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This issue of the *Employee Benefit Plan Review* focuses on New Benefits in a variety of areas: benefits for same-gender spouses, proposed mandatory flexible working arrangements, and open benefit enrollments. Our Feature article addresses PBGC proposed regulations.

### **PBGC PROPOSED REGULATIONS: REPORTABLE EVENTS AND CERTAIN OTHER NOTIFICATION REQUIREMENTS**

This month's Feature article by Amy L. Blackman, Donald P. Carleen, and Jeffrey Ross of Fried, Frank, Harris, Shriver & Jacobson LLP, discusses proposed Pension Benefit Guaranty Corporation (PBGC) regulations to effect changes in the PBGC's reportable event program that are expected to relieve more than 90 percent of plans and sponsors from many of the existing reporting requirements under ERISA. The authors summarize some of the key changes contained in the proposed regulations and provide a chart excerpted from the proposed regulations that provide additional detail regarding the proposed changes.

### **US SUPREME COURT RULING AFFECTS BENEFITS FOR SAME-GENDER SPOUSES**

The first of our Focus articles discusses a recent decision by the US Supreme Court in *United States v. Windsor* striking down the federal Defense of Marriage Act (DOMA) that has many implications for the design and operation of employee benefit plans. The immediate impact of the Court's *Windsor* decision is that the term "spouse" when used in federal law must include same-gender spouses who are legally married under applicable state law. This article by Durward James Gehring, Jonathan D. Karelitz, Joy Sellstrom, and Fredric S. Singerman of Seyfarth Shaw LLP, outlines some of the principal issues facing sponsors of retirement and welfare benefit plans in the wake of *Windsor*.

### **SAN FRANCISCO PROPOSES MANDATORY FLEXIBLE WORKING ARRANGEMENTS**

The San Francisco Board of Supervisors recently unveiled a proposed "Family Friendly Workplace Ordinance," which would allow employees who are caregivers to request a wide range of flexible working arrangements. Employers would be able to deny the request only upon a showing of "undue hardship."

If approved by voters, this ordinance would, subject to any legal challenge, take effect on July 1, 2014, and would be the first of its kind in the United States. Jeffrey M. Tanenbaum and Alexandra Devendra of Nixon Peabody LLP describe the proposed ordinance in this Focus article.

### **VOLUNTARY CHOICES AND OPEN ENROLLMENTS—HOW FAR SHOULD THE DOOR BE OPENED?**

Healthcare reform is a challenge to anyone attempting to read and interpret the law. What is the impact on medical insurance now provided in the workplace? How does this affect employee medical insurance buying patterns? Can insurers adapt and succeed in the new system? How will Exchanges work? The questions are endless and these are just the ones that apply to medical insurance. The assumption is that people are aware of these questions and are talking about them. Of even greater uncertainty is the impact of reform on nonmedical products. Jim Rathburn of RGA U.S. Group Reinsurance and Chad Christensen of ING Employee Benefits discuss the ways in which employers are trying to provide maximum options for their employees, the motivations for enrollments, and factors to consider when handling enrollment requests in our final Focus article.

### **SPECIAL REPORT: WORK-LIFE PROGRAMS**

This month's Special Report, "How the Recent Recessions Have Affected Work-Life Programs," by Frank Giancola, provides a brief history of work-life programs and discusses their current status in the workplace. Mr. Giancola notes that since work-life programs are now a staple in the total-rewards strategy of many firms, benefit professionals should have a good understanding of these programs.

This month we also feature our "From the Courts" column by Norman L. Tolle, a partner in Rivkin Radler LLP; Mark S. Weisberg of Winston & Strawn LLP contributed this month's "Regulatory Update" column; Marjorie M. Glover and David Gallai of Chadbourne & Parke LLP answer readers question in our "Ask the Experts" column; and Michael W. Casey III of Duane Morris LLP provides a "Strategy" update.

Enjoy the issue!

Steven A. Meyerowitz  
Editor-in-Chief  
September 2013

# US Supreme Court Ruling Affects Benefits for Same-Gender Spouses

DURWARD JAMES GEHRING, JONATHAN D. KARELITZ, JOY SELLSTROM, AND FREDRIC S. SINGERMAN

A recent decision by the US Supreme Court in *United States v. Windsor* striking down the federal Defense of Marriage Act (DOMA) has many implications for the design and operation of employee benefit plans. The immediate impact of the Court's *Windsor* decision is that the term "spouse" when used in federal law must include same-gender spouses who are legally married under applicable state law. Employee benefit plans are extensively regulated by federal law—both the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code)—and the definition of "spouse" is integral to a number of important requirements.

