



Results of DOMA's Downfall

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In late June the Supreme Court of the United States issued a decision striking down some, but not all, of the Defense of Marriage Act (DOMA). The Court found the language in DOMA defining marriage as between “one man and one woman” to be unconstitutional. This means that, as far as the federal government is concerned, same-sex marriages performed in states or countries where same-sex marriage is legally recognized will be treated as legal marriages.

However, the Court reserved the right for states where same-sex marriage is not recognized to continue to refrain from recognizing same-sex marriages performed in other states where such marriages are recognized. Currently only thirteen states (plus the District of Columbia) expressly allow same-sex marriages: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington. So, for example, a state such as Tennessee, where same-sex marriages are not recognized, can continue to decline marriages performed in states such as New York, which do recognize same-sex marriage.

Even though the root of the DOMA decision was about federal estate tax and the Internal Revenue Service, rather than employment laws and the Department of Labor, the rights and responsibilities of same-sex spouses that are affected by the Court’s DOMA ruling are vast and varied. In the employment arena, these rights and responsibilities are primarily associated with benefits and taxes. Where federal employment laws refer explicitly to “spouses,” these laws may now be applicable to same-sex spouses. Whether or not the laws encompass same-sex spouses depends on how exactly, if at all, the law defines “spouse.” Some federal laws define “spouse” by incorporating the definition of state laws, and not all state laws are drafted the same.

Employers still have plenty of leeway in the policies they implement. The Court’s decision left employers free to choose how to define terms like “marriage” and “spouse” in policies and plans that are not effectuating federal requirements. Yet, as with all policies, employers need to be aware of the potential effects that policies related to treatment of same-sex marriages will have; there may be some unanticipated risks.

Employers should distinguish what policies and procedures are affected by federal regulations and which are governed by state law. In states where same-sex marriages are not recognized, employers will need to determine how they wish to treat same-sex partners or spouses of

marriages performed in other states and what benefits, if any, they wish to confer. Next, these employers will need to closely analyze policies and practices that relate to spouses to ensure that same-sex spouses are incorporated as desired. In states where same-sex marriages are recognized, employers should verify that all policies and procedures properly incorporate same-sex spouses. Lastly, all employers will need to analyze any explicit reference to DOMA and may need to make changes to reflect the recent change in law.

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