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Client Alert *July 15, 2013*

SAME-SEX MARRIAGE DECISION IMPACTS EMPLOYEE BENEFIT PLANS

On June 26, 2013, the Supreme Court ruled in *United States v. Windsor* that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional. Section 3 of DOMA defined "marriage" for federal law purposes as between a man and a woman. The ruling may have significant implications for employers sponsoring benefit plans because same-sex spouses now will be treated as married for purposes of federal statutes, including the Internal Revenue Code, ERISA, FMLA, COBRA, and HIPAA.

BENEFIT PLAN IMPLICATIONS

Benefit plan administration that is affected by the Supreme Court's ruling includes:

- Same-sex spouses are now eligible for spousal annuity rights under defined benefit plans (and certain defined contribution plans).
- A same-sex spouse is the default beneficiary under qualified plans and 403(b) plans and must consent to the designation of an alternative beneficiary.
- Divorcing same-sex spouses may obtain qualified domestic relations orders.
- A same-sex spouse's expenses may serve as the basis for hardship distributions from certain defined contribution plans.
- Same-sex spouse beneficiaries have expanded rollover options.
- A same-sex spouse beneficiary may delay receipt of required minimum distributions until the date the deceased spouse would have been required to take a distribution.
- A same-sex spouse is no longer subject to imputed income on employer sponsored health and welfare benefits covering his or her non-employee spouse.
- Marriage and divorce are HIPAA special enrollment events for same-sex spouses.
- Same-sex spouses have COBRA rights.
- A same-sex spouse's medical expenses are reimbursable under the other spouse's health FSA, HRA, or HSA.
- Same-sex spouses are treated as spouses for purposes of the dependent care FSA limits and the general requirement that both spouses be gainfully employed.

UNRESOLVED ISSUES

We are awaiting additional guidance on many of the issues employers will need to address to determine what changes are necessary with respect to their benefit plans. The unresolved issues include:

- Whether the ruling will be given retroactive effect.

- How the decision affects same-sex spouses legally married in one state that move to a state that does not recognize same-sex marriage. Currently, same-sex marriages may be performed in California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia (and the list will soon include Minnesota and Rhode Island).
- Whether the ruling itself serves as a HIPAA special enrollment event (*i.e.*, whether a same-sex spouse became married for federal law purposes on June 26).
- Whether there will be any grace period for benefit plan amendments that may be needed to comply with the new legal framework.
- Whether prior beneficiary designations and form of benefit elections that now would require spousal consent remain valid.

ACTION ITEMS

While we await guidance regarding the implications of the Supreme Court's decision, we recommend that employers take the following actions:

- Review plan terms and summary plan descriptions to determine whether changes are necessary.
- Stop imputing income on employer sponsored health and welfare benefits covering same-sex spouses residing in states that recognize same-sex marriages.
- Communicate to employees that they should provide the employer with information regarding any same-sex spouse so that the employer may properly administer its benefit plans.
- Begin applying the existing spousal annuity, consent, and beneficiary rules to same-sex spouses participating in retirement plans who reside in states that recognize same-sex marriage.

For the latest information about this topic, please contact the Thompson & Knight attorney with whom you regularly work or any of the following employee benefits attorneys for assistance.

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