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Legal Update
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# Aftermath of Supreme Court's Ruling on DOMA: Agency Guidance Affecting Employee Benefit Plans

In late June 2013, the US Supreme Court ruled, in the case of *U.S. v. Windsor*, that Section 3 of the federal Defense of Marriage Act ("DOMA") was unconstitutional under the due process clause of the Fifth Amendment and under equal protection principles.[1] Section 3 of DOMA had barred same-sex married couples from being recognized as "spouses" for purposes of various federal laws and for the purpose of receiving federal benefits. The ruling left unanswered a number of questions about how employer-provided benefit plans would be affected and offered no roadmap for plan administration. Federal agencies have since begun to address those questions and this legal update reports on important post-*Windsor* guidance issued by the Treasury and Labor departments.

In Revenue Ruling 2013-17, the Internal Revenue Service (IRS) adopted a "place of celebration" rule: effective *prospectively* as of September 16, 2013, same-sex couples who legally married in jurisdictions (domestic or foreign) that recognize their marriages will be treated as married for federal tax purposes regardless of where they reside or whether their state of residence treats their marriage as legal. The IRS stated its intention to issue further guidance on the *retroactive* application of *Windsor* to employee benefit plans and arrangements.

The IRS also issued Notice 2013-61, providing guidance for employees and employers on making claims for refunds and adjustments of federal employment and income taxes with respect to certain benefits provided to same-sex spouses (e.g., group health insurance). Before the *Windsor* and IRS rulings, such benefits resulted in additional income for the employee that was subject to both FICA and income taxes. The Notice sets forth simplified administrative procedures under which employers may correct overpayments of employment taxes for 2013 and earlier tax years.

Employers filing for refunds, credits or adjustments for prior years must also file Forms W-2c (that is, amended Form W-2), which will assist employees in claiming refunds of federal income taxes. Employees may file amended federal income tax returns to seek refunds, but all items on a return that are affected by the employee's marital status must be adjusted to be consistent with the marital status reported on the return (a same-sex married couple who previously filed separately as unmarried individuals could be subject to higher income taxes when filing as married).

The US Department of Labor (DOL) subsequently issued Technical Release 2013-04 in which it also adopted a place of celebration rule for ERISA purposes. Of note is that the Technical Release does not provide an effective date and does not apply to other federal labor laws. For example, the DOL's Wage and Hour Division issued an updated Fact Sheet No. 28F in August of this year in which it took the position that "spouse" and "marriage" under the

Family and Medical Leave Act were to be determined by applying the laws of the state of residence. The DOL will likely modify this to conform to the "place of celebration" rule.

The foregoing IRS ruling and DOL release apply solely to marriages; they expressly exclude other formal relationships, such as civil unions and domestic partnerships (registered or otherwise). Although the guidance represents a good start in answering some of the questions about how benefit plans are to be administered post-*Windsor*, further guidance is still needed.

*Windsor* did not address the constitutionality of Section 2 of DOMA, which provides that no state is required to recognize a same-sex marriage that is recognized as a legal marriage in any other state (that is, "full faith and credit" is not required), nor did it rule on the constitutionality of state laws that do not recognize same-sex marriage. There remains inconsistency among states as to whether same-sex marriages are legal for state-law purposes and the recent agency rulings have no bearing on such state laws.

As the rapidly evolving post-DOMA world takes shape, what should employers be doing with respect to their employee benefit plans? We offer the following recommendations:

- Review employee benefit plan documents and determine provisions that will need to be amended, such as definitions of "spouse" that expressly exclude spouses in same-sex marriages or that refer to "federal law." While some employers have begun to amend plans, others are awaiting further guidance before preparing amendments. We do not yet know how retroactivity issues will be resolved so it is premature to address those in a plan amendment.
- Consider aspects of plan administration affected by the *Windsor* ruling and IRS and DOL guidance, such as spousal rights (consent to nonspouse beneficiaries and optional distribution forms), minimum required distributions (spouse may delay distribution or commencement), hardship distributions (401(k) plans may permit hardship distributions based on, among other things, expenses relating to the spouse and spouse's children), and rollovers (spouses may roll to an IRA or qualified plan of spouse's employer). Treating participants in same-sex marriages as legally married could sufficiently change the demographics of a defined benefit plan such that greater funding obligations result.
- Review the qualified survivor annuity and beneficiary election forms and explanations of retirement and savings plans for possible changes needed. Given that these forms already require the participant to represent whether he or she is married, and require spousal consent as applicable, the only changes needed may be to provide instructions that explain in greater detail the revised treatment of employees in same-sex marriages.
- Provide qualified pre-retirement survivor annuity notices to employees in legal same-sex marriages, as applicable.
- Communicate with employees about the *Windsor* decision and the recent IRS and DOL guidance, any related changes in plan administration, and any changes in the tax treatment of employer-provided benefits. This will let employees know that the employer is aware of such developments and is acting in accordance with them. In such communications, consider:
  - Instructing employees who believe they have a legal same-sex marriage to contact the administrator(s) of the employer's various plans (e.g., retirement, savings, health and welfare) and provide applicable information.
  - Requesting the date and place the marriage occurred in addition to the spouse's identity. Employers may desire additional proof, such as a marriage certificate, but

caution is advised in this regard as imposing more onerous proof-of-marriage requirements on same-sex couples than on opposite-sex couples could violate state and local anti-discrimination laws (if any).

