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Health Care Benefits After the Supreme Court's 'Windsor' Decision

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In 1996, Congress enacted, and President Clinton signed, the Defense of Marriage Act ("DOMA"), Section 3 of which provided:

> "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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 who is a husband or a wife."[1]

As a result of this statute, same-sex marriages—even if validly entered into—were not recognized for purposes of any Federal law, including everything from Federal income taxes and Social Security benefits, to immigration laws, to visitation rights in V.A. hospitals.

[1] Pub. L. No. 104-99, § 3 (Sept. 21, 1996), codified at 1 U.S.C. § 7.

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The Decision

On June 26, 2013, in a 5-4 decision, the United States Supreme Court held that Section 3 of DOMA was an unconstitutional violation of equal protection and due process guarantees, in *United States v. Windsor*[2] ("*Windsor*"). This was a tax case—estate tax to be precise. Edith Windsor and Thea Spyer were long-time partners who married (lawfully) in Canada in 2007, and were residents of New York, where same-sex marriages are recognized. When Ms. Spyer died in 2009, all of her property passed to Ms. Windsor but was not eligible to be excluded from her Federal taxable estate using the marital deduction, since, under DOMA—and therefore under the Internal Revenue Code—the couple was not "married" and Ms. Windsor was not a surviving "spouse." Ms. Windsor (as executor of the estate) therefor paid over $360,000 in Federal estate taxes, and sued for a refund, challenging the validity and constitutionality of DOMA. The U.S. District Court[3], and then the 2nd Circuit Court of Appeals,[4] each held the law to be unconstitutional, and the Supreme Court ultimately agreed. She received, or will receive, her refund as a result of the Court's decision.

More importantly, however, the decision returns the determination of the validity of marriages to the various states, where it has historically been and where, according to a majority of the Court, it belongs. The majority of the Court noted that, on occasion, it has been necessary to enact laws that affected marriage in order to further specific Federal policies, but viewed DOMA as being much more than that, concluding that DOMA effectively enacted an amendment to all Federal laws and regulations, and constituted a directive to all Federal agencies, to injure a class of persons that the laws of New York, and of several other states, legitimately sought to protect. The Court found that both the intended purpose and the practical effect of DOMA were "to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[5]

[2] 570 U.S. __, 133 S.Ct. 2675 (2013).
[3] 833 F. Supp. 2d 394 (S.D.N.Y., 2012).
[4] 699 F. 3d 169 (C.A.2, 2012).
[5] *Windsor*, 133 S.Ct. at 2693.

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The Court looked at the history of DOMA's enactment as well as the text of the law to demonstrate that its interference with the equal dignity of same-sex marriages was more than incidental, and determined that such interference was the essence of the statute. For example, the Court quoted various Congressional Records, such as the House Report concluding that:

> ''. . .it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage . . . H. R. 3396 is appropriately entitled the 'Defense of Marriage Act.' The effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.''[6]

This and other sources indicated to the Court that the statute's purpose was to address and discourage enactment of state laws permitting or recognizing same-sex marriage, and to restrict the freedom and choice of couples who are married under those laws if they are nevertheless enacted. The Court concluded that this issue raises a serious question under the Fifth Amendment.

Because the Court found that DOMA was intended to deprive same-sex partners of the rights afforded them by the states in permitting them to marry, and in fact had done so in the case being considered, it found Section 3 of DOMA to be unconstitutional. As a result, the validity of marriages under Federal statutes and programs will again be up to the states to determine.

What Was Left Undone

In a number of situations, such as Ms. Windsor's case, returning to that pre-DOMA *status quo* will be perceived as the solution to the problem. Unfortunately, however, in many more cases, including those of employer-provided benefit plans in general, it is only the beginning and opens the door to a much larger problem.

The larger problem is still a result of DOMA. It's just that this time, it is not Section 3, but Section 2 of DOMA that is the culprit. Section 2—which was not held to be unconstitutional, or even addressed, by the Court in *Windsor* —provides that:

> ''No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.''[7]

In other words, as a separate matter from whether or not a state permits persons to enter into same-sex marriages, each state is free to determine whether it will recognize same-sex marriages that have been solemnized elsewhere.

