JONES DAY

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THE SUPREME COURT'S DOMA DECISION: IMPACT OF THE CHANGING DEFINITION OF "SPOUSE" ON EMPLOYEE BENEFITS

On June 26, the U.S. Supreme Court decided the case of *United States v. Windsor*, holding that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional (the "Windsor Decision").

Section 3 of DOMA provides that for purposes of federal law, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. Section 7.

Before the Windsor Decision, Section 3 of DOMA required that all provisions of federal law, including the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code") (and underlying regulations), that refer to spouse or marriage use the DOMA definitions. As a result, under DOMA, same-sex spouses were not required to receive (and in some cases were prohibited from receiving) the same benefit plan protections that applied to opposite-sex spouses. The holding that Section 3 of DOMA is unconstitutional means that this Section is no longer the law and, therefore, same-sex lawfully married spouses are now to be treated in the same manner as opposite-sex spouses for benefit plan purposes.

IMPACT ON DEFINITION OF "SPOUSE"

The Windsor Decision expressly applies only to persons who are "lawfully married." Because most states do not recognize same-sex marriage, however, it is not clear what the Windsor Decision means for same-sex couples who, although they were married in a state that recognizes same-sex marriage, reside in another state that recognizes only opposite-sex marriages. In fact, Section 2 of DOMA (which was not mentioned in the Windsor Decision and remains in effect) allows states to disregard same-sex marriages performed in other states. The scope of

same-sex marriages that are "lawful" and covered by the Windsor Decision is therefore not clear.

While it seems apparent that same-sex spouses living in a state that recognizes such marriages are entitled to equality with opposite-sex married couples, a same-sex couple residing in a state that does not recognize their marriage in another state may not be eligible for such equality. Nor is the treatment of state-recognized civil unions (sometimes called domestic partnerships) under the Windsor Decision clear at this point. Whether they are lawful marriages for purposes of the Windsor Decision despite their different designation may depend on the terms of each state's law regarding civil unions. It also may depend upon whether federal agencies choose to step in and define when a same-sex marriage is lawful for federal law purposes. This may be accomplished, for example, by federal regulation that recognizes same-sex marriages for benefits purposes based on the state of marriage celebration, regardless of whether the state of domicile—if different—would recognize such a marriage.

To the extent that same-sex spouses are lawfully married, however, employers need to consider what benefits and protections must be extended to same-sex spouses under their employee benefit plans. The following discussion of benefit plan provisions highlights the issues that affect same-sex spouses who are lawfully married but is not intended to be an exhaustive list.

QUALIFIED RETIREMENT PLAN BENEFITS AND ISSUES

Qualified Joint and Survivor Annuity. Defined benefit pension plans and certain defined contribution plans are required to offer retirement benefits to married participants in the form of a qualified joint and survivor annuity ("QJSA") unless the spouse consents to a different form of payment. The QJSA rules protect the spouse by limiting a participant's ability to eliminate a spousal benefit. Prior to the Windsor Decision, neither ERISA nor the Code required that such plans offer a QJSA to same-sex spouses. After the Windsor Decision, same-sex spouses are entitled to all of the protections of the QJSA requirements.

Qualified Pre-Retirement Survivor Annuities. Defined benefit pension plans and certain defined contribution plans are required to offer a qualified pre-retirement survivor annuity ("QPSA") to surviving spouses unless the spouse consents to a waiver of the benefit. The QPSA rules protect the spouse if a participant dies prior to the commencement of retirement benefits. Prior to the Windsor Decision, neither ERISA nor the Code required that such plans offer a QPSA to same-sex spouses. After the Windsor Decision, same-sex spouses are entitled to all of the protections of the QPSA requirements.

Spousal Consent. In order to protect the spouse's right to the QJSA and QPSA, the written consent of a participant's spouse is required in order for certain actions to take place under a retirement plan. For example, the written consent of a spouse is generally required to (i) name a designated beneficiary other than the spouse (under certain defined contribution plans), (ii) waive the qualified annuity form of payments described above, and (iii) use the participant's accrued benefit as security for a loan from the plan. Prior to the Windsor Decision, these spousal consent requirements did not apply to same-sex spouses. After the Windsor Decision, the spousal consent requirements apply to same-sex spouses.

