

Client Alert

July 2013

Supreme Court Decision Holding That Section 3 of the Defense of Marriage Act is Unconstitutional Will Affect Employee Benefit Plans

On June 26, 2013, the Supreme Court held in United States v. Windsor that Section 3 of the Defense of Marriage Act (“DOMA”), which defines marriage as a legal union between a man and a woman for purposes of all federal laws, is unconstitutional. The Supreme Court’s opinion will affect over 1,100 federal laws that provide rights and benefits to married couples, including provisions under ERISA and the Internal Revenue Code (“Code”). However, the decision did not address whether a state could define marriage as a legal union between a man and a woman. Hence, state statutes that define marriage in that manner are unaffected. In those states in which same-sex marriage is recognized by a defined benefit pension plan, a same-sex spouse must now be eligible to receive a qualified joint and survivor annuity, and a qualified preretirement survivor annuity, which could cause an increase in a plan’s required minimum funding contribution. In the event of the dissolution of a same-sex marriage, the participant’s partner may now be able to seek a qualified domestic relations order. In a defined contribution plan, in the absence of a designated beneficiary, the same-sex spouse will now be treated as a beneficiary.

With respect to group health plans, same-sex spouses will be able to receive coverage on a pre-tax basis, even if they do not satisfy the Code requirement to be the employee’s dependent and can apply for income and employment tax refunds for open tax years. For this reason, employers should consider discontinuing the practice of charging participants with imputed income for the coverage of their same-sex spouses. It remains an open issue as to whether health plans that offer coverage to opposite-sex couples must now also cover same-sex couples. Further, same-sex spouses will be eligible to elect COBRA, and they can be covered under flexible spending and health savings accounts. However, the federal tax treatment of civil unions and domestic partnerships may be unaffected.

attorneys

Barry L. Salkin
bsalkin@olshanlaw.com
212.451.2212

Manes M. Merrit
mmerrit@olshanlaw.com
212.451.2309

practice

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Issues relating to the administration of plans with some employees residing in jurisdictions that recognize same-sex marriages and others residing in jurisdictions that do not recognize same-sex marriages remain. Plan language specifying which state law should apply will become important. Hopefully, the IRS will establish a uniform rule stating whether the validity of a marriage will be determined where the marriage occurred, or where the participants reside. With respect to employers with offices in different states, some but not all of which recognize same-sex marriages, employers may decide it is easier to recognize same-sex marriages in all of the jurisdictions in which its participants reside.

The Supreme Court decision did not address whether the decision will be applied retroactively. The Constitution does not require retroactive application, and the Supreme Court will sometimes take into account practical considerations. If courts determine that the decision has retroactive effect, the IRS could, as it has done in the past, provide relief by allowing plans to comply with the Windsor decision operationally on a prospective basis, even if the plans generally need to be amended back to 1996. Even if the IRS does provide transitional relief, such actions will not preclude participants from commencing legal actions, subject to statute of limitations and other possible defenses. This is a critical issue, to the extent there is a fiduciary duty under ERISA to seek out individuals who would have been entitled to benefits had Section 3 of DOMA never been enacted. We believe there will be regulatory activity in this area over the next several months as the IRS and DOL grapple with these issues.

See the Client Alert by our Employment Practices group discussing the effect of the Windsor decision on the Family and Medical Leave Act.

Please contact the Olshan attorney with whom you regularly work or either of the attorneys listed below if you have any questions regarding the effect of the Windsor decision on employee benefit programs.

attorneys

Barry L. Salkin
bsalkin@olshanlaw.com
212.451.2212

Manes M. Merrit
mmerrit@olshanlaw.com
212.451.2309

practice

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