TEXAS LAWYER
July 15, 2013
An ALM Publication

DOMA at Work

How Will SCOTUS Ruling Affect ERISA and FMLA?

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Winstead shareholder Greta Cowart knew she'd have a busy summer, with employer clients calling for advice about the Patient Protection and Affordable Care Act. But, ever since the U.S. Supreme Court struck down §3 of the Defense of Marriage Act of 1996 (DOMA), she's been fielding calls about what that ruling means for employee-benefit plans.

"We are waiting for guidance. We need a whole lot more clarity to deal with this," Cowart says about the high court's June 26 ruling in *United States v. Edith Windsor.*

The day after the Supreme Court issued *Windsor*, Baker Botts held a previously scheduled client seminar in Dallas. The planned subject?

"There is that little thing called the new health care law," jokes Mark Bodron, an ERISA partner in Houston.

Clients poured in, he says, but most posed questions about *Windsor*, not the affordable care act.

"My hope is that we are going to get some type of guidance from the federal government," Bodron says.

Cowart, Bodron and two other employee-benefits lawyers says *Windsor* creates a great deal of uncertainty, due largely to questions of how federal agencies will interpret the court ruling when issuing new regulations. Those questions are particularly difficult for Texas employers, where state laws bar recognition of same-sex marriages.

One thorny issue: U.S. Supreme Court Justice Anthony Kennedy's majority opinion includes strong language about the dignity of same-sex marriages. But it also includes language about deferring to the states. How should employers balance those mandates in states that don't recognize same-sex marriages, while ensuring that their benefit plans comply with ERISA and the Family and Medical Leave Act?

Greta Cowart, employee-benefits shareholder in Winstead

THOMAS PHILLIPS

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Windsor

In *U.S. v. Windsor*, the justices decided that DOMA §3, which defined marriage as the union of a man and woman for all federal purposes, violates the right of legally married, same-sex couples to equal protection under the Fifth Amendment. Section 3 applied to more than 1,000 federal laws. [*See "High-Court DOMA Ruling Has Little Impact on Texas Law,"* Texas Lawyer*, July 1, 2013, page 1.*]

Edith Windsor filed the federal challenge to §3 after her spouse died in 2008. Windsor's spouse had left her estate to Windsor, and New York state legally recognized their marriage. But the Internal Revenue Service denied Windsor a spousal estate-tax exemption because DOMA did not recognize same-sex marriages for the purpose of federal benefits. Windsor received a federal estate tax bill of nearly $400,000.

In his majority opinion in *Windsor*, U.S. Supreme Court Justice Anthony Kennedy wrote that DOMA §3 "violates basic due process and equal protection principles applicable to the Federal Government."

"By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive," Kennedy wrote.

Searching for Answers

"There are a lot of doors that just opened," Cowart says about the decision.

"There is a whole panoply of rules and regulations that have to be made now," says Dean Schaner, a labor and employment partner in Haynes and Boone in Houston.

But employers want answers now, say the four lawyers. Within a week of *Windsor*, Schaner says, his office had received 10 to 15 calls from different clients. Because of this, he and other Haynes and Boone lawyers are drafting a position paper about employer strategies for the interim period until key agencies like the Department of Labor and the Internal Revenue Service issue new post-DOMA regulations.

Generally, "If you are in a state that permits same-sex marriages, you know what's going on," says Bodron. If both the federal government and the state recognize same-sex marriages, employers can treat all employees' spouses the same, whether they're same-sex or opposite-sex spouses.

"The harder question is in states like Texas," Bodron says.

In such states, an employer may have to recognize an employee's same-sex marriage for the purposes of the IRS Code and ERISA-compliant benefit plans — but not necessarily for FMLA benefits, since the language of the FMLA explicitly defers to state laws.

Dean Schaner

Felicity Fowler

Texas doesn't recognize same-sex marriages, so, Texas employers won't be required to offer FMLA benefits to same-sex couples. However, Haynes and Boone partner Felicity Fowler says employers may offer FMLA benefits to employees even though they're not required to do so.

"You have productive employees who you want to transfer from a state that recognizes same-sex marriage. But, they would be giving up benefits they have obtained if you move them to Texas," says Fowler, who advises clients on the FMLA and co-chairs Haynes and Boone's attorney diversity committee.

But employers may want to tread carefully even when asking their workers about their marriages and spouses' gender, says Cowart. She believes Kennedy identified same-sex married couples as a protected class, equivalent to the protection provided to the groups as defined by race, color, religion, sex and national origin in Title VII of the Civil Rights Act of 1964. As such, employers who request information from those employees but not from others — such as the state from which they received their marriage license or the sex of their spouse — may violate those employees' rights.

Another knotty set of questions surrounds the issue of the ruling's retroactive consequences, Cowart says. She doesn't know if employers will be responsible for making whole those workers in same-sex marriages whose spouses were denied benefits — including pension benefits if the working spouse died in the time since 1996 and the passage of DOMA.

"There are people who have died in the interim," she says, "and their spouses may not have been paid."