EMPLOYEE BENEFITS IMPLICATIONS OF SUPREME COURT'S DEFENSE OF MARRIAGE ACT DECISION

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On June 26, the U.S. Supreme Court in *United States vs. Windsor* ruled that Section 3 of the Federal Defense of Marriage Act (DOMA) is unconstitutional in that it denies equal protection to persons of the same sex who are legally married under state law. The Court's decision has a wide-ranging and immediate impact on employers that sponsor qualified retirement plans, group health plans, fringe benefit programs, and executive compensation arrangements.

The benefit plan implications may differ depending on whether a benefit program is subject to ERISA (the case for most retirement and health plans maintained by private employers). Benefit plans that are not subject to ERISA, such as church plans and plans maintained by governmental employers, will have separate but related concerns.

The implications of the Supreme Court's decision in *Windsor* may also depend on the laws of the state in which an employee works, resides, or is married. Importantly, the Supreme Court did not rule that there is a constitutionally protected right to same-sex marriage; therefore, it appears that state laws that ban same-sex marriages remain for now. This complicates matters for employers with employees who work, reside, or were married in states on both sides of this issue.

Group Health Plans

Here are some implications of the Supreme Court's decision for employers that sponsor major medical and other group health plans (e.g., dental and vision plans):

- Employees are no longer required to pay federal tax on the value of employer-sponsored health coverage provided to a same-sex spouse. This means employers will no longer be required to impute to the employee additional W-2 compensation equal to the value of the coverage provided to a same-sex spouse. There are state tax implications as well.
- An employee may now pay for the cost of qualified benefits (e.g., medical, dental, or vision benefits) provided to a same-sex spouse with pre-tax dollars through a cafeteria plan. Similarly, HRAs, health FSAs and HSAs may now pay (or reimburse) the eligible expenses incurred by same-sex spouses with pre-tax dollars.

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- Same-sex spouses who are covered as dependents under a group health plan that is subject to COBRA would now qualify for COBRA coverage (i.e., may now achieve the status of "qualified beneficiary") when a qualifying event occurs, such as termination of an employee's employment or divorce.
- Same-sex spouses now enjoy special enrollment rights under HIPAA; new same-sex spouses and spouses who lose coverage may now be added to a group health plan mid-year. Before DOMA, these rights were afforded only to opposite-sex spouses.

As noted above, it may be that these rights can only be enjoyed by employees and same-sex spouses who are covered by the laws of a state, like New York, that recognizes same-sex marriages.

Can a self-insured ERISA health plan continue to define "spouse" in a manner that excludes same-sex spouses? We think the answer may well be "yes," but the issue has yet to be settled. One thing seems fairly clear: such plans may now be at greater risk of discrimination claims.

Retirement Plans

The Supreme Court's decision also has a number of implications for employers that sponsor qualified retirement plans. Retirement plan operations impacting spouses that may be impacted, particularly in states like New York that permit or recognize same-sex marriages, include:

- Survivor Benefits. Survivor benefit rights must be granted to same-sex spouses under plans that are subject to the qualified joint and survivor annuity (QJSA) rules. Under the QJSA rules, the normal form of benefit is an annuity that pays a benefit for the participant's lifetime and pays a 50 percen survivor benefit to the surviving spouse of his or her lifetime. In the event a participant predeceases his or her spouse prior to retirement, the surviving spouse will be entitled to receive a qualified preretirement survivor annuity (QPSA) that pays a survivor annuity in an amount generally equal to 50 percent of the annuity benefit the participant would have received on retirement.
- Consent Rights. The right granted to spouses under plans to consent to participant elections, such as the designation of a non-spouse beneficiary, the waiver of a QPSA, the selection of a form of distribution other than a QJSA, or the application for a plan loan, will now extend to same-sex spouses.
- QDROs. A qualified domestic relations order (QDRO) may now be used to award a portion of the benefits accrued by a retirement plan participant in the event the participant is divorced from his or her same-sex spouse.
- Eligible Rollover Distributions. A same-sex spouse who is entitled to an eligible rollover distribution from a qualified retirement plan will be able to elect a direct or traditional 60-day rollover of that distribution to an IRA or other eligible retirement plan.
- Hardship Withdrawals. Certain retirement plans allow for hardship withdrawals on account of a spouse's medical, tuition, or funeral expenses. For those retirement plans, the right to apply for spouse-related expenses will extend to withdrawals by participants in same-sex marriages.
- Minimum Required Distributions. Certain rules under the age 70 1/2 minimum distribution rules that are specifically applicable to spouses will now extend to same-sex spouses. For example, a same-sex spouse will now be able to defer

payment of minimum required distributions until April 1 of the year immediately following the year in which the participant would have reached age 70 1/2.

Open Issues and Action Steps

The full scope of the employee benefit plan implications coming out of the Supreme Court's decision in Windsor are not yet known. For example, might a qualified retirement plan need to retroactively grant a survivor benefit to a same-sex spouse? Whether and how the Supreme Court's decision might need to be retroactively applied by plan sponsors is unclear. May a health plan participant or a health plan sponsor seek a refund for past payroll and income taxes paid on imputed income resulting from the coverage of a same-sex spouse? If so, how?

And there almost certainly are many other similar issues that will require guidance from regulatory agencies at the state and federal levels as employers work to modify their plans in response to *Windsor*. In the meantime, we suggest plan sponsors undertake the following action steps:

- Employers and other plan sponsors will need to undertake an immediate review of plan documents and summary plan descriptions (SPDs) to determine the rights and obligations of same-sex spouses who are or may become entitled to plan benefits.
- Identify any such provisions in the plan documents and SPDs that are inconsistent with the Supreme Court's decision, and prepare to modify the plan's terms and the plan's operational procedures.
- Review payroll practices and procedures, and modify income and payroll tax procedures to the extent they tax same-sex spousal benefits in a manner inconsistent with the Supreme Court's decision.
- Monitor future guidance.

The attorneys in the Hodgson Russ Employee Benefits Practice Group are well-positioned to assist employers and other plan sponsors in evaluating *Windsor*'s impact and will communicate new developments as they occur.