

Morgan Lewis

Webinar

Implications of the Supreme Court's *Windsor* Decision — DOMA is (Almost) Dead, Now What?

Income Tax, Estate and Gift Tax, Employment Law, and Immigration Issues Post-DOMA

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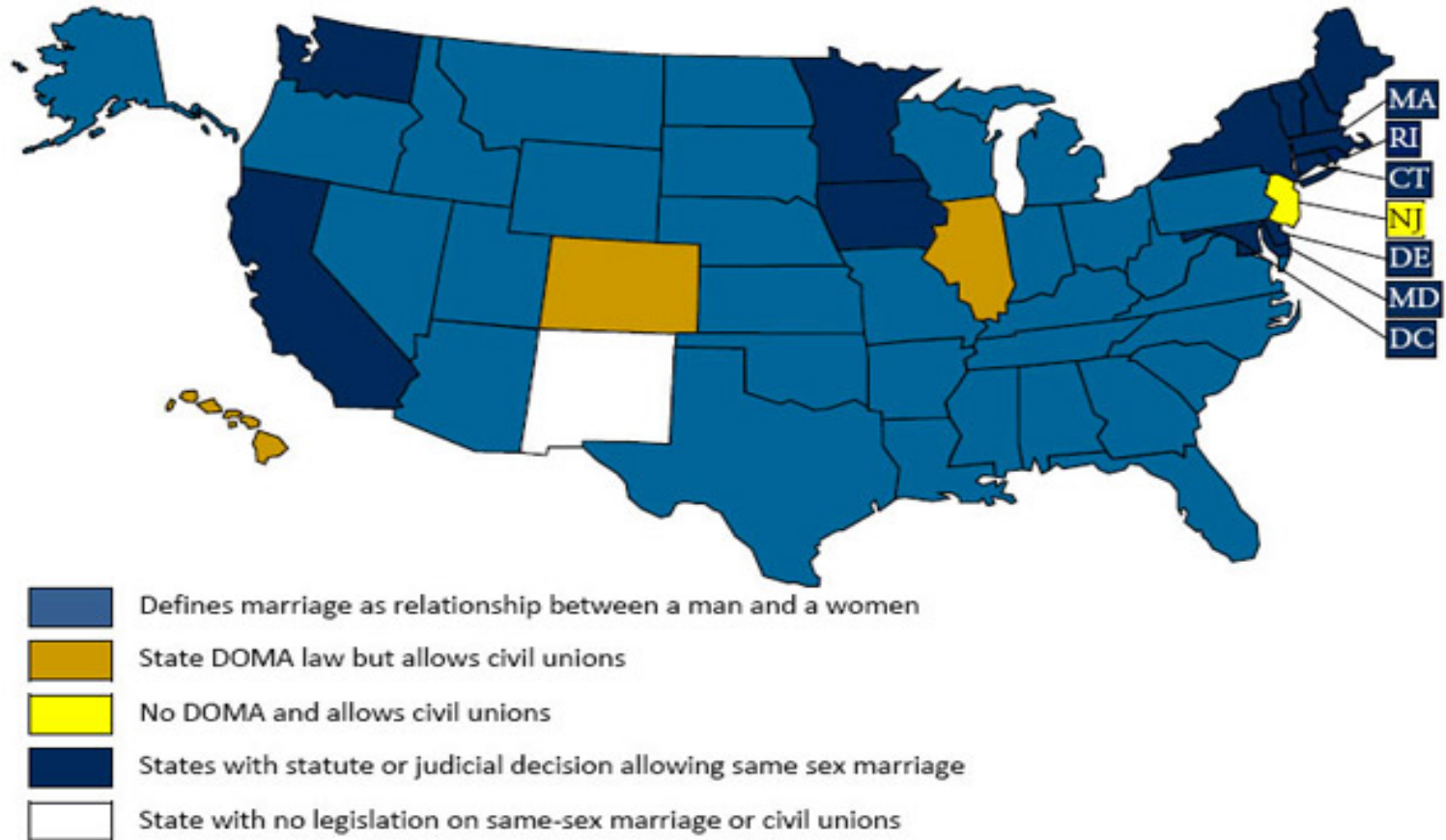
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Discussion Topics

- Introduction
- Estate and Gift Tax Law
- Federal Income Tax
- Fringe Benefits and Payroll Tax
- Labor and Employment Law
- Immigration Law

States That Permit Same-Sex Marriage



States That Permit Same-Sex Marriage

What states authorize same-sex marriage?

