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Supreme Court Decides the Fate of Same-Sex Marriages

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On June 26, 2013, the Supreme Court issued its long-awaited decisions in two same-sex marriage cases. In *Hollingsworth v. Perry*, No. 12-144, the Court ruled that the proponents of a popular voter initiative that reversed same-sex marriage approval in California did not have standing to appeal a decision by a U.S. District Court that overturned the initiative (thereby restoring same-sex marriages in California). In *Windsor v. United States*, No. 12-307, the Court ruled (in a 5-4 decision) that the section of the Defense of Marriage Act (DOMA) that required federal laws to ignore same-sex marriages that are legally entered into under an applicable state law is unconstitutional. The *Windsor* decision, in particular, will have a substantial impact on the design and operation of private employer benefit plans. The decision will also affect the number of employees who may be eligible for a family medical leave, and will require employers to address how legally recognized relationships that are not considered "marriage" (i.e., civil unions or domestic partnerships) fit in with federal and state laws pertaining to leaves.

The State of the Law Before the *Windsor* Ruling

Under Section 3 of DOMA, the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the Internal Revenue Code of 1986, as amended (Code) had to be interpreted so that the term "spouse" could mean only a spouse of the opposite sex, in a marriage recognized under applicable state law. This meant that an employer could (but was not required to) define the term "spouse" in its ERISA-covered benefit plans to include a spouse of the same sex as the employee. If an employer did provide spousal benefits to same-sex spouses, there were significant tax consequences to the employee because the relationship was not recognized as a spousal relationship for tax purposes. Also, certain spousal benefits available under retirement plans (such as assignment of benefits pursuant to a domestic relations order, or survivor benefits that would violate the incidental death benefit rule because the spouse was significantly younger than the employee) could not be provided at all. In addition, if an employer did not carefully define the term "spouse" in its benefit plans, an employee with a same-sex spouse (or a surviving same-sex spouse) could claim benefits based on the ambiguity of the term spouse inherent where a marriage is valid under state law but not under federal law. Employers that chose to provide same-sex benefits had the additional administrative burdens of identifying same-sex spouses as such, and then applying differing state and federal withholding and imputed income factors depending on whether an employee's spouse was a same-sex or opposite-sex spouse. And the employer had to make sure that its insurance policies conformed to its intended (or accidental) provision of same-sex spousal benefits.

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Benefits provided under plans not subject to ERISA (such as certain employee-pay-all group life insurance benefits and plans sponsored by public employers or churches) are subject only to state law, but the tax consequences of benefits provided to same-sex spouses were the same as for an ERISA-covered plan. Also, an employer would still be faced with the question of whether a particular same-sex marriage should be recognized, depending on the state of residence of the employee and spouse when the marriage was entered into, where they resided when claiming the benefit, and where the employer is located or its plan administered.

What the Court Held

After first ruling that it has jurisdiction to hear the case,[1] the majority ruled that the equal protection clause of the Fourteenth Amendment (incorporated into the due process clause of the Fifth Amendment) prevented the federal government from refusing to recognize same-sex marriages that have been entered into under the law of a state. The Court relied primarily on the fact that states have historically defined marriage for themselves. Because New York chose to protect same-sex relationships by allowing same-sex couples to marry, it was a violation of equal protection for the federal government to make unequal a subset of state-sanctioned marriages.

Ms. Windsor and Ms. Spyer had lived together for 30 years when New York made domestic partnership available in 1993—they immediately registered. They married in Canada in 2007, and New York recognized their marriage as valid. When Ms. Spyer died in 2009, she left her entire estate to her wife, but because of DOMA, Ms. Windsor was determined to be ineligible for the marital exemption from the federal estate tax. The *Windsor* case involved her petition for a refund of estate taxes she was required to pay. The Second Circuit Court of Appeals ruled that Section 3 of DOMA was unconstitutional, and the Supreme Court granted *certiorari*.