For example, if a gay couple were to marry in Vermont, and later move to, *e.g.*, Nebraska, Section 2 of DOMA provides that their marriage is not required to be recognized as valid by Nebraska (or by any other ''State, territory, or possession of the United States, or Indian Tribe''). Furthermore, even though Section 3 of DOMA was effectively repealed by *Windsor*, and the Court held that the Federal government would look to the state for a determination of validity of a marriage, the question remains: which state? For a great many purposes (including, *e.g.*, Federal taxes) marital status is determined according to the state of residence or domicile. So the couple who moves to Nebraska, even though their Vermont marriage is perfectly lawful, would no longer be ''married'' for Federal tax purposes once they become residents (and presumably domiciliaries) of a ''non-recognition'' state.

As of the writing of this article, there are thirteen states—California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington—plus the District of Columbia, that permit same-sex marriages. In addition, five Native American tribes[8] permit same-sex marriages, and one state—New Mexico—does not permit the marriages, but recognizes those validly performed in other jurisdictions. Therefore, there are thirty-six states in which same-sex marriages are neither permitted nor recognized. This means that whether or not an employee is treated as married or single could depend upon whether he or she resides in a ''recognition'' or ''non-recognition'' state.

This may or may not cause a problem for employers, depending upon where an employer is located. A business located in San Antonio, for example, is not likely to have employees who commute to work from one of the states that allow same-sex marriages. However, employers located in, *e.g.*, Washington, D.C., or its suburbs—both Maryland and Virginia—could easily draw employees who commute from both ''recognition'' and ''non-recognition'' states. If you look at the list of ''recognition'' states, you can see other situations in which problems can easily arise due to having employees who commute over state lines. Of course, employees can and do relocate from one state to another, which creates the same situation.

There is movement to resolve this issue in Congress—at least one current bill would provide for determination of marital status (for Federal purposes) based on the state of marriage, regardless of residence. If such a bill were enacted, since a same-sex marriage will always have been entered into in a ''recognition'' state (or foreign country); those marriages would be virtually assured of Federal recognition. There are also bills that would repeal Section 2 of DOMA outright (or repeal DOMA altogether, which is effectively the same thing). If that should happen, then one might expect states to return to the general pre-DOMA policy of recognizing each others' validly entered marriages. But many of the thirty-six ''non-recognition'' states have their own statutes, or, in some cases, constitutional provisions, prohibiting same-sex marriages or their recognition, or both.

Take Ohio, for example. In 2004, Ohio amended both its statutory provisions and its constitution to prohibit recognition of same-sex marriages, regardless of where

[6] H. R. Rep. No. 104–664, pp. 12–13 (1996).

[7] Pub. L. No. 104-99, § 2 (Sept. 21, 1996), codified at 28 U.S.C. § 1738C.

[8] The Coquille Tribe (Oregon), the Suquamish tribe (Washington), the Little Traverse Bay Bands of Odawa Indians (Michigan), the Pokagon Band of Potawatomi Indians (Michigan), and the Santa Ysabel Tribe (California).

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performed.[9] Even though Section 2 of DOMA would literally allow this treatment to continue, a Federal District Court in Cincinnati nevertheless just held it to be a violation of the U.S. Constitution's guarantee of equal protection.[10] It appears that, one way or another, the recognition question is going to be addressed next.

What it Means for Health Benefits

Now that we have the ''lay of the land,'' what does all of this mean for employer-provided health benefits? The answer is: several things.

First, and probably foremost, a same-sex spouse is eligible to be covered as a ''spouse'' on a nontaxable basis. It no longer matters whether the spouse can otherwise qualify as a ''dependent'' of the employee for Federal income tax purposes, which would usually not be the case.[11] This means that coverage can be provided without imputing income to the employee, or without requiring the employee to pay the cost of coverage (in order to avoid the tax consequences), just as with any other spousal coverage.

In addition, the children of a same-sex spouse, who previously were not eligible to be covered on a nontaxable basis (or possibly not eligible to be covered at all), since they could not have qualified as the employee's ''dependents''[12], could now qualify as the employee's step-children (subject to the terms of a plan or insurance policy). As such, they could be eligible for nontaxable coverage as well.

Employee cost-sharing attributable to a same-sex spouse can be paid on a pre-tax basis under a cafeteria plan, since he or she is now simply a ''spouse'' under the Internal Revenue Code. Similarly, the cost for children of a same-sex spouse who are now eligible for coverage as step-children can also be paid on a pre-tax basis. In addition, in administering cafeteria plans, ''changes in family status'' must reflect the fact that a same-sex marriage is simply a ''marriage,'' so that, for example, a marriage or divorce, or certain changes in a spouse's employment or job-related health coverage, may allow a mid-year election change by the employee.