  – Advising plan participants with same-sex spouses to submit beneficiary designations or review existing beneficiary designations. Such participants should not rely on a plan's default provisions to protect a same-sex spouse or to carry out the participant's intentions. If the participant has named a non-spouse beneficiary of a defined contribution plan account or is electing an optional form of benefit under a defined benefit plan, the consent of the same-sex spouse will be required for such designation or election to be valid.
  – Addressing changes in the tax treatment of health benefits by (i) describing the change in taxation associated with health plan coverage of same-sex spouses and their children, (ii) suggesting that those in same-sex marriages consult their tax advisers on whether to claim a refund for overpayments of income taxes, (iii) informing them that health and dependent care FSA reimbursements are now available with respect to expenses of same-sex spouses and their children, and (iv) informing them of the fact that the limit on dependent care expenses for married couples may reduce the amount of reimbursements available to them. Communications could also explain that new forms and enrollment materials requiring additional information on marital status are designed to ensure appropriate tax treatment.

- Discuss the implications of *Windso*r and the recent IRS and DOL guidance with plan vendors. Same-sex spouses who are legally married but who were previously not covered, or were covered as domestic partners, should now be reflected as spouses in the vendor's systems. Payroll systems must be modified to allow an employee in a legal same-sex marriage to make pre-tax salary reduction contributions toward payment of premiums attributable to the same-sex spouse and/or the spouse's children for health plan coverage. Health FSA systems need to be changed to process employee claims relating to same-sex spouses and/or their children. Open enrollment materials may also need to be changed to permit enrollment in health plans of same-sex spouses and their children, and procedures should be developed regarding enrollment in health plans of existing same-sex spouses and their children before the next open enrollment period (it is not clear whether a special enrollment opportunity must now be offered so this should be coordinated with insurers and administrators).
- Coordinate with vendors to determine whether any states in which the employer has operations that do not recognize same-sex marriage require, for state income tax purposes, the employer to (i) treat employee contributions toward same-sex spouses' and/or children's health coverage as after-tax employee contributions and (ii) report as taxable income the value of employer-funded health care coverage provided to same-sex spouses and/or the spouse's children. If the employer operates in any such state, its vendors will need systems in place to provide separate "taxable income" reporting for federal and state tax purposes.
- Consider whether, for open tax years, to file a claim or make an adjustment for Social Security and Medicare taxes on employee contributions toward health plan premiums that were treated as after-tax contributions, rather than pre-tax contributions, and on employer contributions toward premiums that were treated as taxable to the employee.

Finally, you should watch for further developments. As noted above, future guidance from the IRS is expected and there will likely be

additional judicial opinions that may affect the administration of employee benefit plans.

*If you have questions about the* Windsor *decision, the IRS and DOL guidance, or any other matter raised in this Legal Update, please contact any of the following lawyers.*


**Maureen J. Gorman**
+1 212 506 2679
mgorman@mayerbrown.com

**Debra B. Hoffman**
+1 312 701 7219
dhoffman@mayerbrown.com

**James C. Williams**
+1 312 701 8139
jcwilliams@mayerbrown.com

**Anna M. O'Meara**
+1 312 701 7196
aomeara@mayerbrown.com

**Ryan J. Liebl**
+1 312 701 8392
rliebl@mayerbrown.com

**Cecilia A. Roth**
+1 312 701 8566
croth@mayerbrown.com

**Karen F. Grotberg**
+1 312 701 7923
kgrotberg@mayerbrown.com

**Rebecca C. Davenport**
+1 312 701 8118
rdavenport@mayerbrown.com

**Christina M. Cerasale**
+1 312 701 8510
ccerasale@mayerbrown.com

**Katherine H. Dean**
+1 312 701 8414
kdean@mayerbrown.com


## Endnote

[1] For more information, see our Legal Update "Supreme Court Rules Part of DOMA Unconstitutional: Ruling's Effect on Employee Benefit Plans," available at http://www.mayerbrown.com/Supreme-Court-Rules-Part-of-DOMA-Unconstitutional-Rulings-Effect-on-Employee-Benefit-Plans-07-08-2013/.


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