



SPECIAL Alert

In This Issue

In this third McGraw Wentworth Special Alert for 2013, we will review the U.S. Supreme Court recent ruling that Section 3 of the federal Defense of Marriage Act (DOMA) violates the Fifth Amendment of the Constitution. This ruling removes the federal requirement that marriage be between a man and woman. Federal law now defers to state law in terms of who should be considered a spouse. In states that recognize same-sex marriages, the federal government will now also recognize same-sex marriages.

This ruling will have implications for employers and their benefit plans. The federal regulators will need to act to help employers understand which changes need to be made. This Special Alert summarizes the potential changes needed in states that recognize same-sex marriage. Employers should wait until regulators issue guidance before addressing some of the changes that may be necessary.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGraw Wentworth web site at www.mcgrawwentworth.com.

“DOMA Ruling Impact on Employers”

The U.S. Supreme Court recently ruled that Section 3 of the federal Defense of Marriage Act (DOMA) violates the Fifth Amendment of the Constitution. Section 3 provides

that only persons of the opposite sex are recognized as spouses and married for the purposes of federal law. The Supreme Court ruled that the Fifth Amendment’s

guarantee of equal protection applies to persons of the same sex who are legally married under the laws of their state. Therefore, by limiting federal recognition of marriage to opposite-sex spouses, Section 3 of DOMA is unconstitutional. Federal law will now look to state law to determine the marital status of same-sex couples.

This ruling means that opposite-sex and same sex-spouses should be treated the same in states that recognize same-sex marriage. This is because the terms “spouse” and “marriage” under federal law will no longer be limited to just opposite-sex spouses.

The impact of the ruling is complex. Hopefully, regulators will be quick to offer some needed guidance to employers. President Obama has directed his administration to review relevant federal statutes. The IRS has announced that it will provide revised guidance in the near future.

Employers are wondering if all federal employee benefit laws that affect spouses will now need to include both same-sex and opposite-sex spouses in



states that permit same-sex marriage. If so, employers in those states will have to modify a number of procedures addressing this change.

Employers may need to consider the following in light of the Court’s ruling on DOMA:

- **Changes to imputing income on the value of health care benefits.** Prior to the ruling, employer plans that covered same-sex spouses were required to impute income on the value of the same-sex spouse’s benefits. This was because federal tax law did not allow tax-favored benefits to be provided to same-sex spouses. Federal law defers now to state law in this regard. If you offer same-sex spouse benefits in states that recognize same-sex marriage, you will likely no longer have to impute income on the value of health care benefits. However, it appears that if you offer coverage to same-sex domestic partners in a state that does not recognize same-sex marriage; you will still need to

impute income of the value of the partner's coverage.

- **Potential changes to the pre-tax payment of premiums.** Employers that offer coverage to same-sex partners in states that recognize same-sex marriage will likely be able to allow same-sex spouse coverage to be paid with pre-tax dollars.
- **Potential COBRA coverage changes.** Same-sex spouses that are offered coverage under a group health plan may now be considered qualified beneficiaries in states that recognize same-sex marriage. If that is the case, COBRA will have to be offered if they experience a qualifying event and a loss of coverage.
- **HIPAA special enrollment rights may be extended.** An employee with a same-sex spouse in a state that recognizes same-sex marriage will be able to add that spouse mid-year if the spouse qualifies for HIPAA special enrollment rights. The health plan must extend coverage to same-sex spouses for this to apply.
- **Eligibility for FSA, HSA and HRA reimbursement may change as well.** The qualified medical expenses of a same-sex spouse may be eligible for reimbursement under any of these accounts. The employee must be living in a state that recognizes same-sex marriage.



These changes seem reasonable due to the way federal law now defers to the state to define "spouse." However, regulators have so far **not** commented on how this Supreme Court decision affects federal laws that apply to spouses. Employers should understand the possible issues that may need to be addressed in their plans. It is prudent to wait to enact some changes until there is more guidance.

Employers may have additional questions on the impact of this historic DOMA ruling:

- **Will employers be forced to offer coverage to same-sex spouses in states that recognize same-sex marriage?** The answer to this question is not particularly clear. If your plan is self-funded, then your organization has the ability to define the individuals to whom coverage is extended. It seems your plan should be able to define a spouse as an opposite-sex spouse. However, if you operate in states that recognize same-sex marriage, you may want to seek a legal opinion to make sure defining spouse as opposite-sex is not problematic.

You should contact your insurance carrier if you fully insure your health plan and offer coverage in states that recognize same-sex marriage. The carrier may be compelled to offer same-sex spouses coverage because of state law.

- **Will the decision to offer benefits to domestic partners be affected?** Some employers may reconsider allowing domestic partner benefits. However, domestic partner benefits may still make sense in states that do not recognize same-sex marriage. The tax implications for domestic partners remain the same. If the domestic partner is not considered a Section 152 tax dependent, then the value of the benefits provided to that domestic partner must be taxed.

Same-sex marriage is currently recognized in the following states and jurisdictions:

- Connecticut
- Delaware
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota
- New Hampshire
- New York
- Rhode Island
- Vermont
- Washington
- Washington, D.C.

Some of these marriage laws are new. Delaware's law took effect July 1, 2013. Minnesota and Rhode Island will be effective August 1, 2013. In addition, the state of California is a gray area.

The Supreme Court also reviewed an appeal on California's Proposition 8 which abolished same-sex marriage. The Court found the parties appealing the decision had no standing. The situation has thus been remanded to the California courts. California has lifted the ban on same sex marriage that was imposed at the point Proposition 8 was passed.

One part of DOMA not under Supreme Court review was Section 2, which mandates that no state be required to recognize as legal a same-sex marriage that was legal in another state. Some states will recognize a same-sex marriage from another state. However, states that do not recognize same-sex marriage are not required under federal law to recognize same-sex marriages that are legal in other states.

Concluding Thoughts

We expect that guidance from regulators will be coming soon. However, employers operating in any of the states that recognize same-sex marriage may want to think about the following now:

- Review the definition of spouse in your plan documents. How would you like it to be defined? It seems a self-funded plan should be able to limit the scope to opposite-sex spouses. Employers may want to secure a legal opinion to make sure they do not have discrimination concerns. If you have a fully insured plan, you need to contact your carrier in that state to see how they intend to define spouses. A clear definition of a spouse will be critical as the federal government now recognizes same-sex and opposite-sex spouses.
- If you are offering same-sex spousal coverage in states that recognize same-sex marriage, you can probably discontinue imputing income on the value of the coverage. It also appears



you can allow pre-tax deductions for the coverage. You may prefer to wait until the IRS confirms that same-sex spouse coverage is tax-favored in states recognizing same-sex marriage.

- If you offer FSAs or HRAs, you should check with your plan administrator if you have employees in any of the states that recognize same-sex marriage. It seems the same-sex spouse's expenses should be reimbursed when otherwise eligible.

Regulations clarifying how this ruling affects employer plans should be coming soon. Employers should delay any other changes until additional guidance is provided on how this ruling will affect federal regulations. **MW**

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