This article outlines some of the principal issues facing sponsors of retirement and welfare benefit plans in the wake of *Windsor*.

## OVERVIEW

### Which State's Law Governs?

The Court's opinion made it clear that the states have the authority to determine what constitutes a valid marriage, and that federal law cannot simply disregard same-gender marriages that are valid under state law. It did not, however, address which state law governs. Possible alternatives are where the marriage was performed, where the participant or couple resides at the relevant time, or where the plan sponsor is located. Guidance is urgently needed on this threshold question. When the term

"Same-Gender Spouse" is used in this article, this issue should be kept in mind.

### Must Benefits Be Offered to Same-Gender Spouses?

Employers are generally not required to offer employee benefits to employees or their dependents. If benefits are provided to employees, however, certain rights are conferred upon their spouses. In addition, beginning in 2014, large employers must offer certain health coverage to full-time employees and, beginning in 2015, their dependents or pay a penalty. These rights are now extended to Same-Gender Spouses, as explained in further detail below.

### When Is *Windsor* Effective?

Under Supreme Court rules, the decision in *Windsor* does not take effect until 25 days after the date of the decision, that is, July 21, 2013. However, once the decision takes effect, it appears that it will be retroactive, and plan administrators should begin planning immediately to implement the decision.

Generally, when the Supreme Court decides that a law is unconstitutional, that means that it has always been unconstitutional, unless the Court expressly provides that its decision is to be applied prospectively. Although the Court did not provide that the decision would be prospective, it is difficult to predict how it will affect benefit programs. In addition, many employers already provide various benefits to domestic and civil union partners, which would typically include Same-Gender Spouses. With respect to the retroactive application of the decision on other federal laws affecting benefits, including ERISA, the Code, and the Affordable Care Act (ACA), we look to the governmental agencies to provide guidance.

### What Needs to Be Done?

All sponsors and administrators of tax-qualified retirement plans and welfare benefit plans should review their plan documents,

## TO-DO LIST

- Review definitions of spouse and dependent
- Review plan eligibility provisions
- Review insurance policies
- Review payroll practices
- Review benefit election forms and explanations
- Review employee communications
- Review third party administrator practices

particularly the definition of “spouse,” and their administrative forms and procedures to ensure that they are compatible with the Supreme Court’s decision.

#### EFFECT ON RETIREMENT PLANS

##### Form of Payment in Defined Benefit Plans

Under ERISA, the default form of payment for a married participant in a defined benefit pension plan is a qualified joint and survivor annuity (QJSA) with the participant’s spouse as the beneficiary. The participant can only elect to waive the QJSA in favor of an optional payment form with his or her spouse’s consent. Before *Windsor*, the QJSA rules only protected opposite-gender spouses. After *Windsor*, benefits paid to a participant with a Same-Gender Spouse must be in the form of a QJSA, unless the participant’s spouse consents to a different form. In addition, participants with a Same-Gender Spouse must now be offered the chance to elect a qualified optional joint and survivor annuity (typically either a joint and 100 percent or joint and 75 percent annuity).

Some pension plans already allow an unmarried participant to elect a joint and survivor annuity with another person as the beneficiary, and many participants who are in a same-gender marriage may already have designated their spouse as their beneficiary, in which case no change is necessary, except that the plan must now provide that payment in the form of a QJSA is a legal entitlement that can be changed only with the spouse’s consent.

Similarly, before *Windsor*, a defined benefit plan was required to provide a death benefit to a participant’s opposite-gender surviving spouse if the participant died before commencing payment of his or her vested benefit. This required death benefit, known as a qualified pre-retirement survivor annuity (QPSA), was traditionally not available to a

participant who died prior to retirement and was either unmarried or married to a Same-Gender Spouse not recognized under DOMA. After *Windsor*, defined benefit plans will be required to provide QPSA benefits to Same-Gender Spouses. If the plan permits the participant to elect an alternate form of death benefit, such as a lump-sum benefit under a cash balance pension plan, or allows the participant to designate a beneficiary other than the participant’s spouse, the requirement that the participant’s spouse consent to waive the QPSA would similarly extend to Same-Gender Spouses.

Some traditional pension plans also permit a participant to waive QPSA coverage with spousal consent, in which case the participant receives a larger pension benefit. A plan that allows participant who is in a same-gender marriage to waive QPSA coverage will now need to ensure that the participant’s spouse consents to the waiver.

The extension of the QJSA and QPSA rules to Same-Gender Spouses will require that plan administrators review and most likely revise their benefit election and beneficiary designation forms to ensure that the spousal consent requirements apply to both opposite-gender and Same-Gender Spouses.

