

Morgan Lewis

seminar

DOMA-Understanding and Applying the New Guidance

ERIC FocusOn Conference Call

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Introduction

What states authorize same-sex marriage?

California
Connecticut
Delaware
District of Columbia
Iowa
Maine
Maryland

Massachusetts
Minnesota
New Hampshire
New York
Rhode Island
Vermont
Washington

Windsor

The Supreme Court struck down Section 3 of DOMA in *Windsor*.

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.

However, Section 2 of DOMA remains law.

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.

Windsor

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*—but the post-*Windsor* guidance does address them (and may expand *Windsor* in some situations)

Windsor Issues

- Initially, because Section 2 of DOMA remained as law, there were 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
 - *Generally called “hostile” states in today’s material*

Recent Guidance

- August 29, 2013 IRS guidance answered these questions--but other questions remain
 - Treasury and IRS Announcement 8/29/2013
 - Revenue Ruling 2013-17
 - FAQ for same-sex couples
 - FAQ for domestic partners and individuals in civil unions
- For federal tax purposes, treated as married if married in a jurisdiction that recognizes same-sex marriage--regardless of current state of residence

Recent Guidance

- Tax (payroll and income) refund claims for 2010, 2011, and 2012 permitted
- Unclear:
 - Change in status/HIPAA special enrollment consequences
 - 2013 actions related to amounts already imputed/withheld
 - Whether employees will refile for 2010, 2011, 2012
 - *If ERs can seek payroll refunds for past years if employees do not refile*

Recent Guidance

- Links to the IRS guidance are below:
 - <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>
 - <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>
 - <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions>
 - <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>

Recent Guidance Steps

- What to do?
 - Be prepared to respond to employee inquiries
 - Prepare a communication to employees explaining the impact of the newly released guidance
 - Turn off imputed income for same-sex marriages in 2013 9/16/2013—possibly correct prior 2013 withholding
 - Be prepared to assist employees with respect to prior-year tax refund efforts
 - Consider filing a claim for a refund of FICA taxes paid on health benefits during open tax years
 - Review your domestic partner policies

Recent Guidance Steps

- There is still a distinction between same-sex marriages and other relationships such as civil unions and domestic partnerships
 - Possible civil union expansion?
- Require employees in same-sex marriages to self-identify, if not reflected in HR records
- Review any documentation requirements for marriage (same-sex and opposite-sex)
- Record same-sex marriage as a status code for your HR records—maybe further expand codes

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"
 - For the time being, employers in 37 hostile states who define "spouse" as opposite-sex only can refuse to offer health and welfare 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 and employer offers H&W benefits to same-sex spouses—regardless of state of residence
 - *Tax-free medical coverage paid for with pre-tax premiums*
 - Midyear opportunity to start medical coverage, or switch from after-tax to pre-tax premiums
 - Stop current imputed income treatment
 - Unwind prior 2013 imputed income
 - *Tax-free reimbursement of expenses through a FSA, HRA, or HSA (note possible HSA \$ reduction issue)*

Health & Welfare Plans

- *Dependent Care FSA*
 - Expenses of same-sex spouse or children
- *COBRA—assuming medical coverage*
 - May expand COBRA notice obligations
 - Often already receive COBRA-like benefits
- *HIPAA Special Enrollment—assuming medical coverage*
- *FMLA—required*

Health & Welfare Plans

- Current federal taxable treatment (assuming partner is not a dependent) for:
 - *Civil unions, domestic partners, and affidavit partners domiciled anywhere in the United States and employer offers H&W benefits to these couples*
 - Basically, no change for these couples
 - Possible expansion for civil union couples where “denominated as a marriage under the laws of that state”

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

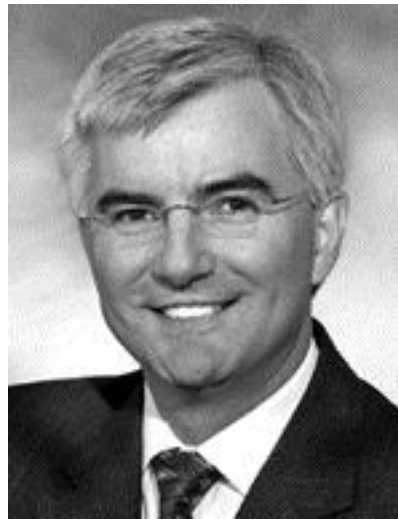
- Should review plan documents and revamp any existing documentation to reflect desired outcome and *Windsor* impact
 - Could require a complete revamping of current H&W policies and employee communications materials
- Should communicate with participants (if currently offer such benefits) by recognizing *Windsor* and post-*Windsor* guidance 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 on payroll tax refunds and changes in status
- Must, at a minimum, identify, track and effective date status as same-sex marriage, civil union, domestic partner, or affidavit partner

Questions?

Contact Information



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