Qualified Domestic Relations Order. Qualified retirement plans are required to recognize a spouse's right under a qualified domestic relations order ("QDRO"). A QDRO is a court order that creates a right for certain persons (including spouses) to receive payments or benefits when a plan participant gets a divorce. Prior to the Windsor Decision, a court order that provided retirement benefits to a same-sex spouse could not be recognized by a retirement plan. After the Windsor Decision, the QDRO rules apply to same-sex spouses.

Required Minimum Distributions. Subject to certain requirements, qualified retirement plans can allow a deceased participant's spouse to defer payment of the plan death benefit until the plan participant would have attained age 70 ½. Prior to the Windsor Decision, same-sex spouses were treated the same as a non-spouse beneficiary, which required them to begin payment within a year of the participant's death and receive any death benefits within five years or over their life expectancy. After the Windsor Decision, the

spousal required minimum distribution rules apply to same-sex spouses.

Rollover Distributions. Qualified retirement plans are required to allow a deceased participant's spouse to roll over an eligible rollover distribution to an eligible retirement plan. Prior to the Windsor Decision, same-sex spouses were precluded from utilizing this rollover feature and were permitted to roll over eligible rollover distributions only to an inherited Individual Retirement Account. After the Windsor Decision, the spousal rollover distribution rules apply to same-sex spouses.

HEALTH AND WELFARE PLAN BENEFITS AND ISSUES

Requirement to Offer Coverage. There is no federal law that requires health or welfare benefits to be offered to spouses. Therefore, the Windsor Decision does not necessarily mean that such benefits must be extended. However, state insurance laws and nondiscrimination laws may affect whether or not an employer extends health and welfare benefits to same-sex spouses. The "play or pay" employer mandate requires "large employers" to offer health coverage to full-time employees and the employee's children (but not spouses) or pay a tax penalty starting in 2015 (following the recently announced one-year delay of the effective date). Under proposed regulations, children include stepchildren. Thus, in 2015 there may be a requirement to offer health coverage to the children of a same-sex spouse, but not to the same-sex spouse.

Tax Implications—Employer Premiums. Under the Code, employer-provided health benefits received by employees and their spouses and dependents generally are excluded from the taxable income of the employees. These excluded amounts include the employer's portion of the premiums paid for coverage for the employees and their spouses and dependents. Prior to the Windsor Decision, health benefits provided to a same-sex spouse (who was not the employee's tax dependent) did not qualify for the exclusion from income, and the value of benefits provided to a same-sex spouse were required to be included in the income of the employee. After the Windsor Decision, the value of health benefits provided to a same-sex spouse is excluded from the income of the employee.

Tax Implications—Pre-Tax Benefits. Employee premiums for health benefits for employees and their spouses and dependents generally are permitted to be deducted from an employee's pay on a pre-tax basis through a cafeteria plan. Prior to the Windsor Decision, health plan premiums for coverage for a same-sex spouse (who was not the employee's tax dependent) either had to be deducted on an after-tax basis, or imputed income had to be allocated to the employee equal to the value of such coverage. After the Windsor Decision, health plan premiums for coverage of same-sex spouses may be deducted on a pre-tax basis.

Tax Implications—Spending Account Plans. Health care flexible spending accounts, health reimbursement accounts, and health savings accounts are accounts that can be used to pay out-of-pocket health care expenses incurred by employees and their spouses and dependents. Prior to the Windsor Decision, out-of-pocket expenses incurred by a same-sex spouse (who was not the employee's tax dependent) were not permitted to be paid from such accounts. After the Windsor Decision, out-of-pocket expenses incurred by a same-sex spouse are permitted to be paid from such accounts.

COBRA Continuation Coverage and Notices. Group health plans are required to provide COBRA notices to spouses and to offer COBRA continuation coverage to a participant's spouse upon the occurrence of a qualifying event that results in the spouse losing coverage under a health plan. Prior to the Windsor Decision, group health plans were not required to offer COBRA continuation coverage to same-sex spouses (although some plans voluntarily provided COBRA-like benefits to same-sex spouses and domestic partners). After the Windsor Decision, full COBRA benefits apply to same-sex spouses who are otherwise eligible for coverage under the plan.

