U.S. Supreme Court Ruling: Defense of Marriage Act ("DOMA")

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While the U.S. Supreme Court(the “Court”) ruled section 3 of the Defense of Marriage Act (“DOMA”) unconstitutional, that does not mean that the changes for human resources departments and employee benefits plans can be immediate or easy. Many employers extend coverage to domestic partners, but very few that I am aware of have any record of whether a domestic partner may be married or in which state or country they are married. While the Court struck section 3 of DOMA, it did not strike section 2 of DOMA because it was not challenged. Section 2 at this time is still good law and it permits States to refuse to recognize same sex marriages performed under the laws of other States. This means that while someone is married in one State, when they move to the next State, that State may not treat them as married. For employers this means they must not only know which States recognize same sex marriage, but also which States have enacted provisions refusing to recognize same sex marriages performed in other States.

The Court ruled section 3 of DOMA unconstitutional, but did not limit the application of its decision to only periods after the decision was issued. At this point the decision appears to apply both immediately and retroactively. If it applies retroactively, there are significant issues that employer plans will face. Even if the decision is applied only prospectively there are significant changes to the procedures that employers and their vendors will need to follow to bring their plans into compliance with the requirements for the same sex domestic partner spouses, once the domestic partners that constitute same sex domestic partners for the plans are identified.

Action Items-

General Initial Considerations

Employers must determine which States in which they operate recognize same sex marriage.

Employers need to determine which States refuse to recognize same sex marriages which occurred in other States or countries.

Employers need to reach out to their employees requesting identification of which of the employees may be married and in which jurisdiction they were married and when that marriage occurred to begin to identify the individuals for whom there may need to be changes in the tax treatment of their health coverage and potential tax refunds and changes in any gross ups for the tax treatment.

Employers will need to consider their plan terms (in all employee benefit plans) and if the plan incorporated DOMA’s definition and if the plan incorporated a State law as the governing law for any matters not preempted by ERISA, it will need to be amended.

Employers will need to determine how much FICA and income tax withholding will need to be refunded to same sex marriage employees and will need to determine how the employer can request a refund for any FICA and Medicare taxes it paid and the employee’s share of the FICA and Medicare (including the additional Medicare tax in 2013) taxes the employer remitted related to the coverage for any same sex married employees.

Employer should review their employment policies, such as for Family and Medical Leave Act, bereavement leave and others, to determine if any revisions are necessary to include same sex married domestic partners (“ SSMDP”) and to determine how the employer wants to address employees in states which do not recognize same sex marriage.

Health and Welfare Plan Considerations

Employers will need to watch for Internal Revenue Service (“IRS”) guidance on how to handle the changes in elections that may be requested because at least in some states there will now be springing marriages for the plans and it is unclear if the date of the Court’s decision will be treated as the date of marriage triggering a special enrollment right under the Health Insurance Portability and Accountability Act (“HIPAA”).

Health and welfare , including cafeteria or section 125 or flexible benefit plans will need to be reviewed to determine when the coverage is available to the same sex married domestic partners ("SSMDP") based on IRS guidance related to the cafeteria plan requirements and the HIPAA special enrollment period requirements.

Health plans subject to Medicare Secondary payer requirements and Tri-Care secondary payer requirements will need to wait for guidance on whether the Center for Medicare and Medicaid Services and the Department of Defense respectively will pursue claims against the plan for the SSMDP's who were protected under such statutes as the result of this decision and for whom the health plan should have paid as primary instead of Medicare paying primary.

While many employers who extended coverage to domestic partners also extended COBRA continuation coverage like rights to domestic partners, some of the domestic partners who are now SSMDPs will have actual rights under COBRA including the right to receive separate notifications. Hopefully, the IRS and U.S. Department of Labor ("DoL") will provide guidance and a grace period to provide initial and other COBRA rights notices to SSMDPs for a period after the decision that permits employers times to determine which domestic partners are SSMDPs and are entitled to receive a notice as a statutory right.

