Landmark Supreme Court "DOMA"Decision to Have Major Impact on Employers

Client Advisories

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A landmark Supreme Court decision regarding how the federal government defines "marriage" will have a major impact on employers. Companies will have to make substantial adjustments to payroll and benefits administration as a result. Exactly what those adjustments will look like, however, depends on a number of factors—several of which have yet to play out.

Congress enacted the Defense of Marriage Act ("DOMA") in 1996. Through DOMA, Congress sought to define "marriage" strictly as a union between a man and a woman—at least for purposes of federal law. Similarly, DOMA defined "spouse" only to include the opposite-sex partner of an individual in a recognized marriage. Affecting over 1,000 federal statutes, DOMA denied federal protection to individuals in same-sex marriages—even when those same-sex couples were married in states that recognize same-sex marriages.

On June 26, by a 5-4 vote, the United States Supreme Court declared that Section 3 of DOMA was unconstitutional, striking down DOMA' s definition of "marriage" and "spouse." While the decision in *Windsor v. Schlain* pertained to estate taxes, invalidation of DOMA's Section 3 has paved the way for individuals in recognized same-sex marriages to receive federal benefits and protections in practically every aspect of life—including those applicable to the workplace.

However, whether workplace benefits extend to same-sex spouses remains murky. The *Windsor* decision left intact Section 2 of DOMA, which permits states to decline to recognize same-sex marriages performed in other states. Only 13 states (*i.e.*, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington) and the District of Columbia presently recognize same-sex marriage. So, for example, a same-sex couple married in Washington, D.C. and living in Virginia may not be recognized as "married" by their resident state.

State and federal recognition of a marriage is crucial to understanding how employers will need to react to the ruling. Whether legal rights extend to "spouses" under federal law sometimes depends on the state in which the

marriage occurred, and sometimes by the state in which the couple resides. For example, immigration issues hinge on where the couple was married. Tax issues, on the other hand, depend on where the couple lives. The result is that HR professionals will be faced with a barrage of questions for which there is, at present, no clear answer.

For companies that have employees who live in a state where same-sex marriage is recognized, some effects of the *Windsor* decision are apparent:

- Employees will no longer have income imputed to them for an employer's contribution to health benefit coverage for their same-sex spouse (at least for federal income tax purposes);
- Employees can receive reimbursements from flexible spending accounts, health reimbursement accounts, and health savings accounts for qualified expenses incurred by the same-sex spouse;
- COBRA continuation coverage will have to be given to same-sex spouses when a triggering event occurs;
- For purposes of 401(k) plan administration, companies will have to recognize same-sex spouses when it comes to determining death benefits and when obtaining spousal consent for beneficiary designations;
- Pension plans will be required to recognize same-sex spouses for determining surviving-spouse annuities;
- Retirement plans will need the consent of a same-sex spouse to permit a waiver of the qualified joint and survivor annuity;
- Companies covered by the FMLA must allow leave for employees to care for same-sex spouses with a serious health condition.

Again, these changes are for employees in same-sex marriages who live in one of the thirteen states, or the District of Columbia, that recognize same-sex marriage. Beyond that, the effect of the *Windsor* decision is anything but clear.

For example, how should companies treat employees who work in states that recognize same-sex marriage but live in a state that does not do so? Another serious question is whether employees can claim benefits retroactively. Since the *Windsor* decision holds, in effect, that Section 3 of DOMA should never have existed as law, can employees who paid taxes on imputed income for health benefits obtain refunds? While Human Resources might not be directly involved in the answer to that question, there is no doubt that HR professionals will be asked these—and many other—questions opened up by the decision.

Complete answers will not be available until further guidance is issued by the relevant federal agencies. That does not mean that companies should simply sit back and take a wait-and-see approach. At an absolute minimum, HR professionals should evaluate their policies carefully to ensure they understand all areas that can be potentially affected, so they are ready to amend policies as needed when that much-needed guidance emerges. Further, companies should ensure that their various employment policies line up with both corporate intent and the laws of the state(s) in which the company operates. Only then will HR be in a position to fully and properly respond when additional guidance becomes available.

If you have questions or concerns related to this ruling or other labor & employment matters, please contact a member of Archer's Labor and Employment Department in Haddonfield, N.J., at (856) 795-2121, in Flemington, N.J., at (908) 788-9700, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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