Connecticut

Delaware

District of Columbia

Iowa

Maine

Maryland

Massachusetts

Minnesota

New Hampshire

New York

Rhode Island

Vermont

Washington

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

DOMA, which was enacted in 1996, includes three sections:

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

What did the Supreme Court rule in *Windsor*?

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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

Estate and Gift Tax Law

Christina M. Fournaris

Estate and Gift Tax Planning Considerations

- New reality when advising same-sex married couples
- Interplay of federal and state laws
 - State laws – differing laws
- Review of family wills and trust agreements
 - Define “spouse”
 - Powers of appointment where beneficiary has power of appointment to “spouse”

Estate and Gift Tax Planning Considerations

- Federal benefits available to same-sex couples
 - Marital deduction for gift and estate tax
 - Election of portability of deceased spouse's unused applicable exclusion amount
 - Splitting of inter vivos gifts
 - Transfers of property pursuant to marriage settlement
- Prenuptial planning
 - Where should clients marry/divorce?

Federal Income Tax

Daniel F. Carmody

Federal Income Tax

- Option to file joint federal income tax returns for same-sex married couples
 - Likely will reduce a couple's income tax liability if one spouse has a high income while the other earns substantially less (marriage “bonus”)
 - However, it may increase their tax liability when the spouses' incomes are similar and substantial (marriage “penalty”)

Federal Income Tax

- The existence of the marriage “bonus” and “penalty” is forced by the progressive rates. For example, under the 2012 rates:
 - A single filer with \$100,000 of taxable income would pay \$21,460.50 in tax.
 - A single filer with \$200,000 of taxable income would pay \$50,528 in tax.
 - Joint filers with \$200,000 of taxable income would pay \$43,779 in tax. Whether the joint filers will pay more or less tax will depend on their relative earnings.

Federal Income Tax

- What if a couple overpaid? It is possible to request a refund of an overpayment if the refund request is timely.
 - The refund request must be made within either (1) three years of the date the original return was filed or (2) two years of the date the tax was paid.
 - This means that it may be too late to file a refund request for timely filed 2009 returns.
 - Role of a protective refund claim.
- What if a couple underpaid?

Federal Income Tax

- This has an impact beyond filing status: “married” appears in 80 sections of the Internal Revenue Code; “spouse” appears in close to 200 sections.
 - Tax savings for selling primary residence (a married couple filing jointly can exclude up to \$500,000 in gains).
 - Taxation of spousal alimony (deductible to payor; includable in payee’s income).
 - Related party status for sections 267 and 318.
 - Consent to S corporation elections.
 - Material participation for section 469 passive activity loss rules.

Fringe Benefits and Payroll Tax

David R. Fuller

Fringe Benefits and Payroll Tax

Overview

- Fringe Benefits for Spouses
- Information/Payroll Reporting
- Refund Opportunities
- Employers' Obligations

Fringe Benefits and Payroll Tax

Fringe Benefits Issues

- Impacted Benefits
 - Health benefits
 - Rank and file fringe benefits
 - Executive fringe benefits
- Income Tax Exclusions
- FICA Tax Exclusions

Fringe Benefits and Payroll Tax

Health Benefits—Imputed Income

- Health benefits include insurance coverage and health expense reimbursements
- Pre-*Windsor*—employers followed IRS ruling position and imputed the value of employer-paid healthcare benefits provided to same-sex spouses
- Post-*Windsor*—modify current and prospective tax treatment and reporting to exclude such health benefits
- Transitioning between pre- and post-*Windsor* years
- Similar issues/rules impact other tax-favored fringe benefits

