Employee Benefits in Post-DOMA Minnesota

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It is easy to get lost in the rhetoric surrounding the decision issued on June 26, 2013, by the U.S. Supreme Court in *United States v. Windsor*, striking down a portion of a federal law known as the "Defense of Marriage Act" or "DOMA." It is not difficult to understand the significance of the decision for individuals of the same sex who want to be married and who want to have the marriage recognized as if it were between two individuals of opposite sexes. But how does the decision affect the workplace? Specifically, how does the decision impact employee benefits?

First, some background: The section of DOMA found to be unconstitutional required the use of certain definitions of "marriage" and "spouse" in federal laws and regulations. Under DOMA, "'marriage' means . . . a legal union between one man and one woman as husband and wife," and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. In declaring this section of DOMA unconstitutional, the Supreme Court upheld the rights reserved by the states to legislate regarding marriage and, if a state so chooses, to sanction marriage between same-sex individuals. The Court left intact another section of DOMA that permits states to prohibit same-sex marriage and to refuse to recognize same-sex marriages performed in other states.

Until recently, the State of Minnesota recognized marriage only between individuals of opposite sexes and did not officially recognize any sort of "civil union" or "domestic partnership" between same-sex partners. Legislation legalizing same-sex marriage was passed in the 2013 legislative session and signed into law by Governor Dayton on May 14, 2013. This legislation took effect August 1, 2013. Minnesota law is now consistent with federal law. In addition to Minnesota, as of the date this article was prepared, 15 other states and the District of Columbia have legalized same-sex marriage.

The changes in the law require Minnesota employers to offer spousal benefits under both state and federal law to spouses in same-sex marriages, regardless of the state in which the marriage occurred. For example, an employee who married his same-sex spouse in Iowa is entitled to spousal benefits under his Minnesota employer's retirement and welfare benefits plans. The new law simplifies benefits administration for Minnesota employers who had previously voluntarily offered spousal benefits to same-

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sex spouses in marriages recognized under other states' laws. For example, these employers previously had to withhold tax from an employee's pay on imputed income attributable to dependent coverage provided to a same-sex spouse. These employers may now be entitled to a refund of related FICA withholding.

Neither the Supreme Court decision nor the new law in Minnesota changes the treatment of same-sex "civil unions" or "domestic partnerships" that are not considered "marriage." For example, Wisconsin law recognizes same-sex "registered domestic partnerships," but does not recognize same-sex marriage. A Minnesota employer may offer spousal benefits to the same-sex partner of an employee whose relationship is recognized in some fashion other than marriage under another state's law, such as Wisconsin's, but is not required to do so.

What is the impact of the *Windsor* decision and Minnesota's same-sex marriage law on typical employee benefits offered by a Minnesota employer to its employees? Under guidance issued by the Department of Labor and Internal Revenue Service, ERISA-governed plans are required to consider an individual as married for ERISA and tax purposes if the marriage is considered valid in the state of "celebration," regardless of the state in which the individual resides.

- **401(k) Plans:** Perhaps the biggest impact of the change in law concerns beneficiary designations under 401(k) and other retirement plans. ERISA requires that an employee's 401(k) account be distributed to his or her spouse in the event of the employee's death, unless the employee has designated someone else as beneficiary and the spouse has consented to that designation. Prior to the law changes, a participant in Minnesota with a same-sex spouse (from a marriage performed in a state that had legalized same-sex marriage) could have designated someone other than the same-sex spouse, such as a child or parent, to receive the participant's 401(k) or other retirement plan account, without the consent of the same-sex spouse. Effective in Minnesota as of August 1, 2013, absent the consent of the same-sex spouse, any such designation is invalid. For the designation to be valid, the participant needs to file a new beneficiary election form, designating the child or parent, and obtain the consent of the same-sex spouse to the designation. The changes in the law similarly impact survivor annuity rights under traditional pension plans.

- **Medical Plans:** Under prior law, unless an employer's plan specifically provided for partner benefits, coverage would not have been available to an employee's partner if he or she could not be considered the employee's dependent under federal law. If the medical plan had a separate premium rate for spousal coverage, under prior law, that rate would not have been available to the employee's same-sex partner. Under new law, the employee will be able to cover his or her same-sex spouse at the spousal coverage premium rate. COBRA rights are now also available to the same-sex spouse.

- **Cafeteria or Flex Plans:** These plans generally permit an employee to change his or her deferral election mid-year if the employee gets married during the year. Now, marriage to a same-sex partner during the year qualifies as a change in status that will permit an employee to change his or her deferral election. In addition, otherwise eligible health care expenses, such as for eyeglasses or for transportation to obtain necessary medical care, for a same-sex spouse or a same-sex spouse's dependents may now be reimbursed by the employee spouse's flex plan.

Do the changes in the law cost employers? There likely will be no need for employers to amend plan documents, because it is rare for such documents to specify gender in the definition of "spouse." There may be costs involved in preparing employee information and in changing administrative procedures and handbooks to reflect the new law. Employers who fail to comply with the new law may incur significant costs associated with non-compliance.

An employer should not assume that it is aware of the marital or partnership status of its employees. It may be unlawful for an employer to ask its employees direct questions about their marital status. Instead, the better course of action is for the employer to communicate generally the impact of federal and state law changes on employee benefits and invite employees to take action, if necessary, to reflect (and protect) the new status of their partners under federal and state law.

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