The World Post-Windsor: Rethinking Benefit And Leave Policies For Same-Sex Spouses

Insights
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Following a highly-publicized U.S. Supreme Court decision and subsequent guidance from both the Labor Department (DOL) and the Internal Revenue Service (IRS), employers need to rethink how they treat same-sex spouses under their employee benefits plans and leave policies.

Supreme Court Decision Changes Federal Definition Of Marriage

In *U.S. v. Windsor*, a 5-4 decision issued on June 26, 2013, the U.S. Supreme Court decided that it is unconstitutional to limit the term "marriage" and "spouse" to opposite-sex couples for purposes of federal law.

The decision invalidated Section 3 of the Defense of Marriage Act (DOMA), which limited marriage in the federal context to unions between one man and one woman. In its decision, the Court did not invalidate Section 2 of DOMA, which allows states in which same-sex marriage is not legal (34 of them) to refuse to recognize same-sex marriages from other jurisdictions.

The federal agencies weighing in on this issue so far have not been consistent. The main question comes down to whether a legally married same-sex couple should be recognized for purposes of federal law based on a "*place of residence*" standard (*i.e.*, does the couple live in a state that recognizes same-sex marriage?) or a "*place of celebration*" standard (*i.e.*, was the couple legally married in a state or foreign country that recognizes same-sex marriage?).

The DOL Issues FMLA Guidance

The DOL was the first agency to issue guidance after the *Windsor* decision, defining marriage in the context of FMLA leave using the "place of residence" standard.

The FMLA allows eligible employees working for covered employers to take up to 12 weeks of job-protected leave during a 12-month period for specified family and medical reasons, including the birth or adoption of a child; the serious health condition of the employee; and the care of a spouse, child, or parent with a serious health condition.

The DOL guidance was published on August 9, 2013, and defined spouse as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee

resides, including 'common law' marriage and same-sex marriage."

Based on this guidance, employers must consider the serious health condition of a same-sex spouse when determining an employee's right to FMLA leave if the employee is 1) legally married to a same-sex spouse and 2) *residing* in a state that recognizes same-sex marriage.

While this is the extent of current FMLA guidance, employers who limit FMLA rights using a "place of residence" standard may face a risk of litigation. [WHY?] For ease of administration, and to limit liability, many employers are choosing to recognize all legally married same-sex spouses across the board for FMLA purposes.

The IRS Issues Tax Guidance

Twenty days after the DOL issued its FMLA guidance, the IRS announced that it was adopting a "place of celebration" standard for purposes of federal taxation: "Same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes."

At the same time, the IRS posted FAQs on its website to help employers understand the consequences of the new guidance. In prior years, employees were taxed on the value of same-sex spouse health benefits provided by an employer and had to pay the employee's share of the cost with after-tax dollars. Now, benefits for same-sex spouses enjoy the same tax-favored treatment as benefits of opposite-sex spouses. In addition, the IRS guidance outlines procedures for employers and their employees to request refunds of taxes attributable to benefits for same-sex spouses for all open tax years.

EBSA Issues ERISA Guidance

The Employee Benefits Security Administration (EBSA), a division of DOL, issued its own guidance in September with respect to the Employee Retirement Income Security Act of 1974 (ERISA), adopting, like the IRS, the "place of celebration" standard.

Impact on retirement plans

This will have an impact on retirement plans and employers should review their retirement plan documents to make sure the plan definition of spouse does not exclude same-sex couples. In addition, with respect to administration, plan sponsors should ensure that they:

- take the circumstances of same-sex spouses into consideration for purposes of hardship withdrawals, including medical, tuition, and funeral expenses for same-sex spouses;
- honor Qualified Domestic Relations Orders to divide retirement plan assets from participants who divorce same-sex spouses;

- require the consent of same-sex spouses before an employee can make a beneficiary designation other than the same-sex spouse;

- recognize a same-sex spouse as the default beneficiary when an employee fails to designate a beneficiary;

- allow same-sex spouses to directly roll over eligible rollover distributions and notify such spouses of these rights; and

- where appropriate, adjust eligible minimum distributions for employees with same-sex spouses.

Impact on welfare plans

Though it is clear that same-sex spouses must be recognized based on "place of celebration" for retirement plan purposes, the employer's obligations with respect to its welfare plans are murky.

Employers should consider eligibility policies for same-sex spouses and their children under their welfare programs. Though it is not clear at this time whether there is a legal mandate to include such spouses and their children, many employers will decide to include them to reduce the risk of lawsuits.

Same-sex spouses may now be reimbursed for qualified medical expenses using Flexible Spending Accounts (FSAs), Health Reimbursement Accounts (HRAs), and Health Savings Accounts (HSAs).

Same-sex spouses may be entitled to special enrollment rights pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and must be treated like other spouses with respect to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).

Employees must be allowed to pay for health insurance for their same-sex spouse on a pre-tax basis if an employer offers this option. Finally, you should consider other employee benefits you are offering to employees and spouses, such as life insurance, disability, and employee assistance programs, and prepare policies to include or exclude same-sex spouses.

Domestic Partnerships And Civil Unions

Neither the decision in *Windsor* nor agency guidance has created obligations for you with respect to domestic partnerships and civil unions. Nevertheless, employers should be prepared to answer questions regarding what rights both same-sex and opposite-sex couples have as domestic partners.

Some employers that recognized domestic partnerships before *Windsor* have decided to recognize only same-sex marriages going forward. These employers may want to consider grandfathering the participation of couples who are currently receiving benefits as domestic partners to avoid ill will.

Advice Going Forward

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Employers should determine how they intend to treat same-sex spouses for purposes of leave, and health and welfare benefits, and modify their employee communications, SPDs, and handbooks accordingly. Make your supervisors aware of your position so that they are prepared to respond to or redirect employee questions when an issue arises. A disconnect between employer policies and action taken by supervisors can lead to lawsuits.

You should prepare for requests for revised Form W-2s from employees who are seeking a tax refund, stay aware of state laws regarding same-sex marriage, and watch for future guidance from federal agencies regarding the *Windsor* decision.

Finally, an outstanding question following the IRS guidance on federal taxation is whether states that do not recognize same-sex marriage will continue to calculate income tax based on federal income tax amounts, or if they will require employers to impute the cost of a same-sex spouse's health coverage to an employee. States will need to issue guidance on the subject.

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