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Section 3 of DOMA Held Unconstitutional – Employee
Benefits Implications

The Supreme Court recently issued its long-awaited opinion in *United States v. Windsor* – the Defense of Marriage Act ("DOMA") case – striking down Section 3 of DOMA on equal protection grounds. Although the exact details of how the federal government will implement this change in the law are not yet known, it is clear that a thorough review of employee benefit plans for compliance with the new landscape, as it continues to evolve, will be required.

Under DOMA, enacted in 1996, the terms "spouse" and "marriage" in employee benefit plans governed by federal law applied only to opposite-sex couples, and employers were not required by law to extend (and in some cases were prohibited from extending) benefits to same-sex couples which were available to opposite-sex couples.

EFFECT ON EMPLOYERS AND
EMPLOYEE BENEFIT PLANS

The Court's holding that Section 3 of DOMA is unconstitutional means that the federal government will have to treat same-sex couples as married for federal purposes if their marriage is recognized under the law of the state in which the couple resides. Currently, 12 states – Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington, plus the District of Columbia – recognize same-sex marriages, whether performed in state or out of state (including Canada). Some uncertainty

remains as to the extent benefits available to opposite-sex spouses under employee benefit plans must be provided to same-sex spouses who marry in a state that recognizes such marriages, but reside in a state that does not.

However, even if the Court's decision is narrowly implemented, employers will have to address the significant benefit plan design and administrative issues listed below, at least with respect to couples whose marriage is recognized by the state in which they reside:

GROUP HEALTH PLANS AND FRINGE
BENEFIT PLANS

- *Imputation of Income.* The federal tax code excludes from employees' taxable income amounts an employer pays for medical care provided to the employee and an employee's spouse and dependents. Under DOMA, employers who extended same-sex spouse medical coverage, either because of a state mandate (for fully-insured plans in certain states) or voluntarily (under a self-insured plan), were required to report the value of the benefit provided to the same-sex spouse as federal taxable income to the employee unless the spouse qualified as a tax dependent. Some employers provided a tax gross-up for the imputed income tax liability. Neither the imputation of income for federal tax purposes nor the gross-up will be required post-DOMA. Employers will need to work

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with their payroll departments to stop the imputation of income and to review plan documents and summary plan descriptions to eliminate any provisions that require income imputation.

- **Definition of "Spouse."** Employers will need to review governing plan documents, summary descriptions and employee communications to make sure that definitions of spouse do not exclude same-sex spouses.
- **COBRA Rights.** Under DOMA, same-sex spouses were not eligible to be qualified beneficiaries under COBRA even if they qualified as tax dependents for medical coverage taxation. Post-DOMA, same-sex spouses can be qualified beneficiaries under COBRA to the same extent as opposite-sex spouses.
- **Cafeteria Plan Status Change Rules and HIPAA Special Enrollment Rights.** Under Section 125 of the federal tax code, health plan participants who pay for their share of premiums with pre-tax dollars are prohibited from changing elections between open enrollment periods unless they or their spouses experience a qualifying change in status. Some of these qualifying changes in status give rise to special enrollment rights for employees and newly-acquired spouses and dependents. Same-sex spouses should now be eligible for special enrollment rights and will need to be taken into account in applying the change in status rules.
- **Medical Flexible Spending Accounts ("MFSA").** Because MFSA's provide a federal tax benefit, employees were

prohibited from paying for the qualifying medical expenses of a same-sex spouse using MFSA funds. That benefit should now be extended to same-sex spouses. In addition, eligible medical expenses incurred by a same-sex spouse will be reimbursable under health reimbursement accounts ("HRAs") and health savings accounts ("HSAs").

- **Family Medical Leave.** Employees were not entitled to use FMLA leave to care for same-sex spouses (although some state laws did confer that right). Following the Supreme Court's decision in *Windsor*, employers will be required to allow employees to use FMLA leave to take care of spouses, regardless of whether spouses are same-sex or opposite-sex.

QUALIFIED RETIREMENT PLANS

- **Definition of "Spouse."** Many retirement plans contain DOMA-compliant definitions of the terms "spouse" and "married." Such definitions were often required as a condition of obtaining a favorable IRS determination letter. Those definitions must now be amended to make clear that same-sex spouses and marriages are "spouses" and "marriages" under the plan to the same extent as opposite-sex spouses and marriages.
- **Qualified Joint and Survivor Annuities ("QJSA") and Qualified Pre-Retirement Survivor Annuities ("QPSA").** Defined benefit plans and certain defined contribution plans are required to provide a survivor annuity form of benefit with the spouse named as survivor unless the participant elects an alternate form of benefit or another beneficiary with

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the spouse's consent. As a result of the DOMA decision, for plans subject to the QJSA/QPSA rules, QJSAs should be the default form of benefit for married participants at retirement and QPSAs should be provided to surviving spouses in the event of the participants' pre-retirement death, regardless of whether spouses are same-sex or opposite-sex.

- *Spousal Consent.* Even in plans that are not required to provide QJSAs and QPSAs, a participant's spouse is the default beneficiary unless the participant designates another beneficiary and the spouse consents. Spousal consent should now be required of a participant in a same-sex marriage on the same basis as it is for opposite-sex marriage.
- *Hardship Distributions.* Hardship safe harbor reasons such as the need to pay health care expenses, funeral expenses, etc., must now be extended to include expenses of same-sex spouses to the same extent as those of opposite-sex spouses.

- *Qualified Domestic Relations Orders ("QDROs").* Under DOMA, qualified retirement plans were not permitted to treat same-sex spouses (or former spouses) as alternate payees under a QDRO. That now changes and plans will be required to accept same-sex spouse QDROs.

Again, uncertainty remains over how broadly the federal government will implement the Court's DOMA decision; organizations operating in multiple jurisdictions, only some of which recognize same-sex marriage, may find implementation of the *Windsor* decision a challenge. We anticipate that federal agencies will provide guidance relatively quickly. Until then, for more information on how the Supreme Court's DOMA decision may affect your employee benefit plans and tax reporting obligations, please contact a member of our Employee Benefits Practice Group.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.