##### Beneficiary Designations in Defined Contribution Plans

Although most defined contribution plans are not subject to the QPSA requirements, virtually all defined contribution plans allow participants to designate a beneficiary who will receive the participant’s account balance if the participant dies before distribution. ERISA provides that a participant must obtain his or her spouse’s consent to designate a beneficiary other than the spouse. If a participant in a same-gender marriage has designated a beneficiary other than the participant’s spouse, that designation will now be invalid unless consent of the spouse is obtained.

##### Hardship Withdrawals in 401(k) Plans

Internal Revenue Service (IRS) regulations permit 401(k) plans to provide participants with an opportunity to withdraw all or a portion of their contributions in the event of an immediate and heavy financial need. The regulations include six “safe harbor” events that are deemed to satisfy this requirement. Before *Windsor*, three of the safe harbor events could be triggered by expenses incurred on behalf of a participant’s opposite gender spouse, tax dependent, or primary beneficiary. After *Windsor*, subject to all other existing plan terms, hardship withdrawals will now be permissible to pay (1) a Same-Gender Spouse’s medical expenses, (2) a Same-Gender Spouse’s educational expenses, and (3) the burial or funeral expenses of a deceased Same-Gender Spouse, even if the Same-Gender Spouse is not the participant’s tax dependent or primary beneficiary under the plan.

##### QDROs

Under ERISA, a participant’s tax-qualified retirement benefit generally may not be assigned to another person. One of the few exceptions to this rule is if a divorced participant’s former spouse obtains a court-approved domestic relations order assigning all or a portion of the participant’s benefit to the former spouse, and the plan administrator determines that the order satisfies certain minimum standards (commonly referred to as a QDRO). Before *Windsor*, a plan administrator could not give effect to domestic relations orders assigning benefits to a former Same-Gender Spouse. In light of *Windsor*, Same-Gender Spouses may now pursue a division of tax-qualified plan assets in connection with a divorce proceeding.

##### Technical Changes to Tax Laws

Recognition of Same-Gender Spouses under the Code will eliminate some of the technical

distinctions that qualified retirement plans have historically had to deal with when extending benefits to Same-Gender Spouses, domestic partners, and other non-spouse beneficiaries, including the following:

- Same-Gender Spouses will now be permitted to roll over benefits into IRAs and other tax-qualified retirement plans, rather than being limited to rolling over into an inherited IRA.
- Same-Gender Spouses will also be entitled to take advantage of the ability to defer the commencement of death benefits to the year in which the participant would have reached age 70½, rather than being required to receive benefits by the last day of the first year after the participant's death (or the last day of the fifth year for lump-sum payments).
- If a defined benefit plan subsidizes the cost of a survivorship pension, the value of a survivor benefit payable to a Same-Gender Spouse will not be taken into account for purposes of the annual limit on benefits under the plan.
- If the Same-Gender Spouse is more than 10 years younger than the participant, the rule requiring a reduction of the maximum benefit percentage that can be paid in the form of a joint and survivor annuity will no longer apply.

Employers should review applicable plan provisions to confirm that Same-Gender Spouses are treated consistently with opposite-gender partners in this regard.

### Nonqualified Plans

In general, the tax laws governing supplemental executive retirement plans and other nonqualified plans, including Section 409A of the Code, do not contain special provisions applicable only to spouses, and the invalidation of DOMA will not have any legal effect upon the administration of nonqualified plans. However, many nonqualified plans do contain

provisions applicable to spouses of participants, and any employer that maintains a nonqualified plan should review the plan to make sure that the definition of spouse, if the plan contains such a definition, is still appropriate in light of *Windsor*, and will not cause any unintended consequences.

### EFFECT ON HEALTH AND WELFARE PLANS

#### Redefine Spouse

The effect of declaring DOMA unconstitutional depends on whether a health or welfare plan is insured or self-funded. Although insured plans will contain a definition of spouse that complies with applicable state law, employers will have to decide how to define “spouse” for purposes of their self-funded plans. A spouse can no longer be defined with reference to DOMA. Instead, employers may choose to define “spouse” as an individual married to a participant for federal income tax purposes, or with reference to a specific state law.

#### Stop Imputing Income for Same-Gender Spouse Benefits

Employers should no longer impute income for federal income tax purposes on the value of benefits provided to Same-Gender Spouses. Although plan sponsors should stop imputing income as soon as possible, there are practical hurdles involved due to the difficulty in changing payroll systems. Notably, the Supreme Court's decision did not change the tax consequences for domestic/civil union partners. Thus, employers may need to determine which participants have enrolled a Same-Gender Spouse as opposed to a domestic/civil union partner to ensure income is imputed appropriately and that the proper employee contribution amount is charged.