Fringe Benefits and Payroll Tax

Health Benefits—Impact on Deductions

- Limits on deductions where eligible to participate in any subsidized plan maintained by the spouse's employer
- May require filing amended income tax returns and tax deficiencies

Fringe Benefits and Payroll Tax

Information/Payroll Reporting

- Corrected Tax Returns
 - Forms W-2
 - Forms 941
 - Individual Income Tax Returns
 - When to Correct?
 - Penalties and Civil Exposure
 - Alternative Employee Statements

Fringe Benefits and Payroll Tax

Information/Payroll Reporting

- Penalties and Civil Exposure

<u>IRS Penalties for Incorrect Forms W-2.</u>	<ul style="list-style-type: none">• Each punishable by:<ul style="list-style-type: none">\$100 per W-2, up to an annual maximum of \$1.5 million for all such failures or, in case of intentional disregard, greater of 10% of underreported amount or \$250 per W-2• Action/damages for filing fraudulent information return of greater of \$5,000 or the sum of actual damages• Employee suit for personal damages if employer knowingly provided an erroneous Form W-2. <i>See, e.g., Clemens</i>
<ul style="list-style-type: none">(1) Failure to File Correct Forms W-2(2) Failure to Furnish Correct Forms W-2	
<u>Possible Civil Liabilities</u>	

Fringe Benefits and Payroll Tax

Refund Opportunities—

Health Benefits Example

- Employers imputed the value of employer-paid healthcare benefits provided to an employee's same-sex spouse
- Taxes Impacted—
 - *FICA taxes (employer and employee)*
 - *Individual income taxes*
- Who files—
 - *Employees can file for both FICA and federal/state income taxes*
 - *Employers can only file for FICA taxes (but on behalf of both)*
 - *Employers can provide important information to assist filings*

Fringe Benefits and Payroll Tax

Refund Opportunities— Employer Obligations

- Amended/corrected information on tax returns
- FICA tax refund as “deputy tax collector”
- Determination of marital status for same-sex partners
- Timing of information returns and refund claim filings

Fringe Benefits and Payroll Tax

Unanswered Questions

- What if employee legally marries in one state but resides in another state that does not recognize same-sex marriage?
- Must an employer file a FICA tax refund?
- Must an employer issue corrected Forms W-2?
- If so, when must the returns be issued?
- Should employers solicit proof of a same-sex marriage for an employee claiming a same-sex spouse?

Fringe Benefits and Payroll Tax

What should employers do now?

- Employee communications
- Determine impacted health, rank/file, and executive fringe benefits
- Identify impacted employees
- Identify value of impacted benefits
- Track anticipated IRS guidance
 - *“We are reviewing the important June 26 Supreme Court decision on the DOMA. We will be working with the Department of Treasury and Department of Justice, and we will move swiftly to provide revised guidance in the near future.”*

Labor and Employment Law

Michelle S. Silverman

Labor and Employment Law

- The Family and Medical Leave Act (FMLA) is the most significant employment statute impacted by *Windsor*.
- Refresher:
 - The FMLA entitles qualified employees to unpaid leave for a number of reasons, including:
 - *the care of a spouse with a serious health condition;*
 - *the care of a spouse who is a military member with a serious illness or injury sustained in or aggravated by military service;*
and
 - *for qualifying exigencies arising from a spouse's military deployment.*

The Family and Medical Leave Act

- To understand the impact of *Windsor*, it is helpful to start by looking at the state of affairs before the opinion was handed down.
 - The FMLA regulations define “spouse” as “a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.” 29 CFR § 825.102.
 - But, a 1998 Opinion Letter from the Department of Labor (DOL) stated that:
 - *The agency considered itself bound by DOMA's definition of “spouse” as only a person of the opposite sex who is a husband or wife.*
 - *Thus, the DOL took the position that only spouses who fit within the definition of DOMA could be recognized for purposes of the FMLA.*

