

Management Alert



Supreme Court To Hear Same-Sex Marriage Cases

Last year, the U.S. Supreme Court decided the constitutionality of healthcare reform. Now, the Supreme Court has agreed to hear two cases addressing questions pertaining to the rights of same-sex couples; decisions which could also have a profound effect on employee benefits in the future.

Background

Windsor v U.S. - No deprivation of property without due process.

In *Windsor v. U.S.*, the question presented is whether Section 3 of the Defense of Marriage Act (DOMA) deprives same-sex couples (who are lawfully married in their state) the equal protection guaranteed by the U.S. Constitution. Section 3 of DOMA provides that for federal law purposes, "marriage" means only a legal union between one man and one woman as husband and wife. Because of DOMA, Edith Windsor was assessed with a large federal estate tax bill when her same-sex spouse died. The couple had married in Canada in 2007, but were residents of the State of New York at the time of the spouse's death in 2009. Although New York did not license same-sex marriage in 2009, the decision presumed that New York would recognize same-sex marriages entered into in other jurisdictions. The Second Circuit Court of Appeals found that DOMA violates the equal protection provision of the 5th Amendment of the Constitution, which states that no person shall be deprived of property without due process.

Hollingsworth v Perry - States cannot deny equal protection of laws.

In *Hollingsworth v Perry*, 671 F.3d 1052 (9th Cir. 2012), the question presented is whether the Equal Protection Clause of the 14th Amendment of the U.S. Constitution prohibits a state from defining marriage as the union of a man and woman. Proposition 8 was a voter initiative that amended the California constitution to limit marriage to the union of a man and woman. The Ninth Circuit Court of Appeals found that Proposition 8 violated the Equal Protection Clause, which provides that no State shall deny to any person the equal protection of the laws, because Proposition 8 failed to identify a legitimate governmental interest for eliminating the right of same-sex couples to marry.

In both cases, the U.S. Supreme Court must first decide certain procedural issues presented by the cases, which will affect whether the court actually hears the challenges.

If the U.S. Supreme Court decides that Section 3 of DOMA is unconstitutional and/or that a state's constitutional ban on same-sex marriage violates the U.S. Constitution, it would have far-reaching effects on employee benefits, some of which are discussed below.

Health and Welfare Plans

In general, employers are free to decide whether to offer welfare benefits (such as health coverage and life insurance) to their employees and their dependents. Employers that offer, for example, health coverage to spouses often define spouse

Seyfarth Shaw — Management Alert

as opposite sex spouses, mainly due to DOMA. Under DOMA, tax-free benefits are generally only available to opposite sex spouses. Employers that also offer welfare benefits to same-sex spouses often offer these benefits as “domestic partners” or “civil union partners” to facilitate the appropriate federal income tax treatment.

If DOMA is found to be unconstitutional, plans and practices will have to be reviewed to ensure that the federal income tax rules are applied appropriately for same-sex spouses (and their dependents). In addition, same-sex spouses who have health coverage under an employer-plan would be entitled to COBRA continuation coverage.

Tax-Qualified Retirement Plans

Federal law provides certain protections and rights in favor of spouses of retirement plan participants. If DOMA is held to be unconstitutional then these rights and protections must be extended to same-sex spouses. A participant’s same-sex spouse will be the participant’s primary beneficiary under tax-qualified retirement plans unless the spouse consents to the designation of someone else. If the retirement plan is a pension plan (either a defined benefit plan or a money purchase plan), the participant’s benefit will be paid as a qualified joint and survivor annuity with the same-sex spouse unless the same-sex spouse consents to a different option. If a defined contribution retirement plan requires spousal consent for loans or hardship withdrawals, the same-sex spouse’s consent would be required.

A same-sex spouse will be able to keep benefits in retirement plans longer (generally, until the participant would have reached 70-1/2), which continues the deferral of taxes on those amounts. Same-sex spouses will also be able to roll retirement plan distributions into a spousal individual retirement account (“IRA”), which permits longer tax-deferral than a non-spouse beneficiary IRA.

If DOMA is found to be unconstitutional, a critical question will be whether the repercussions (including the associated tax impacts) will be retroactive or prospective. Employers will need time to evaluate their plans and administrative systems in order to make the necessary adjustments to comply with a new federal definition of spouse, and will hopefully receive transitional relief from the Court and appropriate governmental agencies.

To read the Labor & Employment alert targeting the retail industry, please click [here](#)...

By: [Linda Haynes](#) and [Joy Sellstrom](#)

[Linda Haynes](#) is a partner and [Joy Sellstrom](#) is senior counsel in Seyfarth’s Employee Benefits & Executive Compensation practice group. If you would like further information, please contact your Seyfarth attorney, Linda Haynes at lhaynes@seyfarth.com or Joy Sellstrom at jsellstrom@seyfarth.com.



www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.) © 2012 Seyfarth Shaw LLP. All rights reserved.

Breadth. Depth. Results.