If plans offered spousal life or accidental death and dismemberment insurance coverage, the employers will need to work with their insurers or brokers to determine when those coverages will be available to SSMDPs and in which states those coverages will be available. Since the insurance policies are governed by State laws, it may be determined by the State in which the insurer is licensed or in which it has obtained approval of the policy issued to the employer.

Hopefully, the IRS and DoL will also coordinate and provide a grace period for other notification requirements for SSMDPs for other health and welfare and retirement plan requirements.

Retirement Plan Consideration

Employers will need to consider the impact on their defined contribution retirement plans. The springing marriages may impact defined contribution plans who previously had what appeared to be valid beneficiary designations and which now are beneficiary designations that were made when the individual was married and required the waiver of the spouse for the designation of a different beneficiary. (For plans with loans that required spousal consent for the loan, there may be issues related to whether the loan was validly issued when there was a SSMDP who did not consent.)

For retirement plans making required minimum distributions to participants who are age 70 and ½ or older, there may be a need to recalculate the amounts of the required minimum distributions because the individual now has a recognized spouse.

Defined benefit retirement plans (including cash balance plans and other hybrid plans), money purchase pension plans and target benefit plans all distribute in the normal form of benefit as a qualified joint and survivor annuity ("QJSA") and qualified pre-retirement survivor annuity ("QPSA") if the participant dies prior to reaching retirement age, and offer qualified optional survivor annuities ("QOSA") all of which are for the participant and their spouse. The addition of the new SSMDPs will mean that some of these distributions may have started when a participant was married, but were not offered because on the plan's records at the time the participant was not married. There will need to be guidance from the IRS regarding how these should be handled so that the plan complies with its legal obligations to offer the correct forms of benefit and election rights. Furthermore, there is also a required notice that must be provided to the spouse for the QJSA and a waiver required and a required notice for the QPSA and there will need to be guidance regarding how plans can comply with these notice requirements with respect to the new SSMDPs.

Retirement plans will also need to receive guidance regarding how and when they must recognize domestic relations orders and qualified domestic relations orders for SSMDPS and participants who sever their marriage ties and whether the plans must recognize retroactive domestic relations orders in such situations for separations that occurred prior to the Court's decision.

Some defined benefit plans offered alternative forms of distribution or provided for a Social Security benefit offset reducing the benefit paid by the plan. The recognition of the SSMDPs as spouse may alter the Social Security benefits payable and the offsets for the Social Security offsets of the benefits. For plans offering a benefit that is a Social Security leveling benefit so the total retirement benefit is approximately equal for participants retiring prior to Social Security benefit eligibility, the benefits may need to be recalculated because the Social Security benefit may vary if the individual is married and this may alter the amount of the plan benefit payable before and after Social Security eligibility.

Employers with defined benefit plans should consider consulting with their actuaries regarding whether the addition of additional spouses to the plan will result in any changes to the plan's funding requirements in the event there are any employer subsidized benefits.

Concluding Thoughts

At this point, employers and plan sponsors have more questions regarding how to implement the Court's decision than answers. Guidance will be needed to determine how plans are to approach this change and its apparent retroactive application since there is no provision in the Court's decision limiting the retroactive application of its ruling. While we know the Court's decision, there is significant work ahead for employers in reviewing their plans, policies, procedures internally and the directions they have provided to vendors administering their plans or employment policies. The above descriptions of areas impacted is not intended to be a complete or definitive list, but a starting point. If you have any questions or concerns, please do not hesitate to contact any of the attorneys shown on this news alert.

Authored by Greta Cowart

Contacts:

Greta Cowart | 214.745.5275 | gcowart@winstead.com
Tony Eppert | 713.650.2721 | aeppert@winstead.com
Nancy Furney | 214.745.5228 | nfurney@winstead.com
David Jackson | 281.681.5944 | djackson@winstead.com
Lori Oliphant | 214.745.5643 | loliphant@winstead.com