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webinar

## Health And Welfare Implications Post DOMA

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# Introduction

- What states authorize same-sex marriage?

<b>Connecticut</b>	<b>Minnesota</b>
<b>Delaware</b>	<b>New Hampshire</b>
<b>District of Columbia</b>	<b>New York</b>
<b>Iowa</b>	<b>Rhode Island</b>
<b>Maine</b>	<b>Vermont</b>
<b>Maryland</b>	<b>Washington</b>
<b>Massachusetts</b>	

- California resumed same-sex marriages upon authorization of the 9th Circuit, which had imposed a “stay” pending litigation on Proposition 8

# Introduction

- Some states (or subdivisions) have enacted laws recognizing domestic partnerships or civil unions
- Some employers offer an affidavit process to establish domestic partner status
- These relationships were not addressed in Windsor

# Introduction

- What did the Supreme Court rule in Windsor?

## Section 1. Short title

This Act may be cited as the “Defense of Marriage Act”.

## Section 2. Powers reserved to the states

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

## Section 3. Definition of “marriage” and “spouse”

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only 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.

# Introduction

- Because Section 2 of DOMA remains as the law, there are many uncertainties and questions, including:
  - Whether the ruling is retroactive or may be given retroactive effect
  - The effect of having a same-sex marriage but a domicile in a state that does not recognize same-sex marriage

# Introduction

- What to do?
  - Determine what you do, and what you want to do
    - *Issues very different for employers who do, and do not, offer DP benefits currently—and where they are located*
  - Guidance is coming (later rather than sooner)
  - Be prepared to reach out to employees in same-sex marriages
  - Be prepared to respond to employee inquiries
  - Review your domestic partner policies

# Health & Welfare Plans

- What is required?
  - Depends upon the State where the employer is headquartered, whether ERISA preempts State law, and the employer’s definition of “spouse”
    - *Clean up documents, or else!*
  - Employers in 37 other States who define “spouse” as opposite-sex only can likely refuse to offer H&W benefits to same-sex spouses, particularly for self-insured benefits
  - Watch for future litigation in this area, and whether any federal rights are created or recognized regarding discrimination—and if there are religious exceptions

# Health & Welfare Plans

- What is not required, but permitted?
  - Full federal tax parity for same-sex marriages when domiciled in a same-sex marriage state and employer offers H&W benefits to same-sex spouses
    - *Tax-free medical coverage paid for with pre-tax premiums*
      - Mid-year opportunity to start medical coverage, or switch from after-tax to pre-tax premiums
        - » Note pre-tax premium preferred treatment
      - Stop current imputed income treatment
      - Unwind prior 2013 imputed income
      - Age 26 coverage for SSSpouse's children
      - Gross-up complications



# Health & Welfare Plans

- *Tax-free reimbursement of expenses through a FSA, HRA or HSA (note possible HSA \$ reduction issue)*
- *Dependent Care FSA*
  - Expenses of same-sex spouse or children
- *COBRA—assuming medical coverage*
  - Full COBRA rights for SSM spouses and children
  - Expands COBRA notice obligations
  - May already offer COBRA-like benefits
    - » That are sometimes limited—be careful!
- *HIPAA Special Enrollment—assuming medical coverage*
- *FMLA—may be required*

# Health & Welfare Plans

- Current federal taxable treatment (pending guidance, and assuming partner is not a dependent) for:
  - *Same-sex marriages when domiciled in a traditional marriage state and employer offers H&W benefits to same-sex spouses*
    - Employers already receiving pressure in this scenario
      - » Higher risk than retirement, because no one wants to restart imputed income, risk cafeteria plan status, etc. if domicile guidance is unfavorable

# Health & Welfare Plans

- Current federal taxable treatment (assuming partner is not a dependent) for:
  - *Civil unions, domestic partners, and affidavit partners domiciled anywhere in USA and employer offers H&W benefits to these couples*
    - Basically, current federal tax status for these couples

# Health & Welfare Plans

- Should employers who offer H&W benefits revamp benefit eligibility to, in a future-oriented framework:
  - Require same-sex marriage where available?
  - Require civil unions where available?
  - Require domestic partner registration where available?
  - Reserve affidavit status only for when the state or local imprimaturs above are unavailable?

# Health & Welfare Plans

- Should review plan documents and revamp any existing documentation to reflect desired outcome and Windsor impact
  - Could require a complete revamping of current H&W policies and employee communications materials
- Should communicate with participants (if currently offer such benefits) by recognizing Windsor and indicating permitted immediate and possible longer-range steps
  - Let participants know you will act as quickly as permitted by guidance and administrative realities

# Health & Welfare Plans

- Monitor upcoming federal guidance, particularly as it relates to domicile issues
  - May also address retroactivity issues prior to 2013 and employer obligations regarding revised Form W-2s, assistance with FICA refunds, etc.
- Must, at a minimum, identify, track and effective date status as same-sex marriage, civil union, domestic partner, or affidavit partner
  - Establish, or clarify, current HRIS coding

QUESTIONS?

# Presenter



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