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LEGAL ALERT



## Legal Alert: New Challenge to the Federal Defense of Marriage Act

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On September 15, 2009, a bill (H.R. 3567, entitled the "Respect for Marriage Act of 2009") was introduced in the U.S. House of Representatives to repeal the federal Defense of Marriage Act (DOMA) and to "ensure respect for State regulation of marriage."

Since 1996, the DOMA has provided that for all purposes of federal law, such as ERISA and the Internal Revenue Code, 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 wife." The DOMA further provides that states may, but are not required to, recognize any same-sex "marriage" that is performed in another state.

The proposed bill, which simply provides:

For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.

would require that all marriages that are valid under state law are also valid and must be recognized under federal law. States that have not legalized same-sex marriage would not be required to do so, or to recognize same-sex marriages performed elsewhere, but same-sex marriages performed in a state where same-sex marriage has been legalized would be recognized for all purposes of federal law.

Same-sex marriage is now legal in Connecticut, Iowa, Massachusetts, and Vermont, as well as in California if entered into between June 17 and November 4, 2008. Effective January 1, 2010, same-sex marriages will also become legal in New Hampshire. Although they do not actually allow same-sex marriages, New York and the District of Columbia recognize same-sex marriages that have been lawfully performed elsewhere.

If enacted, the bill would significantly change the federal rules governing spousal rights, including benefits available to employees and their same-sex spouses. For example, employers with pension or 401(k) plans would be required to recognize same-sex spouses for purposes of determining the surviving spouse annuities or other death benefits under those plans. The federal income tax treatment of health coverage for an employee's same-sex spouse would also change so that employees would no longer be taxed on the imputed value of the same-sex spouse's coverage. Employees would also

be permitted to use Family and Medical Leave Act (FMLA) leave to care for the illness of a same-sex spouse.

It is too early to know whether HR3567 (or a similar bill) will be enacted, but it would make significant changes to the benefits landscape.

If you have any questions regarding the RMA, the DOMA or their effects upon your employee benefits programs, you can contact the author of this Alert, Jeffrey Ashendorf, at 212-453-5926, [jashendorf@fordharrison.com](mailto:jashendorf@fordharrison.com), or any other member of Ford & Harrison's Employee Benefits practice group.