HUMAN RIGHTS CAMPAIGN®

U.S. v. WINDSOR

One June 26, 2013 the Supreme Court of the United States issued a decision in *U.S. v. Windsor*, invalidating Section 3 of the Defense of Marriage Act (DOMA), which had previously restricted federal recognition of marriages to those between different-sex couples. The Court held that restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to different-sex marriages, is unconstitutional under the Due Process Clause of the Fifth Amendment, because doing so "disparage[s] and … injure[s] those whom the State, by its marriage laws, sought to protect in personhood and dignity." This decision allows the federal government to recognize same-sex marriages for the purposes of crucial federal benefits and programs including Social Security and Taxation.

FEDERAL LEGAL OBLIGATIONS

Federal agencies have implemented the *Windsor* decision based on the authorizing statute of each federal program and benefit that they administer. In practice, this means that individual benefits may vary depending on the state where the couple lives. Below is a description of agency actions that may directly impact your employees.

ERISA

- DOL announced guidance that in general for purposes of Title I of the Employee Retirement Income Security Act (ERISA), 'spouse' will refer to any individual who is lawfully married under any state law, including individuals in a same-sex marriage who were legally married in a state that recognizes such marriages, but who are currently domiciled in a state that does not recognize the marriage. Also, "marriage" will be interpreted to include a same-sex marriage that is legally recognized as a marriage under any state law.[1]

FMLA

- Under current DOL policy, an employee is eligible for leave under the Family and Medical Leave Act (FMLA) to care for a same-sex spouse if the employee resides in a state that recognizes his or her marriage.[2] In June 2014, DOL published a Notice of Proposed Rulemaking extending leave eligibility to all same-sex spouses regardless of their state of residence.[3] Employees living in states that do not recognize their marriages will remain ineligible to take FMLA leave until the Department publishes an Interim or Final Rule.

---

1 See, *Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in U.S. v. Windsor*; available at: http://www.dol.gov/ebsa/newsroom/tr13-04.html.

2 See, *Wage and Hour Division Fact Sheet #28F: Qualifying Reasons for Leave under the Family and Medical Leave Act*; available at http://www.dol.gov/whd/regs/compliance/whdfs28.htm.

3 See, *Family and Medical Leave Act: Notice of Proposed Rulemaking to Revise the Definition of "Spouse" Under the FMLA*; available at: http://www.dol.gov/whd/fmla/nprm-spouse/

IMMIGRATION/INTERNATIONAL TRAVEL

- The U.S. Citizen and Immigration Services (USCIS) at DHS announced that same-sex marriages will be treated exactly the same as opposite-sex marriages for the purposes of immigration law. This includes an individual seeking to accompany or follow his or her spouse who has been granted an employment-based visa. USCIS generally looks to the place where the marriage was celebrated to determine the validity of the marriage, and will apply these same principles to same-sex marriages. U.S. Citizens and lawful permanent residents can now file petitions to sponsor their same-sex spouses for family-based immigrant visas, and can file fiancé or fiancée petitions based on their engagement to a person of the same sex. All other immigration benefits conditioned on the existence of a marriage or one's status as a spouse now include same-sex marriages. Same-sex marriages now, like opposite-sex marriages, reduce the residence period required for naturalization for aliens married to U.S. citizens. And whenever the immigration law conditions eligibility for discretionary waivers of certain inadmissibility grounds on marriage or status as a spouse, same-sex marriages will be treated exactly the same as opposite-sex marriages.[4]

TAXATION/WITHHOLDING

- The IRS published a Revenue Ruling providing that for federal tax purposes same-sex couples will be considered to be "married" if they were married in any jurisdiction that recognizes same-sex marriages regardless of where they live. Same-sex spouses may now fund a spousal IRA for a non-working spouse. Also, 401K plans are also now required to recognize same-sex spouses. This will allow a surviving spouse to roll their spouse's IRA into their own. Same-sex spouses can also not be cut out of their spouse's 401K plan without their permission. Couples may file amended returns up to 3 years.[5]

- The IRS issued guidance for employers and employees regarding the process for claiming refunds or adjusting overpayments of FICA taxes and employment taxes with respect to certain benefits and remunerations provided to same-sex spouses.[6]

4 See, *USCIS, Same-Sex Marriages*; available at: http://www.uscis.gov/family/same-sex-marriages.

5 See, *IRS Revenue Ruling* (http://www.irs.gov/pub/irs-drop/rr-13-17.pdf) and Frequently Asked Questions; available at: http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples.

