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Employers should prepare for impact of marriage rulings

By Todd Scherwin and Andrew J. Hoag

The U.S. Supreme Court's decisions in *United States v. Windsor* and *Hollingsworth v. Perry* will have profound cultural, political and social implications. And since, as Justice Anthony Kennedy noted in *Windsor*, the federal definition of the Defense of Marriage Act (DOMA) affects more than "1,000 federal statutes and the whole realm of federal regulations," holding it unconstitutional has large-scale implications. One such area implicated is employment law.

Unlike *Windsor, Hollingsworth* was not decided on the merits. The court did not decide whether Proposition 8 was constitutional, holding instead that the case was nonjusticiable — the initiative's official proponents did not have standing because they had no justiciably cognizable interest of their own. Because the initiative's official proponents did not have standing to appeal the district court's holding, the 9th Circuit did not have jurisdiction to consider the appeal. The Supreme Court vacated the 9th Circuit's judgment, remanding the case with instructions to dismiss the appeal. The result is that the district court's decision striking down Prop. 8 is good law, paving the way for same-sex couples to marry in California.

And they will need to do so soon — Gov. Jerry Brown ordered all 58 counties to issue marriage licenses to same-sex couples as soon as the 9th Circuit lifted the stay on the district court's ruling.

Windsor opens up federal benefits to same-sex couples lawfully married under state law. As such, employers will need to consider the newfound implications of federal recognition of same-sex marriages. And since *Hollingsworth* effectively clears the path for California's resumption of same-sex marriages, California employers will also need to consider the implications of same-sex marriages on state employment laws.

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The *Windsor* and *Hollingsworth* decisions will impact employers in two main areas: benefit and leave laws.

The decisions likely impact the Employee Retirement Income Security Act (ERISA), with major implications for employer administration of pension plans and health-benefit plans. ERISA preempted states from extending certain pension benefits to same-sex spouses. That prohibition is likely no longer applicable.

Health benefits under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), are also likely impacted. Under COBRA, an employee who loses health benefits is given the ability to choose to continue health benefits provided by his or her group health plan. And a terminated employee is entitled to continue health benefits for his or her "spouse." Since DOMA precluded same-sex couples from the definition of "spouse," the option to continue spousal health benefits was unavailable to same-sex couples. But the prohibition likely no longer applies, and employers will have to prepare for providing health benefits to same-sex spouses of terminated employees.

California employers also likely need to prepare for changes to the administration of 401(k) plans. Surviving spouses of different-sex couples are permitted to roll over a deceased spouse's 401(k) plan and defer withdrawals until a certain age. Under DOMA, the deferral was not available to a same-sex spouse designated as a beneficiary of a 401(k) plan. Same-sex spousal beneficiaries were required to withdraw distributions by the end of the next calendar year — potentially foregoing the benefits of additional compound interest and various tax benefits. Those penalties are likely no longer applicable. And, assuming a same-sex spouse is an automatic beneficiary, employers may need to obtain the consent of an employee's same-sex spouse in order to distribute 401(k) funds to an alternative beneficiary.

Employers will also likely need to prepare for the consequences of changing payroll and income tax requirements stemming from the recognition of same-sex marriages. For instance, an employee married to a person of the same sex might no longer be taxed on certain imputed income that goes to pay for spousal healthcare coverage.

Employers may also face numerous changes surrounding the Family and Medical Leave Act and employer-provided fringe benefits like bereavement leave and sick-care leave. Per the *Windsor* decision, employers will likely now be required to permit an employee to take family medical leave to care for a same-sex spouse. And while the California Family Rights Act already provides for leave to care for a registered domestic partner, multistate employers will have to account for significant new changes. Moreover, companies that provide fringe benefits such as bereavement leave, kin-care leave, sick leave, or other perquisites related to an employee's spouse, will likely have to provide identical perquisites to same-sex couples.

Windsor and *Hollingsworth* will significantly impact employment law. And employers should immediately prepare for numerous changes in benefit and leave laws.

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