#### Refund of Taxes Paid on Imputed Income

In addition, employers have been required to pay federal payroll taxes

on all imputed amounts, including Social Security, Medicare, and Unemployment. Applying the decision retroactively to these employers may mean that employees have a claim for a refund of federal income taxes on imputed income paid (and possibly the employee-paid portion of Social Security), and employers have a claim for a refund of federal payroll taxes paid. Generally, a claim for a refund may be filed for open tax years, which are three years from April 15 of the calendar year following the year in which the income was imputed.

#### Subsidies Under the Affordable Care Act

Under the ACA, taxpayers with household income between 100 percent and 400 percent of the federal poverty line who purchase insurance through an Exchange will qualify for a premium tax credit. “Household income” includes the modified adjusted gross income of spouses and tax-dependents. After *Windsor*, a spouse will include a Same-Gender Spouse. Adding the income of a Same-Gender Spouse could cause an employee who would be otherwise eligible for a premium tax credit to be ineligible. Similarly, an individual who would otherwise be eligible for Medicaid may be ineligible.

#### Children of Same-Gender Spouses

Under the ACA, health coverage must be extended to any child who has not attained age 26. The term “child” includes a biological or adopted son or daughter, as well as a stepson or stepdaughter. Under previously issued Answers to Frequently Asked Questions for Same-Gender Couples, the IRS indicated that if a same-gender partner (including a domestic partner, civil union partner, or spouse) is the stepparent of his or her partner's child under the laws of the state in which the partners reside, then the same-gender partner is the stepparent of the child for federal income tax purposes. After *Windsor*, a child of a Same-Gender Spouse will

be treated as a stepchild and entitled to extended coverage.

### Extend COBRA Coverage

Due to DOMA, a domestic partner could not qualify as a federally recognized spouse, even if state law were to recognize a same-gender domestic partner as an employee's spouse. Thus, COBRA has not required plans to extend continuation coverage to Same-Gender Spouses who were covered under an employer's plan, although some plans provided "COBRA-like" coverage to these individuals. Now that DOMA has been declared unconstitutional, COBRA continuation coverage will have to be extended to Same-Gender Spouses in the same manner extended to opposite-gender spouses. Guidance is needed as to various existing situations such as those in which an employee with a Same-Gender Spouse recently incurred a termination of employment and COBRA was not offered to a Same-Gender Spouse who has since incurred medical expenses.

### Change in Pre-Tax Elections

Clearly if a plan allows an employee to change an election due to a spouse's change in status or special enrollment event, prospectively, a Same-Gender Spouse will be treated the same as an opposite-sex spouse.

Guidance is needed for various situations, such as those in which a Same-Gender Spouse lost a job or acquired a dependent prior to *Windsor*, but that event was not recognized as a change in status at the time. Possibly, the IRS will require or allow employers to have special enrollment periods for these situations, as well as for participants whose same-gender marriages were in effect recognized by *Windsor*, and now wish to make a mid-year election to cover their spouses.

### Flexible Spending Accounts (FSA)/Health Savings Accounts (HSA)/Health Reimbursement Arrangements (HRA)

The Code limits reimbursements under FSAs, HSAs, and HRAs to qualifying medical expenses incurred by the taxpayer and the taxpayer's spouse and tax dependents. After *Windsor*, expenses incurred by a Same-Gender Spouse will be reimbursable.

There are some disadvantages for Same-Gender Spouses that result from the decision as well. With respect to HSAs, when either spouse has family high deductible health plan (HDHP) coverage, the maximum HSA contribution for family coverage is split between spouses. Prior to the *Windsor* decision, a Same-Gender Spouse would

be entitled to contribute an amount up to the entire family contribution limit. In addition, if a spouse participates in a non-HDHP, both the employee and spouse become ineligible for an HSA. Prior to the *Windsor* decision, a Same-Gender Spouse could participate in a non-HDHP and not affect the employee's eligibility for an HSA.

### Impact on Coverage for Domestic Partners

Employers must review their plans and plan designs. Employers that already provide benefits to Same-Gender Spouses will have to delete any language regarding imputing income for federal tax purposes, and employers that do not currently provide benefits to same-gender partners may be under increased pressure to do so. In addition, employers in states that recognize same-gender marriage may consider providing coverage to spouses, but not to domestic partners. ☼

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