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U.S. Supreme Court Rules Legally-Married Same-Sex Spouses Entitled to Federal Recognition and Lifts California Ban on Same-Sex Marriages

The United States Supreme Court has issued two decisions that expand same-sex marriage rights.

- In the first, *United States v. Windsor*, No. 12-307 (June 26, 2013), the Court ruled unconstitutional a law denying federal recognition of legally-married same-sex couples.
- In the second, *Hollingsworth, et al. v. Perry,* No. 12-144 (June 26, 2013), the Court effectively permitted same-sex marriage in California. These decisions have wide-ranging implications for employers.

Background

In the watershed case of *United States v. Windsor*, the Supreme Court struck down Section 3 of the Defense of Marriage Act of 1996 ("DOMA"), holding that it violated the equal protection component of the Fifth Amendment's Due Process Clause. The text of Section 3 states:

> *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.*

Windsor involved Edith Windsor and her late, same-sex spouse, Thea Spyer. Windsor and Spyer were legally married in the couple's state of residence (New York, which recognized their marriage) at the time Spyer died in 2009. However, pursuant to Section 3 of DOMA, the federal government did not recognize the couple as legally married. Accordingly, Windsor was required to pay more than $363,000 in federal estate taxes on her inheritance of Spyer's estate. Yet, pursuant to federal tax laws, because New York had recognized the couple's marriage, this tax would not have been levied against Windsor if Spyer had been a man.

Windsor sued the United States, claiming she was unconstitutionally discriminated against on the basis of her sexual orientation. The U.S. District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit both sided with Windsor and struck down Section 3 of DOMA. The Supreme Court agreed.

Hollingsworth, et al. v. Perry involved a 2008 California ballot initiative known as "Proposition 8." Proposition 8 defined "marriage" as between one man and one woman. After California voters approved Proposition 8, same-sex couples who had been legally married in California sued the state and its officers claiming Proposition 8 was unconstitutional. The U.S. District Court for the Northern District of California and the U.S. Court of Appeals for the Ninth Circuit both found Proposition 8 to be unconstitutional. The Supreme Court in *Hollingsworth* ruled the Ninth Circuit lacked standing to hear the appeal.

Implications for Employers

First, the Family and Medical Leave Act of 1993 ("FMLA") requires private employers who employed at least 50 employees on each working day during at least 20 calendar weeks in the current or preceding calendar year to grant qualifying employees time off to care for their sick spouse. However, under Section 3 of DOMA, the term "spouse" as used in the FMLA meant only "a person of the opposite sex." Thus, an employee who had legally married his or her same-sex partner in a state that permits same-sex marriage or in a foreign country was not entitled to FMLA leave to care for that partner because the partner was not a "spouse" under federal law.

Now that Section 3 of DOMA has been overturned, *employers covered by the FMLA must grant to qualifying employees time off to care for their sick, same-sex spouses.*

Second, under the Internal Revenue Code ("IRC"), an employee's gross income does not include employer-provided insurance coverage, including coverage for a "spouse." Accordingly, if an employer affords its employees the benefit of putting their "spouses" on their health plan, those spousal benefits are not taxed. Prior to *Windsor*, this meant that spousal benefits for employees in opposite-sex marriages were not taxed, while spousal benefits for employees in same-sex marriages were taxed. Employers were required to impute the value of an employee's same-sex spouse's coverage into the employee's income.

Now that Section 3 of DOMA has been overturned, the Internal Revenue Service ("IRS") will revert to its pre-DOMA interpretation of the IRC to determine how to interpret the term "spouse," meaning the IRS will defer to each state's law regarding the definition of the term "spouse." *See* IRS Revenue Ruling 58-66.

> Therefore, *if an employee's same-sex partner is considered a "spouse" under state law, the partner's benefits are not to be considered part of the employee's gross income and the IRS will not tax that partner's health benefits.*

Consequently, the employee's net income will decrease, resulting in a decrease in the amount of payroll taxes the employer and employee will be required to pay. Additionally, many employers have put into effect programs that reimbursed same-sex legally-married couples for the additional tax cost imposed upon such couples because of DOMA. Those employers should examine their programs to review continuing necessity or appropriateness.

Same-sex marriage is legal in 12 states (Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Washington, Maine, Maryland, Rhode Island, Delaware, and Minnesota), the District of Columbia, and three Native American tribes (Coquille Tribe, Suquamish Tribe, and the Little Traverse Bay Bands of Odawa Indians). The Supreme Court's decision in *Hollingsworth* will add California to that list.

Employers with operations in multiple states will have to deal with a patchwork of state laws governing what constitutes a spouse. Unsurprisingly, Windsor does not address whether pre-DOMA law will apply retroactively for tax purposes and/or benefit plan purposes. For example, unresolved issues include questions concerning claims for income tax refunds based on the recognition of spousal status, as well as Federal Insurance Contributions Act ("FICA") tax refund claims by employees and employers and the rights to spousal benefits under pension and health plans. Employers, with the assistance of counsel, should monitor any upcoming guidance from the IRS and U.S. Department of Labor that will direct how employers should address spousal benefits and any retroactive application of *Windsor*.

Third, since there is no legal requirement that employers provide benefits to their employees at all, *Windsor* and *Hollingsworth* do *not* dictate who must be covered under employers' benefit plan(s). Rather, most plans explicitly define terms like "spouse" and "marriage." Now is the time *to examine your benefit plan(s) with counsel to ensure that benefits are designed in a manner that is consistent both with the company's goals and applicable laws.*

Finally, "spousal privilege" protects the content of confidential communications between spouses during their marriage from testimonial disclosure. In federal proceedings (e.g., depositions and trials), under DOMA, this privilege did not include the confidential communications of legally-married same-sex partners. Now that Section 3 of DOMA has been struck down, same-sex married couples will almost assuredly be entitled to the same spousal privilege protections as opposite-sex married couples in federal proceedings. *Employers should speak to counsel about the implications of this change with respect to any ongoing litigation.*

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