The FMLA After *Windsor*

- What impact did *Windsor* have on the FMLA?
 - DOL Opinion Letter nulled.
 - We now look to the plain language of the FMLA regulations, which tie the definition of “spouse” to the domiciliary state. So, employees who are married to a same-sex spouse and who:
 - *Live in a same-sex marriage state should be eligible for FMLA spousal leave even if they work in a state that does not recognize the marriage.*
 - Ex.: an employee in a same-sex marriage who lives in Delaware, but works in Pennsylvania.
 - Ex.: an employee in a same-sex marriage who lives in Iowa, but telecommutes to a worksite in Texas.
 - *Live in a state that does not recognize same-sex marriage—including states with civil union statutes—may not be eligible for FMLA spousal-related leave, regardless of the state in which they work.*
 - Keep an eye out for further guidance on this.
 - An employee who works in a state with leave protections for same-sex partners may still be eligible for state leave, even if not FMLA covered.

Things to Consider

- As we await guidance, some things to consider:
 - If an employer follows the plain language of the regulations, some employees who work in the same worksite may be eligible for FMLA, and some may not—depending on where they live.
 - *Employers should carefully consider how to implement and communicate these differences.*
 - *Employers could see lawsuits in states with laws against discrimination.*
 - Employers that decide to approve FMLA leave for a same-sex spouse for an employee living in a state where the marriage is not recognized should be aware of the risk of “double dipping.”
 - *I.e., the employee may technically be eligible for another 12 weeks of FMLA leave for a different qualifying event.*

Things to Consider

- Also, as we await guidance:
 - Employers in same-sex marriage states that offer domestic partner leave benefits may want to reevaluate those policies.
 - At a minimum, employers in non-same-sex-marriage states should make sure that their policies allow for spousal leave for an LGBT employee living in a state that recognizes his/her marriage.
 - *Employers should avoid asking for more documentation of same-sex marriages than of opposite-sex marriages.*
 - Management or human resources professionals who implement and enforce these policies should be made aware of the changes and trained on practices going forward.

Immigration Law

Eric S. Bord

Immigration Law

- Sponsoring same-sex spouses for immigration benefits
 - Under DOMA, only heterosexual spouses were granted the right to sponsor a foreign spouse either for nonimmigrant (temporary) or immigrant (permanent) status in the United States
 - *First marriage-based immigrant petition was approved within days of Supreme Court decision*
 - *Agencies (DHS/USCIS, State, Justice) coordinating implementation*
 - Expected to apply to any same-sex marriages that are lawfully entered into in the U.S. or foreign country
 - Whether the couple resides in a US state recognizing same-sex marriages should not matter
 - Unlikely that partners in a civil union or domestic partnership would qualify for immigration benefits

Immigration Law

- Additional issues:
 - Dependent nonimmigrant benefits, such as H-4 and L-2 status, should be available to same-sex spouses
 - Immediate relative benefits now available to same-sex spouses, including overstay adjustment of status and 3-year naturalization
 - Certain waivers and avenues for relief in removal proceedings depend upon a demonstration of hardship to certain qualifying relatives; should include same-sex spouses
 - Benefits for qualified stepchildren, who can apply for immigration benefits in the same fashion as biological children, subject to certain restrictions
 - Same-sex marriages will still be subject to the same scrutiny as heterosexual marriages with respect to the bona fides of the marriages

Immigration Law

- Same-sex spouses based on marriages in one of the following countries may be eligible for U.S. immigration benefits:

Argentina
Belgium
Brazil
Canada
Denmark
France
Iceland
Israel
Mexico

Netherlands
New Zealand
Norway
Portugal
South Africa
Spain
Sweden
Uruguay

Next Steps

- Keep an eye out for guidance that is coming (likely within 60 days)
- Be prepared to reach out to employees in same-sex marriages
- Be prepared to respond to employee inquiries
- Consider reviewing your domestic partner policies
- Expect to include married same-sex spouses as dependents on immigration matters
- Consider how you might tap into this new pool of potentially lawful workers (spouses of L and E nonimmigrants; permanent resident spouses)
- Review your policies regarding the extent to which you pay for immediate relative immigration benefits

QUESTIONS?

Presenters

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