Justice Kennedy wrote the majority opinion, joined by the four liberal Justices. After eloquently describing the process of recognition of same-sex marriages by 12 states (by his count) and the District of Columbia,[2] he described the historical delegation of authority to the various states to define marriage, with the federal government intervening in only limited ways, such as to ensure constitutional protection to minorities (striking down laws that forbid interracial marriage) or to protect a discrete federal interest (allowing the federal government to ignore marriages designed only to allow a non-American to immigrate, or to recognize common-law marriages for Social Security benefits even if not recognized under state law). States, on the other hand, are free to establish varied rules for marriages (minimum age, whether cousins can marry) that are uniform within the state but may differ from others. DOMA "departs from" this historical pattern, and imposes a uniform rule solely "to impose restrictions and disabilities" on a class of state-sanctioned marriages. "What the State of New York treats as alike the federal law deems unlike by a law designed to injure the same class the State seeks to protect." So Justice Kennedy frames the question as "whether the resulting injury and indignity is a depravation of an essential part of the liberty protected by the Fifth Amendment."

Notably, the Court defined the "class" that was subject to the denial of equal protection *not* as homosexuals, *not* as same-sex couples, but as "those persons who are joined in same-sex marriages made lawful by the State." By defining the class this way, the Court seems to be saying that other states are free to limit their marriages to opposite-sex relationships—thus allowing some states to outlaw same-sex marriages while others accept them. The dissenting Justices recognized that this definition of the class attempts to confine the scope of the majority opinion so that its impact will be limited and that its "judgment is based on federalism."

Justices Scalia, Roberts, and Thomas would have held that the Court lacked jurisdiction to hear the case because of the refusal of the Justice Department to defend DOMA. Those Justices, together with Justice Alito, also would have upheld DOMA as constitutional, based on a federal interest in uniformity and stability. Justice Roberts opined that the federal government had an interest in eliminating state-by-state differences

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1 This question arose because of the Justice Department's opinion that DOMA was unconstitutional and therefore it would not defend it. The Court ruled that the Court has Article III standing because the government's refusal to refund the taxes paid by Ms. Windsor constituted an "injury in fact," and the Court has "prudential" standing because at least one of the parties before the Court (the "Bipartisan Legal Advisory Group"—the Republican members of the House of Representatives) would defend DOMA "with vigor" even though the Justice Department agreed with Windsor that DOMA was unconstitutional, and because if the Court were to dismiss this case, it would be followed by extensive litigation, given the broad scope of DOMA. Justice Alito opined that BLAG has direct standing to bring the case to the Court because it suffered an "injury in fact" when the Justice Department decided to stop defending DOMA.

2 Justice Kennedy wrote that these states "decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons."

over something thought by most people (at the time) to be essential to the very definition of marriage, but the primary thrust of his separate opinion was to point out to readers the limited scope of the decision (of likely relevance to future challenges to state marriage definitions and their impact on same-sex couples). Justice Scalia's extensive dissent (much of which is devoted to the jurisdictional issue) points out the difficult implications of the majority opinion—primarily based on the questions that arise when a couple is married in one state but lives in another where the marriage is not recognized. He would have upheld DOMA as supported under the "rational basis" test for equal protection analysis.

Justice Alito (joined by Justice Thomas) observed that "[t]he Constitution does not guarantee the right to enter into a same-sex marriage" (a proposition the majority opinion appears to support as well). He then asserted that same-sex relationships were not entitled to heightened scrutiny in equal protection cases, and that the question of whether marriage should be defined in terms of procreation (opposite sex only) or relationships should be left to the legislatures of the states *and* the federal government.

What Does This Mean for Employers?

Impact of *Windsor* on Private Employer Benefit Plans

Effective immediately, an employee with a valid same-sex marriage will be treated as having a spouse for any benefit plan that refers to "spouses" without limitation. This means employers can provide spousal coverage under medical plans without imputing income to those employees. It also means that same-sex spouses will receive the benefit of spousal status for purposes of 401(k) and other retirement plans. If an employer has been "grossing up" employees with same-sex spouses for the tax cost of the extra imputed income, that gross-up can cease. But there are many open questions.

The *Windsor* decision does not eliminate all of the confusion surrounding the patchwork of state recognition of same-sex relationships, and raises additional questions that can only be answered by future regulation or litigation. The confusion arises in large part from the myriad ways that states have chosen to recognize or disavow same-sex relationships, and the fact that the only section of DOMA that was at issue in *Windsor* was the section relating to recognition of such marriages by the federal government. Section 2, which allows one state to refuse to recognize same-sex marriages entered into in another state, is still the law, and it is uncertain how a challenge to that section might fare, given the limited scope of Justice Kennedy's opinion.