6 See, *Application of Windsor Decision and Revenue Ruling 2013–17 to Employment Taxes and Special Administrative Procedures for Employers to Make Adjustments or Claims for Refund or Credit*; available at: http://www.irs.gov/irb/2013-44_IRB/ar10.html.

POTENTIAL FOR LITIGATION

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans. ERISA requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty. In practice, as a federal law ERISA coverage pre-empts state and local laws. Companies that are not covered by ERISA may be particularly vulnerable to litigation based on state level sexual orientation protections.

Following the June 2006 adoption of protections for employees based on sexual orientation, a different sex couple filed a discrimination claim with the Washington state Human Rights Commission against Honeywell arguing that the company's policy of providing domestic partner benefits only to same-sex employees violated the prohibition against discrimination based on sexual orientation. The Human Rights Commission determined that due to federal ERISA coverage it did not have jurisdiction to enforce potentially conflicting Washington state laws. Honeywell currently offers domestic partner benefits to all unmarried employees who meet the eligibility requirements.

Recent cases filed under ERISA have met with varying results in the courts. In *Roe v. Empire Blue Cross Blue Shield*, the court determined that a plan adopted by an employer that explicitly excluded same-sex spouses and domestic partners from coverage did not violate section 510 of ERISA as fiduciary breach or interference with benefits. The court provided that the plan exclusion did not amount to an adverse employment action and that the Windsor decision emphasized the importance of state laws plan content. Last summer in *Cozen O'Connor P.C. v. Tobits*, the U.S. District Court for the Eastern District of Pennsylvania determined that the same-sex spouse of a deceased profit-sharing plan participant was entitled to spousal death benefits under the benefits plan and ERISA.

RECOMMENDATIONS AND BEST PRACTICES

For same-sex couples across the country, the *Windsor* decision means spousal recognition for many federal benefits for the first time. As an employer, these changes may also have an impact on policies in place before the decision—specifically domestic partner benefits. These benefits may be covered by state and local sexual orientation protections that may prohibit offering domestic partner benefits to employees based on sexual orientation or the sex of the employee's partner.

CONTINUING TO OFFER DOMESTIC PARTNER BENEFITS

- As a best practice and to ensure compliance with all state and local employment laws, employers should ensure that all legally married employees, regardless of the sex of their partner, are treated equally and have equal access to all company benefits and programs. Companies operating in states without marriage equality or protections for LGBT employees may continue to offer domestic partner benefits to only same-sex couples. For companies operating in states with marriage equality domestic partner benefits should be made equally available to all employees regardless of sexual orientation. This will ensure that the company policy is in full compliance with state and local laws prohibiting discrimination on the basis of sexual orientation.

ADOPTING A CASE-BY-CASE APPROACH TO ENSURE TRUE EQUAL ACCESS

- Companies in marriage equality states that decline to continue to routinely offer domestic partner coverage may consider adopting a case-by-case approach. Given the patchwork nature of marriage equality laws across the country, requiring marriage in lieu of domestic partner benefits will undoubtedly impact some employees who live in a bordering non-marriage state and are unable to relocate. For example, an employee working at a company in Washington, D.C. may live in Virginia. Many municipalities and counties require residence as a condition of employment. For an employee whose partner works for a city or county in Virginia with a residence requirement relocating to another jurisdiction with marriage recognition would not be a viable economic option. Couples across the country are living out this reality every day in Nebraska, Montana, Virginia, and countless other states where people are living on the border of marriage equality.