Likewise, an employee's Flexible Spending Account (FSA), Health Savings Account (HSA) or Health Reimbursement Account (HRA) can cover expenses incurred by his or her previously-ineligible same-sex spouse, or by the spouse's children.

As a ''spouse,'' a same-sex spouse who is covered by a plan also has spousal COBRA rights, including the right to elect continuation coverage upon divorce from, or death of, the employee. Similarly, he or she is a ''spouse'' for purposes of HIPAA's privacy and special enrollment rights.

In addition to ''positive'' changes, being treated as a spouse can have some ''negative'' effects as well, depending upon particular circumstances. For example, the spouse's income is taken into account for purposes of determining a family's eligibility for the premium tax credit under the Patient Protection and Affordable Care Act, and may result in ineligibility for the credit. Similarly, counting the additional income may affect eligibility for Medicaid or other government programs. If a spouse participates in a health plan other than a ''high-deductible health plan'' (HDHP), an employee could lose Health Savings Account eligibility. Even if the couple's only health plan coverage is HDHP coverage, the HSA maximum now applies to the combined contributions of the couple, as opposed to each being able to contribute up to the limitation. If a spouse has low (or no) income, that could affect the employee's eligibility to contribute to a dependent care assistance account, since the limitation is based on the lesser of the two spouses' incomes.

There are also changes that simply need to be addressed by employers maintaining health plans, without necessarily being favorable or unfavorable to employees. The first thing is that plan documents (including summary plan descriptions, enrollment forms, and other documents that may be used) need to be changed to reflect a new definition of ''spouse'' (or ''child'', ''dependent'', ''marriage'', or any other terms that are used whose definitions are affected by the *Windsor* decision). Similarly, employers should check insurance contracts so that they are familiar with any changes made by their insurers; insurance remains subject to state regulation[13], and some ''recognition'' states have already required insurance contracts to provide for coverage of same-sex spouses.

Information systems may need to be updated to reflect marital status of employees with same-sex spouses; many employers' HR information systems may not distinguish between same-sex married couples and domestic partners.[14] Payroll systems will have to be modified to cease imputing income to employees whose same-sex spouses or non-dependent children are being covered under the plan. (No change has been made, however, in the case of unmarried domestic partners; coverage of a domestic partner is still taxable to the employee.)

What Remains to Be Done

These changes seem fairly straightforward, but, like many other things about the *Windsor* decision, are not quite as simple as they seem to be. For instance, the effective date as of which these changes must apply is not exactly clear.

When a statute is declared unconstitutional, it is usually retroactively invalid, *i.e.*, it has *always* been unconstitutional, unless the decision provides otherwise. Here, the Court said nothing—in fact, the actual decision was applied retroactively, since Ms. Spyer had died four years prior to the decision. If Section 3 of DOMA were never valid, then the changes made by the decision would, logically, go back to 1996. However, that would be quite impractical, and the degree to which it should be retroactively applied is not yet known.

The Internal Revenue Service has authority to limit retroactive effect for tax purposes[15], and it seems reasonable that, at least for tax purposes, the decision should be applied retroactively to open tax years.[16]

[9] *See* Ohio Rev. Code. § 3101.01(C)(2)&(3) and Ohio Constitution Art. XV, § 11.

[10] *Obergefell v Kasich*, Case No. 1:13-cv-501 (S.D. Ohio, July 22, 2013).

[11] *See* Internal Revenue Code § 152(d).

[12] *See* Internal Revenue Code § 152(c).

[13] 29 U.S.C. § 1144(b)(2).

[14] Unmarried domestic partners are not ''spouses'' under the *Windsor* decision.

[15] 26 U.S.C. § 7805(b).

[16] Generally, 2010 and later.

That would enable (but not require) affected employees to file amended tax returns, changing their filing status from single to married filing jointly (assuming that is advantageous) and correcting the imputed income (if any), and enabling employers to file for refunds of FICA taxes on any imputed income[17], for those open years. Once they are able to determine whether a marriage is supposed to be recognized, employers should also cease imputing income to the employees whose same-sex spouses receive coverage, and if possible adjust withholding already done in 2013 so that the amounts for the year turn out ''correct.'' Obviously, if changes are made, affected employees should have the opportunity to furnish new Forms W-4.