At this writing, 12 states (and the District of Columbia) provide full marriage equality to same-sex relationships (plus California, based on the opinion in *Hollingsworth*). Some states provide for civil unions or domestic partnerships that have all of the legal equivalence of marriage (for state law purposes) other than the name. Some states allow for registration of domestic partnerships or civil unions for same-sex couples, or for both same-sex and opposite-sex couples, but do not provide all of the incidences or privileges of marriage to those couples. It remains to be seen whether the federal government (for purposes of ERISA) provides spousal standing only to marriages that are labeled marriages, or also to other relationships (civil unions/domestic partnerships) that may be argued are equivalent to marriages. Similarly, it is not clear how the law will be applied to civil unions/domestic partnerships that are entered into by same-sex couples where marriage is or was not available.

Will civil unions/domestic partnerships entered into in a state that now recognizes same-sex marriages be treated as a marriage, or must the couple officially marry to obtain recognition by the federal government (and by extension, ERISA plans)? If a couple lives in a state that does not recognize same-sex marriages, can they get married in a state that does, and will that marriage be recognized for ERISA purposes even if it is not recognized by the state where they live? What if they were validly married when they lived in the other state, and moved to a state that does not recognize same-sex marriage? If the couple's current state of residence is a state that does not recognize the marriage, the tax treatment for state purposes may be different from the tax treatment for federal purposes.

Once we know what relationships are recognized under federal law, ERISA plans (by definition) will have to treat couples in such relationships as married for the purposes of the spousal benefits prescribed under ERISA (such as survivor benefits under tax-qualified retirement plans and 401(k) plans, and domestic relations orders). But these plans will still be able to define "spouse" differently (narrowly or more broadly) for purposes of non-mandated spousal benefits under ERISA plans.

The *Windsor* decision will take effect immediately, but whether it is retroactive is not yet determined. Even if it is retroactive, it is uncertain what effect that retroactivity has on ERISA plans that were operated in accordance with the DOMA definition of marriage. Among the issues we have identified are:

- How has each plan recognized "spouses" in a same-sex relationship, and will you expand or narrow the federal definition for non-mandated spousal benefits?
- Can you offer special enrollment rights in light of the decision (is this a "change in status" for purposes of cafeteria/125 plans and medical plans)?
- How quickly can you change payroll withholding?
- Do you have to offer retroactive spousal survivor benefits for deaths that occurred before the ruling?
- Do you have to obtain spousal consents for previously-distributed pension benefits that were not in joint-and-survivor form?
- Will your benefit plans and plan descriptions need to be amended?

Impact of *Windsor* on FMLA Leave

The Family and Medical Leave Act (FMLA) provides eligible employees up to 12 weeks of unpaid, job-protected leave a year for the employee to care for a spouse with a serious health condition. If the spouse is an eligible military service member with a serious injury or illness, the employee is eligible for 26 weeks of leave. The FMLA defines "spouse" as a husband or wife. 29 U.S.C. § 2611 (13). The FMLA regulations issued by the Department of Labor clarify that spouse means "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides." 29 CFR § 815.102. When DOMA was enacted in 1996, its definition of spouse as only "a person of the opposite sex who is a husband or wife" controlled, so that same-sex married couples were not entitled to FMLA leave to care for their spouse.

Effect of *Windsor* on FMLA Leave

Now that DOMA has been overturned, the definition of spouse in the DOL regulations is once again in effect. So, same-sex married couples who live in a state that recognizes same-sex marriages will be considered married for FMLA purposes and an employee in a same-sex marriage will be entitled to FMLA leave to care for his or her spouse. However, because the regulations look to the employee's state of residence to determine whether a person is a spouse, an employee who lives in one of the 37 states that do not recognize same-sex marriage will not be able to take FMLA leave to care for his or her spouse even though the couple became legally married in another state. For example, a same-sex couple married in New York living in Alabama would not be considered "spouses" for FMLA purposes.

To ensure that same-sex married couples are entitled to full FMLA protection no matter where they reside, the DOL could amend the regulation to provide that spousal status is based on the laws of the state where the employee married rather than the laws of the state where the employee resides. Whether that will happen, and how soon, is unclear. Various advocacy groups have indicated that they will be working to ensure that such changes are made so that same-sex married couples are treated the same under federal law regardless of their residence. Notably, in President Obama's statement yesterday on the *Windsor* decision, he said he had directed the Attorney General to work with the members of the Cabinet to review all relevant federal statutes to ensure that "this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly."

