July 1, 2013

U.S. Supreme Court Decisions on Same-Sex Marriages Impact Employee Benefits

On June 26, 2013, the U.S. Supreme Court (the "Court") issued two decisions, finding that federal and California laws on same-sex marriages are unconstitutional. These decisions will have far-reaching and wide-ranging consequences on employee benefits programs. This Alert highlights some of the benefits-related issues employers will need to address in the very near future in light of the Court's decisions.

THE COURT'S DECISIONS

Section 3 of DOMA Is Unconstitutional. In *U.S. v. Windsor*, the Court ruled that section 3 of the federal Defense of Marriage Act of 1996 ("DOMA") is unconstitutional because it does not provide equal protection rights under the Fifth Amendment to the U.S. Constitution. Section 3 of DOMA amended federal law to exclude same-sex partners from the terms "marriage" and "spouse" as used in over 1,000 federal laws and related regulations.

The Court's decision did not address section 2 of DOMA because it was not a part of this case. Section 2 allows each state to decide whether to recognize same-sex marriages performed under the laws of other jurisdictions. Some members of Congress already are seeking to repeal Section 2.

California's Proposition 8 Is Unconstitutional. In *Hollingsworth v. Perry*, the Court ruled only on the procedural issue of whether the proponents of California's Proposition 8 ("Prop 8") had "standing" to appeal in federal court a California state court's decision finding Prop 8 to be unconstitutional. Prop 8, a voter ballot initiative, had amended California's constitution to define marriage as a union between a man and a woman. The proponents of Prop 8 took over defending Prop 8 when California state officials refused to do so following the district court's decision. The Court held that the proponents of Prop 8 did not have standing to litigate the issues in federal court.

The Court did not address whether Prop 8 was constitutional. However, the Court's decision means that the California district court decision, which had found Prop 8 to be unconstitutional, will be the controlling decision.

IMPACT ON EMPLOYEE BENEFITS

The Court's decisions mean that employers must take numerous actions with regard to the benefits available to their employees. Many of the actions are prospective, while some may be retroactive. In addition, some of the ramifications of the Court's decisions are unclear, and more guidance will be needed before employers can act. A number of federal agencies already have indicated that they will be expediting the issuance of guidance to address the impact of DOMA following the Court's decision.

As an initial course of action, employers should consider the following:

1. Determine Which Employees Are In Same-Sex Marriages. Employers should begin to administer employee benefits plans, programs and policies in a manner that recognizes the same-sex marriages of employees who (i) were married in a state that recognizes same-sex marriages and live in that state or (ii) were married in one jurisdiction but live in another jurisdiction that recognizes same-sex marriages performed in other jurisdictions. This will not necessarily be an easy task.

Only 12 states (California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington) and the District of Columbia currently recognize same-sex marriages. Where a same-sex couple is married in a state that recognizes same-sex marriages and lives in that state, we would expect the same verification procedures that are applied to opposite-sex marriages would apply. However, because DOMA section 2 remains in effect for now, employers will need to develop administrative procedures for determining whether an employee's same-sex marriage should be recognized when

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the marriage occurred in a jurisdiction other than that in which the employee currently resides. Administrative procedures will need to take into account the laws of the state governing the benefit plans, the laws of the states where employees were married, the laws of the states where employees reside, and the terms of the benefit plans. Without doubt, more guidance is needed to assist employers in dealing with these multijurisdictional issues.

Brownstein Comment: Many other states have approved civil unions. We do not expect that civil unions generally will be recognized as same-sex marriages, but this will depend on whether applicable state law considers civil unions to be the same as marriage. For example, Colorado's Civil Union Act specifically states that it is not granting same-sex couples the right to marry.[1]

2. Plan Administration Changes. Changes in benefit plan administration certainly will be required. Examples of administrative changes needed in benefit plans include the following:

- **Retirement Plans** (such as 401(k) and defined benefit pension plans)
  - An employee's same-sex spouse will have to consent to the participant's naming of a nonspouse beneficiary.
  - An employee's same-sex spouse will have to consent to the participant's distribution elections -- including hardship distributions, loans, and the selection of the form of benefit distribution upon retirement, if the participant wants to be paid in a form other than a joint and survivor annuity with the spouse as the surviving annuitant.
  - An employee's same-sex spouse must be treated as an alternate payee under a QDRO.
- **Health and Welfare Plans** (such as medical, dental, vision, life insurance, cafeteria, flexible spending accounts, health savings accounts, etc.)
  - Employees can now pay for their share of the cost of providing health coverage to their same-sex spouses on a pre-tax basis. No longer must an employer's share of the cost of providing health coverage to an employee's same-sex spouse be imputed as income to the employee. (Note: we believe that this does not result in changes for domestic partners.)
  - The Court's decisions likely are a status change event, which could allow employees to make mid-year changes to their health FSA elections to take into account health expenses of their same-sex spouses.
  - Same-sex spouses are now entitled to elect COBRA health care continuation coverage.
  - Employees can elect dependent life coverage for same-sex spouses.
- **Other Benefits Programs**
  - Employees have the right to take FMLA leave to care for a sick same-sex spouse.
  - Same-sex spouses should be required to give consent to employee-spouses' exercise to purchase stock under the employer's stock option or other equity ownership programs.

These administrative changes will require changes in plan documents, employee communications, administrative forms and procedures. ***Brownstein Comment:*** Employers should work with their third party administrators and legal counsel to ensure that their benefit plans become fully-compliant with the law.

3. Plan Design Considerations. Since the provision of benefits to employees and their dependents is largely discretionary, subject only to certain nondiscrimination and other regulatory constraints, employers will need to consider whether any benefits program revisions are necessary or desired in response to the Court's decisions.

[1] SB 13-011 (Colo. 2013); CRS §14-15-101, et seq.

4. Plan Amendments. Both the administrative and design changes mentioned above may require plan amendments. For example:

- Plan documents should describe accurately the coverage of eligible dependents. For example, the plan document should define who is an eligible spouse.
- Plan documents should describe accurately the benefits available to same-sex spouses, their rights and responsibilities.

5. Employee Communications. Employers can expect many questions from employees who are in, or may be entering into, same-sex marriages and should consider preparing an initial communication to tell employees that the impact of the Court's decisions on the employer's benefit programs will be addressed. Employers should ask for employees' patience while employers work through all of the implications and explain that additional guidance may be needed from governmental entities because there are many unanswered questions at this time. We think that communications regarding the details of changes implemented in response to the Court's decisions should be prepared and distributed only after employers have fully considered the broad range of implications of the Court's decisions and after reviewing the anticipated government guidance.

6. Respond to Future Statutory Changes and Regulatory Guidance. Employers must be prepared to react to future changes. We can expect that proponents, both for and against same-sex marriage, will be active in trying to change their state's marriage laws. As indicated above, regulatory guidance will be forthcoming. As laws change and guidance is issued, employers will need to make coordinating changes in their benefits programs.

RETROACTIVE APPLICATION

Since DOMA section 3 has been found to be unconstitutional, it is as if the law never existed. This raises numerous plan administration issues. For example, do participants and their same-sex spouses have the right to make claims for benefits on a retroactive basis? Will plan administrators have to invalidate distribution elections made by participants without same-sex spousal consent? If these types of actions are required, how must they be accomplished? Future guidance may provide some direction on these and other issues but such guidance will take time. Employers and plan administrators will need to determine what this retroactive invalidation of DOMA means for their benefit plans and what actions may be required to undo or redo prior administrative decisions and actions.

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If you have any questions about, or would like assistance in analyzing the impact of, the Court's decisions on your benefit plans, please contact one of the Brownstein benefits group members:

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