Another effective date issue is deciding when coverage can or should be effective for a newly-eligible spouse (or child). The coverage can certainly be made effective upon a plan's next ''open enrollment.'' But what can be done if you don't want to wait that long? There hasn't been a new marriage, and few if any plans or policies will provide that legitimizing an existing marriage will trigger ''special enrollment rights'' under HIPAA or, in the case of a cafeteria plan, cause a ''change in family status.'' However, they would literally be permitted to do so under the applicable regulations. The cafeteria plan regulations[18] provide that ''changes in status'' include ''events that change an employee's legal marital status, including . . .'' marriage, divorce, separation, etc. The repeal of Section 3 of DOMA is certainly an event that changed employees' marital status—at the effective time of the decision, they went from unmarried to married. Similarly, the HIPAA regulations grant an individual special enrollment rights if ''the individual becomes the spouse of a participant''[19] (assuming that the individual is otherwise eligible to be covered by the plan, *e.g.*, the plan covers spouses). For purposes of this requirement, since it was subject to Section 3 of DOMA, same-sex spouses *did* become spouses when the decision became effective. So in either of these cases, the effective date of the decision would arguably have triggered the right to enroll a newly-eligible spouse, but for the fact that the plan or policy may not contain the same provision as the regulations. It may instead refer to a participant ''getting married,'' which, of course, did not happen. We also would need to know an actual effective date of the decision, since both ''change in status'' and ''special enrollment rights'' involve specific time periods. The IRS, however, has the ability to, and may, promulgate a rule that simply treats the *Windsor* decision as itself being a change in status or triggering special enrollment rights, and prescribing the procedures to be followed in order to take advantage of that ''new'' authorization. Unless and until it does so, plans' existing rules and procedures should be followed.

A third effective date issue is deciding whether coverage simply became effective by virtue of the marriage, and if so, as of when? If a couple was married in 2012, should expenses already incurred by the previously ineligible spouse now be eligible for reimbursement, or payment? Should it depend on whether the employee's coverage would have covered the spouse had same-sex spouses been eligible for coverage (*e.g.*, employer-paid family coverage)?

In addition to the effective date issues, there also needs to be guidance regarding whether same-sex spouses *must* be covered as spouses, or only that they *may* be treated as any other spouse. Generally, there is no Federal legal requirement that health benefits be provided to employees' spouses or dependents (unlike, for example, survivor benefits in qualified retirement plans). However, in some circumstances that can change. For example, in 2015, dependent coverage will be required in order to avoid penalties under the Affordable Care Act. In addition, if a plan is insured, the terms of the insurance policies will be governed by state law, and some states' laws may require health insurance policies to cover spouses.

Finally, as discussed above, guidance is badly needed on the subject of which state's law to follow in determining the validity of a marriage. This is perhaps the most important issue that remains to be decided since everything discussed in this article is based on whether or not there is a valid same-sex marriage, and several agencies[20] have indicated their intention to issue guidance in the near future (obviously, for purposes of administering their own requirements). The three possible alternatives are: the state of marriage, the state of residence (or domicile) of the couple, or, the state in which the employee works. Each would have its advantages, and disadvantages. The state in which the marriage occurs would provide uniformity for Federal purposes, but employers would still have to deal with each state's own determination for non-Federal matters. The state of residence would seem to provide an easy determination and a degree of uniformity within a state, but individuals' status could change every time they moved, and previously-valid marriages could be effectively voided simply by changing an address. The state of work would serve the purpose of providing employers with a ready answer—they would not, *e.g.*, have to know where the employee got married—but there is little other basis supporting work location as an alternative. Employers will just have to await agencies' guidance and decide what to do at that time.

[17] In order to request a refund of the employer share of FICA tax, the employer would also request a refund, on behalf of the employees, of the ''excess'' amounts withheld from the employees.

[18] 26 C.F.R. § 1.125-4(c)(2).

[19] 26 C.F.R. § 54.9801-6(b)(2)(ii).

[20] The IRS, the Social Security Administration, and the Departments of Labor, Justice, and Homeland Security have each indicated that guidance was on a ''fast track.''

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