In one respect, the decision can result in same-sex married couples in states recognizing same-sex marriage being entitled to less FMLA leave than they had before. Under the FMLA, an employee can take up to 12 weeks of unpaid, job-protected leave for the birth, adoption, or foster care of the employee's child (Bonding Leave) or to care for a parent with a serious health condition (Family Care Leave). However, if both spouses work for the employer, the spouses are limited to a total of 12 workweeks off between the two of them when the leave is for either Bonding Leave or Family Care Leave for a parent. Under DOMA, same-sex married couples who worked for the same employer were not "spouses," so each one could take 12 weeks to bond with a new child or to care for their parent. Now, for these purposes, they will be limited to a total of 12 weeks between the two of them.

As noted above, some states which do not recognize same-sex marriage do provide for civil unions or domestic partnerships for same-sex couples. Employees in those relationships have not been entitled to spousal leave under the FMLA and that is not likely to change. Even before DOMA, the DOL had taken the position that employers did not have to provide FMLA leave to an employee to care for an unmarried domestic partner. In addition, because the FMLA regulations define "spouse" in terms of the state of residence's definition of "marriage," it seems likely that (absent a change in the regulations) spousal standing under the FMLA will apply only to marriages that are labeled by the state as marriages and not to civil unions even where they may be designed to provide the legal equivalences of marriage for state law purposes.

Impact of *Windsor* on State Family and Medical Leave Laws

The *Windsor* decision impacts employers not only on a federal law compliance level, but also with regard to state law compliance. Some impacts may be more easily anticipated than others, however. Under *Windsor*, California's recognition of same-sex marriages will now allow California employers to extend FMLA, as well as the California Family Rights Act (CFRA), to same-sex spouses. However, California also extends legal rights under its laws to registered domestic partners. Registered domestic partnerships can cover either same-sex couples or opposite sex couples, if one or both persons meets certain Social Security Act criteria. Cal. Fam. Code § 297. As a result, while *Windsor* will simplify how a California employer administers FMLA and CFRA leave for same-sex couples who are married, California employers will still have to grapple with the complexities of administering FMLA and CFRA for registered domestic partnerships whether the couples are in same-sex or opposite sex partnerships.

As is evident from the potential complexities that will now arise under California law, the Supreme Court's ruling does not have any immediate impact on couples in a recognized domestic partnership or civil union, leaving many same-sex couples (or opposite sex couples who may meet the definition of a recognized partnership or union) still without FMLA leave rights for a partner. This includes states like Illinois which recognize civil unions, but not same-sex marriage.

States that provide leave under state law and recognize civil unions, but not same-sex marriage, likely will see no change in how they administer leave under *Windsor*. For example, because New Jersey does not recognize same-sex marriage but does provide leave under the New Jersey Family Medical Leave Act for employees within a civil union, New Jersey employers will continue to face the situation of state leave laws applying in scenarios in which the FMLA will not be triggered. The same result will apply to employers operating in Oregon ("same-sex domestic partners" are covered under the Oregon Family Medical Leave Act), Connecticut ("civil unions" are covered under the Connecticut Family Medical Leave Act), Hawaii ("civil unions" are covered under the Hawaii Family Medical Leave law), Maine (same-sex "domestic partners" are covered under the Maine Family Medical Leave Act), Rhode Island ("civil unions" are covered under the Rhode Island Parental and Family Medical Leave Act), Vermont ("civil unions" are covered under the Vermont Parental and Family Leave law), Wisconsin (same-sex "domestic partners" are covered under the Wisconsin Family Medical Leave Act), and Washington ("registered same-sex domestic partners" are covered under the Washington Family Care Act).

Recommendations for Employers

Employers in states where same-sex marriages are recognized will have to provide leave for an employee in a same-sex marriage to care for the employee's same-sex spouse. This change will increase the number of employees who may legally be entitled for leave under the law. Likewise, this change highlights the importance of reviewing policies, forms, and procedures to ensure that employees, managers, and administrative personnel understand under what circumstances employees in same-sex marriages, civil unions, domestic partnerships, or other relationships may be permitted leave, and to ensure that employers are properly complying with the law.

We continue to analyze the effect of these decisions on employers. Littler will publish in-depth analyses of the *Windsor* decision and its impact on employer benefit plans and employment taxes next week.

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