Special Enrollment Periods. Group health plans are required to offer special enrollment rights to a participant's spouse under the Health Insurance Portability and Accountability Act ("HIPAA") if the participant gets married and if the health plan allows for spousal coverage. Prior to

the Windsor Decision, group health plans were not required to offer special enrollment rights to same-sex spouses. After the Windsor Decision, same-sex spouses will be entitled to all of the special enrollment provisions of HIPAA if they are otherwise eligible for coverage under the plan.

Cafeteria Plans. Cafeteria plans are required to provide plan participants an opportunity to change their cafeteria plan elections when a participant gets married, dies, divorces, or legally separates from a spouse. Cafeteria plan elections generally are irrevocable during the year, unless there is a "change in status event" such as a change in "legal marital status." Prior to the Windsor Decision, a same-sex spouse was not treated as a spouse under the change in status rules. After the Windsor Decision, events involving a same-sex spouse will be change in status events.

RETROACTIVITY OF THE DECISION

As outlined above, the Windsor Decision has many implications on employee benefit rights going forward. It will have significant additional implications if the decision is given "retroactive" effect, and Jones Day is of the view that the decision is indeed retroactive.

Is the Decision Retroactive? The Supreme Court has made clear that at least in the civil context, full retroactivity of judicial decisions is the rule. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). Consequently, there appears to be no basis for limiting the force of the Windsor Decision, even as to events or determinations involving same-sex spouses who were not parties to the litigation and that predate the decision. This does not mean, however, that every benefit determination, no matter how long ago it was made, is now subject to reexamination. Rather, ordinary doctrines of res judicata, statutes of limitations, and other established legal doctrines will likely limit the degree to which past actions may be subject to legal challenge.

Consequences of Retroactivity. It is reasonable to assume that the Internal Revenue Service and the Department of Labor will provide guidance on the responsibilities of employers in connection with the retroactivity of the Windsor Decision. But until such guidance is provided, we think these practical principles should apply.

- It would appear that employees whose same-sex married spouses were not their tax dependents and whose taxable income was increased by the value of benefits provided to such spouses can file for income tax refunds. The right to apply for refunds can extend to employers that overpaid their share on FICA and FUTA taxes for such employees. But employers do not have to rush to do anything. The next deadline for filing employment tax refund claims to protect open years is next spring for employers who have timely filed their employment tax returns.

- For benefits that already have been paid, and were paid correctly under the law as it then stood, it is highly unlikely that employers have a current legal obligation—whether based on ERISA fiduciary principles or otherwise—to act affirmatively to unwind those payments. Instead, the practical course would be to wait for federal guidance.

- For benefits that have not yet been paid, but for which prior designations have been made that are now in legal jeopardy, a strong communications program should be provided to employees advising them of the Windsor Decision and its impact on those prior designations. (See discussion below.) As an example, assume an employee previously designated a non-spouse beneficiary to receive a pension without consent of his same-sex spouse, despite being married to such spouse at the time. The employer—as plan administrator—may well have a current duty to advise its employees of the legal changes effected by the Windsor Decision so that the prior designation (now potentially defective in light of the Windsor Decision) can be altered.

EMPLOYER ACTIONS NEEDED

Communications and Processes. All employee and participant communications (and other similar documents or forms) and all human resource, payroll, and benefits administration processes (manual and electronic) related to the benefits and protections that have been extended to same-sex spouses should be reviewed to ensure that the communications are updated to comply with the Windsor Decision and that processes are adjusted to account for any spousal participation and election changes.

Plan Amendments. All plan documents that govern benefits and protections that have been extended to same-sex spouses should be reviewed to ensure that the plans are amended as necessary to comply with the Windsor Decision. The definition of "spouse" under all plan documents should also be reviewed and appropriately updated, including removing all references to DOMA.

Interaction with Domestic Partner Policies. To the extent that an employer's benefit programs provide benefits and protections for domestic partners or other persons who are not spouses or dependents of an employee, the policies should be reviewed and updated to reflect the change in treatment of same-sex spouses under federal law.

LAWYER CONTACTS

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