# Update on Same-Sex Employee Benefits

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In recent months employers around the country, have been scrambling to keep up with developments with respect to the evolving rights of employees in same-sex relationships. This articles touches on some recent guidance in this regard from federal agencies.

**State law controls**

Since the United States Supreme Court's decision in *United States v. Windsor* last year, whereby the Court ruled that Section 3 of the 1996 Defense of Marriage Act (DOMA) is unconstitutional, additional guidance has been released by the Internal Revenue Service (IRS), the U.S. Department of the Treasury (Treasury), and the Employee Benefits Security Administration (EBSA), a division of the U.S. Department of Labor (DOL). As a reminder to employers, Section 3 of DOMA defined marriage as the "legal union of one man and one woman." Thus, under DOMA as originally enacted, only people of opposite sex could be married for purposes of federal law, which encompasses the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code, the Consolidated Omnibus Budget Reconciliation Act (COBRA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the Family and Medical Leave Act (FMLA), to name but a few.

In *Windsor,* while the Court struck the same-sex marriage ban language in Section 2 of the Act, the Court didn't find Section 2 of DOMA, which allows states to <u>not</u> recognize marriages performed in other jurisdictions, to be unconstitutional. Thus, post-*Windsor*, employers have needed to look to state law to determine an employee's status and rights with respect to this issue. But *which* state law? Readers may reside in the many states where same-sex marriage is currently *not* recognized under state law. But what about same-sex married employees of employers who either currently reside in states where same-sex marriage is recognized, or who have moved from such states? Federal agencies which regulate issues impacted by same-sex marriage recognition recently weighed in on the issue.

**IRS and EBSA weigh in on tax and benefits issues**

Recently issued guidance from the IRS and Treasury states that same sex couples that were legally married in a state that recognizes such marriages will be treated as married for federal tax purposes, even if they reside in a state that doesn't recognize such marriages. This is known as a "state of celebration" approach, rather than a "state of residence" approach. Thus, for example, employees who pay for employer-provided health coverage for their same sex spouse, may be able to exclude those costs may be from federal income tax, even if the same sex couple lives in a state that doesn't recognize their marriage. The IRS guidance became effective on September 16, 2013. Notably, the IRS guidance doesn't apply to domestic partners, civil unions, or similar relationships that aren't recognized as marriages under applicable state law.

Like Treasury and the IRS, as stated above, the EBSA has adopted a state of celebration approach with respect to recognizing same sex spouses under employee benefit plans. The EBSA has stated that adopting such an approach will ease the burden of administration for, and lessen the occurrence of problems and errors with respect to, employee benefit plans for employers concerning same sex spouses. The EBSA has coordinated its efforts in its interpretation and application of *Windsor* with the IRS, Treasury and the Department of Health and Human Services (HHS), primarily with respect to HIPAA, and has expressed that the state of celebration approach is consistent and promotes uniformity in administration. The congruency of the approaches among these agencies and departments is important, as all of these agencies and departments have overlapping jurisdiction over employee benefit plans.

**DOL changes course with new proposed FMLA regulations**

At the end of June, 2014,the DOL issued proposed regulations setting forth its position to extend Family Medical Leave Act (FMLA) protections to legally married same sex couples despite their state of residence; thus also applying the state of celebration approach. This is in contrast to the DOL's initial approach to FMLA protections in light of *Windsor*, issued in the fall of 2013, whereby the DOL applied a state of residence rule. This original rule conflicted with the subsequent guidance issued by the IRS, Treasury and EBSA, set forth above, with respect to employee benefit plans. The proposed regulations don't specify an effective date. Thus, with respect to FMLA protections, employers may continue to use the state of residence approach until such regulations become final.

**State same-sex marriage bans falling**

Meanwhile, many same-sex marriage bans in several states have been invalidated in the wake of *Windsor*. As of the writing of this article, twenty (20) states, plus Washington D.C., have legalized same sex marriage, including the States of California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont and Washington. However, based upon the new guidance above, because same-sex marriage does not have to be recognized in the state where the employer presides, employers in *all* states (including where same sex marriage is banned) must prepare for the impact of employee benefits for same sex couples. Employers must review their employee benefits plans and related processes that are impacted by the *Windsor* decision, such as qualified retirement plans, health plan benefits, COBRA elections, HIPAA special enrollment, and payroll systems, as well as their plan operations for compliance.

**Action items for employers**

In the spring of 2014, the IRS issued additional guidance for compliance with *Windsor* for qualified plans, including document requirements, required and optional amendments, and operational guidance. For example, if a plan document defines "spouse" or "marriage" in a way that is inconsistent with the *Windsor* decision, then an amendment to the plan is required. The IRS indicates that, however, even if a contrary definition isn't used, and an amendment isn't required,

that a clarifying amendment may be helpful for purposes of plan administration. Generally, plan amendments should be adopted by December 31, 2014.

Further, plan sponsors need to evaluate plan operations as well. Plan compliance issues frequently arise through plan operations, not just plan documents. Thus, plan sponsors must implement the plan document language through administrative practices whereby same sex spouses are provided with the appropriate rights under federal law, as set forth under *Windsor*. Such administrative practices include but aren't limited to payroll practices and procedures; deferrals, contributions and other contributory elections; beneficiary designations; and plan disclosures (such as COBRA and HIPAA notices). Plan sponsors should also review associated employee records that support such plan documents and processes.

This due diligence is an important step towards compliance with the *Windsor* decision and the subsequent guidance issued by the IRS, Treasury, EBSA, DOL and HHS, in an effort to interpret and apply the Supreme Court's ruling. Employers need to take proactive steps to make sure compliance is achieved, even as guidance continues to evolve in this area of the law.

If you have questions about your company's compliance, please contact the author of this article or any member of Butler Snow's Labor and Employment group.