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Supreme Court Strikes Down DOMA

Yesterday, the U.S. Supreme Court held in *United States v. Windsor* that provisions of the Defense of Marriage Act ("DOMA") violate the Fifth Amendment's guarantee of equal protection under the law.

Although not all of the effects of this ruling on employee benefit plans are clear, there are several likely implications on plan administration that should be considered by employers that sponsor retirement plans and health and welfare plans. We will continue to monitor and explore the implications of this ground-breaking ruling and keep you up to date.

Background. For purposes of federal law, DOMA generally defines "marriage" as a legal union between one man and one woman and "spouse" to mean a person of the opposite sex who is a husband or wife. Accordingly, before yesterday's ruling, retirement plans and self-insured health and welfare plans were subject to DOMA's definition of spouse and marriage in complying with the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code"). This means that, for many purposes, plans were required to treat same-sex couples who are legally married under state law as being single instead of married.

Likely Implications. In light of the Supreme Court's ruling, at this stage it is unclear to what extent employee benefit plans will be required to recognize same-sex spouses for purposes of ERISA and the Code. The likely effects of the case include:

Retirement Plans.

- Consent of Non-Spousal Beneficiary. Plans must now obtain the written consent of a same-sex spouse if a participant designates anyone other than the same-sex spouse as beneficiary.

- QJSAs & QPSAs. Plans subject to the qualified joint and survivor annuity ("QJSA") requirements (generally only defined benefit pension plans) must provide QJSA benefits to same-sex spouses and obtain consent from the same-sex spouse if a participant wishes to receive his or her distribution in a

different form. Qualified pre-retirement survivor annuities ("QPSAs") must also be provided to same-sex spouses.

- QDROs. Plans will now be required to honor a qualified domestic relations order ("QDRO") that names a same-sex spouse as an alternate payee.

- Hardship Withdrawals. 401(k) plans may allow participants to receive withdrawals on account of hardships incurred by their same-sex spouses even if the same-sex spouse is not the participant's designated beneficiary.

- RMDs. Same-sex spouses entitled to death benefits may now defer payment of minimum required distributions ("RMDs") until age 70½.

***Health and Welfare Plans*.**

- Tax-Favored Benefits. Traditionally, if an employer wanted to offer health and welfare benefits to a participant's same-sex spouse, both the employee and employer portion of the contribution could not be offered on a tax-favored basis—meaning that the value of the employee and employer contributions were taxable to the participant unless the same-sex spouse also qualified as the participant's tax dependent. Now employer-provided health and welfare benefits may be provided tax-free to same-sex spouses under the same conditions as opposite-sex spouses.

- Reimbursement. Participants may now be reimbursed for medical expenses incurred by their same-sex spouses from health flexible spending accounts ("FSAs") and health reimbursement accounts ("HRAs") even if the same-sex spouse does not qualify as the participant's tax dependent.

- Change in Status. Events affecting a participant's same-sex spouse may now trigger a change in status under the cafeteria plan rules.

- COBRA and HIPAA. Same-sex spouses will now be eligible for federal continuation coverage and special enrollment rights in the same manner as opposite-sex spouses.

Employment Law. The ruling may also impact areas of traditional employment law, such as FMLA leave (*e.g.*, employees will now be permitted to take FMLA leave for reasons such as caring for a sick same-sex spouse). Employers may need to revise their employment and leave policies accordingly.

Next Steps. We expect future guidance from government agencies and the courts as to exactly how the Supreme Court's ruling will affect employee benefit plans, including clarification on certain issues (*e.g.*, treatment of domestic partnerships under certain state laws, potential tax refunds for employers, and retroactive application of the ruling). In the meantime, employers should consider the possible

administrative implications listed above and stay apprised of future developments.

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