualify for the plan.
- Same-sex spouses may not be entitled to retirement benefits under defined benefit plans.
- Employees may now receive tax-free reimbursement for expenses incurred for same-sex spouses and dependents under a flexible spending account, health savings account, and health reimbursement accounts.

⁷ FMLA regulations provide for a state of residence rule in defining the term “spouse.” See CFR § 825.102.

⁸ This section assumes that the employer benefit plan does not currently include same-sex spouses.

- ERISA plans may be subject to federal discrimination claims now that same-sex spouses are recognized under federal law.
- Minimum distribution rules under tax-qualified retirement plans may now be applicable to married same-sex spouses. Married same-sex spouses may now also be eligible for hardship distributions under such retirement plans.

* * * *

If you have any questions regarding the impact of the Supreme Court's *Windsor* decision on employee benefits, please contact:

Linda Z. Swartz	+1 212 504 6062	linda.swartz@cwt.com
Steven G. Eckhaus	+1 212 504 6860	steven.eckhaus@cwt.com
Pamela Landman	+1 212 504 6104	pamela.landman@cwt.com
Shane J. Stroud	+1 212 504 6392	shane.stroud@cwt.com