

Morgan Lewis

webinar

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

Employee Benefits Issues Post-DOMA

Webinar 1 of 2

July 10, 2013

www.morganlewis.com

Presenters:

Robert L. Abramowitz

Andy R. Anderson

Brian J. Dougherty

Morgan, Lewis & Bockius LLP

Introduction

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?

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?
 - Guidance is coming
 - Be prepared to reach out to employees in same-sex marriages
 - Be prepared to respond to employee inquiries
 - Consider reviewing your domestic partner policies

Introduction

- There is still a distinction between same-sex marriages, and other relationships such as civil unions and domestic partnerships
- Consider having employees in same-sex marriages 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

Retirement Plans

- What is required?
 - Spousal statutory rights
 - QJSA/QPSA
 - *Consent to waive QJSA/QPSA or to alternative beneficiary*
 - *Eligible rollover distribution*
 - *QDRO/alternate payee status*

Retirement Plans

- Retroactive application?
 - Limited exposure
 - *Preretirement death benefits paid to someone else*
 - *Postretirement benefits paid to which spouse did not consent*
 - Consider allowing participants in pay status to change distribution elections
 - Governmental relief
 - *7805(b)(8) relief for plan qualification*
 - *Does not address Title I claim*
 - Title I claim defense: arbitrary and capricious standard of review?

Retirement Plans

- Does a same-sex spouse who moves to a state that doesn't recognize same-sex marriage cease to be a spouse?
 - Administrative guidance expected “soon”
 - Government agencies will likely continue to recognize valid ceremonial same-sex marriage, regardless of current domicile
 - Little downside to plan administrator doing likewise
 - *Residual cutback issue related to consent requirement, but unlikely to be raised by IRS or private litigant*
 - *Judicial consideration of domicile less predictable, but litigation risk by same-sex spouse seeking to disregard marriage seems remote*

Retirement Plans

- What is not required, but permitted?
 - Safe harbor hardship withdrawals
 - *Unreimbursed medical, post-secondary education, and funeral expenses*
 - Required minimum distributions
 - *Extended deadlines for spousal death benefits*
 - DB 415 limits
 - *Free pass for spousal survivor annuity*

Retirement Plans

- What about other legally recognized same-sex statuses (e.g., civil unions, domestic partnerships)?
 - Not marriage, so recognition not required
 - Recognition permitted, subject to residual cutback issue related to consent requirement

Retirement Plans

- What should employers do?
 - “Wait and see” for governmental guidance?
 - *Some obligations are clear; others carry low risk of exposure for extending recognition*
 - *In these cases, delays increase exposure*
 - No affirmative obligation to take initiative to clarify employee marital status
 - *Employers and administrators need to be reactive when employees provide information about marital status*
 - *Employers and administrators may want to remind employees of need to keep personnel records and beneficiary information current and accurate*

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”
 - Employers in 37 other States who define “spouse” as opposite-sex only can 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
 - 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—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 crossing state lines
 - 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

Implications for Executive Compensation

- In connection with a divorce, there are potential tax benefits for splitting stock options and nonqualified plan benefits.
- SERPs and LTIPs may designate spouses for death benefits.
- Domestic relations orders.
- Fringe benefits.
- Hardship/unforeseeable emergency distributions.



QUESTIONS?

Presenters



Robert L. Abramowitz
Partner, Philadelphia
[rabramowitz@morganlewis.com](mailto:r Abramowitz@morganlewis.com)
215.963.4811



Andy R. Anderson
Partner, Chicago
aanderson@morganlewis.com
312.324.1177



Brian J. Dougherty
Partner, Philadelphia
bdougherty@morganlewis.com
215.963.4812

DISCLAIMER

- This material is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It does not constitute, and should not be construed as, legal advice on any specific matter, nor does it create an attorney-client relationship. You should not act or refrain from acting on the basis of this information. This material may be considered Attorney Advertising in some states. Any prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change.
© 2013 Morgan, Lewis & Bockius LLP. All Rights Reserved.
- **IRS Circular 230 Disclosure**
To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend, please see <http://www.morganlewis.com/circular230>.



international presence

Almaty Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine
London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia Pittsburgh
Princeton San Francisco Tokyo Washington Wilmington