The U.S. Supreme Court, in Overturning Section 3 of DOMA, Creates Issues for Benefit Plans

by Gary S. Young on July 23, 2013

Historically, the definition and regulation of the marriage relationship was deemed to be the exclusive domain of the states. With passage of the Defense of Marriage Act of 1996 ("DOMA"), Congress changed this assumption in two important respects:

- DOMA Section 2 permitted states to refuse to recognize same-gender marriages performed under the laws of other states; and
- DOMA Section 3 barred same-gender married couples from being recognized as "spouses" for all purposes of Federal law.

In *United States v. Windsor (Case No. 12–30, decided June 26, 2013)*, the U.S. Supreme Court ruled that DOMA's definition of "spouse" (DOMA Section 3) is unconstitutional "as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment."

There are many federal statutes that either confer separate or unique benefits, or impose separate or unique obligations, on married individuals. More important examples of such federal statutes include the Internal Revenue Code (the "Code"), the Employee Retirement Income Security Act (ERISA), and the Family and Medical Leave Act (FMLA). Benefit plan sponsors and administrators should immediately undertake a comprehensive review of administrative practices and plan documents to bring benefit plan practices and provisions into conformity with this decision.

Applying the Windsor decision becomes complicated because the Supreme Court did not address DOMA Section 2, which continues to allow states to refuse to recognize same-gender marriages performed under the laws of other states. Thirteen states and the District of Columbia currently recognize same-gender marriages. A handful of other states recognize some sort of equivalent right — e.g., civil unions. The remaining states, however, also have DOMA-like statutes that define the term "spouse" for purposes of state law as a union of one man and one woman. Thus, the Supreme Court's decision does not attempt to address the ramifications of conflicting state laws under which the terms "married" or "spouse" will have different meanings for purposes of each state's law. This confused state of marital status, from state to state, will particularly complicate multi-state business operations.

So what is an employer to do?

The obvious first — and critically important — step is to review all benefit plan documents to determine how the terms "spouse" and/or "married" are currently defined. Employers, whose plans cite DOMA explicitly, will clearly need to change their plan documents. Employers with self-insured plans or individually designed retirement plans can adopt their own explicit definitions but should consider the application of state law(s), as well as the implications of discrimination issues, in framing these definitions. The eligibility of children of same-gender spouses, who now are the step children of employees for federal tax purposes, must be considered and resolved.

Changes may be required to bring plans into compliance with the new rules and/or to adjust plan design. Employers with insured plans should contact their insurance providers to discuss the interpretation of the definition of spouse under the insurer's plan document(s).

Review enrollment processes so that same sex spouses are properly identified and accorded the proper participation rights and tax treatment. Review and change the tax treatment of health benefits for same sex spouses. For example, employees may now cover their same sex spouse's health care coverage on a pre-tax basis.

If you have any questions about the DOMA decision or would like to discuss the compliance issues involved, please contact me, Gary Young, or the Scarinci Hollenbeck attorney with whom you work