

FOCUSON CALL, MARCH 6, 2013

**BENEFITS LITIGATION UPDATE:  
SUMMARY OF MATTERS AND ISSUES TO BE DISCUSSED**

**SPEAKERS: PAUL A. FRIEDMAN, JOHN HOUSTON POPE, DALY D.E. TEMCHINE**

- **The recognition of same gender marriages.** The first topic is an update on the litigation involving same sex marriages. The Supreme Court had ten petitions before it when it selected just two cases for review. The discussion will focus on the potential implications of the Court's selection of these cases. The issues presented by these cases are:
  - The constitutionality of DOMA – The Supreme Court is expected to decide the constitutionality of the Defense of Marriage Act (DOMA) in *U.S. v. Windsor*. This decision will impact federal laws, such as those that apply to benefit plans.
    - If the Court finds that DOMA is constitutional, plans will not be required to recognize same-sex marriages in their plans regardless of the validity of such in one or more states.
    - If the Court rules that it is unconstitutional, plans will need to recognize the same-sex marriages in accordance with state law, such as for joint and survivor annuities in retirement plans and the tax exclusion for health plans.
  - The constitutionality of same-sex marriages – The Supreme Court is also expected to decide whether state laws can prohibit same-sex marriages in *Hollingsworth v. Perry*. This decision could impact both federal and state laws, including the tax consequences of receiving benefits from plans.
    - If the Court finds that the ability of a person to marry someone of the same gender is not a constitutionally protected right under federal law, then plans will not be impacted by the Court's decision in this case.

- The Court may also hold that same-sex marriages in California must be recognized because of the unique constitutional and other history of the issue in California. If the Court so ruled, ERISA plans would have to recognize (or not) same sex marriages based on the DOMA decision. California state laws that are not preempted by ERISA would also apply to benefit plans affected by marriage recognition.
  - If the Court finds that same-sex marriage is a constitutionally protected right, plans with participants in all states would need to recognize same-sex marriages in all states for state law purposes only (and the Court would likely find DOMA to be unconstitutional as well in the *Windsor* case).
- **Current litigation about Obamacare.** The second topic is a discussion of the second round of litigation following the Supreme Court’s rulings last year in *National Federation of Independent Businesses v. Sebelius (NFIB)* upholding the individual mandate. The issues presented by these cases are:
  - “Swinging for the fence” challenges – *Sissel v. Sebelius*. Following up on the Supreme Court’s holding in *NFIB*, that the individual mandate is a “tax,” this case argues that the enactment of the law violated the Origination Clause of the Constitution, which commands that bills raising revenues must originate in the House of Representatives, because the substance of the law originated in the Senate. The government has filed a motion to dismiss the case.
  - The constitutionality of the employer mandate -*Liberty University, Inc. v. Geithner* (this case also may revisit the constitutionality of the individual mandate on new grounds not considered in *NFIB*). The issues raised by *Liberty University* are:
    - Whether the Anti Injunction Act applicable to taxes is applicable to the employer mandate;
    - Whether the employer mandate exceeds Congress’ powers under the Commerce, Necessary and Proper, Taxing and Spending clauses of the Constitution; and

- Whether both the employer and the individual mandate violate the Free Exercise, Establishment and Equal Protection Clauses of the Constitution.
  - The constitutionality of the individual mandate – *U.S. Citizens Ass’n v. Sebelius*. The plaintiffs’ claims in this case are that the individual mandate burdens an individual’s right to liberty, violates “intimate association” and invades their privacy. The Sixth Circuit Court of Appeals rejected these claims and plaintiffs may seek certiorari from the Supreme Court.
  - Privacy and preemption challenges – *Coons v. Geithner*. This case presents a broad spectrum of high level issues such as violation of separation of powers doctrine, invasion of medical privacy and whether state laws that prevent the implementation of Obamacare are preempted. The latter issue is particularly relevant to multi-state employers. Plaintiffs lost at the District Court level, but an appeal to the Ninth Circuit was filed in late February.
  - State and federal relationships – *State of Oklahoma ex rel. Pruitt v. Sebelius*. This case presents several important issues concerning state-federal relationships, but one issue is of particular interest to employers. Oklahoma contends that the tax penalties to which employers may be subject if their employees obtain coverage from an exchange apply only to state run exchanges. The punch line is that, when a state declines to operate an exchange and the federal government steps in with its own exchange, the employers in that state are not subject to these penalties. Notably, a group of private employers seeks to intervene in the case.
- **Contraception coverage.** This is an issue in more than one hundred cases. Many are brought by for profit employers. These employers raise two primary grounds for their challenges to the mandatory coverage of contraception:
  - Free exercise of religious belief under the Constitution; and
  - The Religious Freedom Restoration Act.

No final ruling has been issued in any of these cases, and there is a clear split in the Circuit courts over whether enforcement of the mandate should be enjoined while the cases go forward.

Clearly, the courts are going to have a lot to say about whether Obamacare will remain an important issue of concern to employers. In light of the low likelihood that Congress will take any actions affecting the law in the near future, the action to watch is in the courts.