Windsor & DOMA: Issues for Cross-Border Employers

Insights
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On June 26, 2013, the U.S. Supreme Court ruled in *U.S. v. Windsor* that Section 3 of the Defense of Marriage Act ("DOMA"), which defined "marriage" as strictly between opposite-sex couples and "spouse" as referring only to a person of the opposite sex who is a husband or a wife, was unconstitutional. Given that there are hundreds of federal statutes and regulations using and giving effect to terms such as "spouse," "marriage," and other similar terms, this ruling has far-reaching legal implications. Employers and employees are particularly affected in a wide-range of areas—from immigration to employee benefits to taxation.

One question the Supreme Court left unanswered was how to apply this ruling to same-sex couples who had been legally married elsewhere, but currently resided in a state which did not recognize such marriages. (In fact, as discussed in more detail below, the first post-*Windsor* judgment involved such an issue: where a same-sex couple married in Canada, but then resided in a state which did not recognize their marriage.)

Such questions have begun to be answered, with several federal agencies recently issuing guidance adopting a "state of celebration" interpretation, under which same-sex couples legally married in a U.S. state or territory or any foreign jurisdiction with legal authority to sanction marriages will be considered married under federal law. Thus, an employee legally married in a foreign country which recognizes same-sex marriage will be treated as married for U.S. federal law purposes, regardless of whether the state or foreign jurisdiction in which the employee is domiciled or where the employee works recognizes same-sex marriage.

Adopting a "state of celebration" rule is particularly good news for large employers with employees (and/or their spouses) in multiple states and abroad. Had the federal agencies adopted a "state of domicile" interpretation (an approach which would have recognized same-sex marriages only if a couple resided in a state or foreign jurisdiction that recognizes same-sex marriages), employers would have faced a major administrative headache. Specifically, they would have had to track the domiciles and adjust benefits provisions and tax withholdings for their mobile workforce based on the ever-shifting legal landscape of same-sex marriage recognition among states and foreign countries.

Fortunately, employers can now rely on a uniform application of the *Windsor* decision and new federal regulations.

Accordingly, the State Department has begun adjudicating visa applications of same-sex spouses in the same manner as those of opposite-sex spouses. Similarly, the U.S. Citizenship & Immigration Services has indicated it will adjudicate work authorization petitions in the same manner, but will also reopen prior work authorization petitions dating back to 2011 which were denied solely on the basis of Section 3 of DOMA.

The Department of Labor has directed that the Family and Medical Leave Act's ("FMLA") protections will now extend to same-sex couples. In other words, otherwise eligible employees are now able to take protected time off of work to care for their ailing same-sex spouses.

ERISA benefit plans are also affected, given ERISA's requirements for plans to contain certain spousal benefit provisions and protections. For example, retirement plans will need to recognize same-sex spouses for purposes of spousal consent requirements for distributions, annuities, death benefits, and rollovers and COBRA continuation coverage must now be offered to same-sex spouses.

In addition, employers and plan administrators will need to review their ERISA plan documents and may need to clear up ambiguous definitions of "spouse" or other marriage-related terms (and particularly definitions referencing DOMA) to ensure compliance with federal law. A recent post-*Windsor* federal court case dealt with ambiguous definitions of "spouse" under a law firm's retirement plan after a lawsuit over entitlement to death benefits by the same-sex widow (from a Canadian marriage) of a deceased employee. The court ultimately awarded death benefits to the widow as the "surviving spouse."

Windsor will also impact taxation related to employer-sponsored health plans. For the past several years, more and more employers offered health coverage to same-sex spouses. However, prior to the decision such coverage generally translated to income tax liability for the employees. Under IRS guidance, provision of healthcare coverage to same-sex spouses generally will no longer will be imputed as taxable income to the employee on the federal level. (However, depending on the state, such benefits may still trigger state income tax liability.)

Along the same lines, employers may need to correct for overpayments of employment taxes for 2013 (and possibly prior years). The IRS has laid out various filing alternatives for doing so. In addition, some employers may need to adjust the level of benefits provided if they had previously "grossed up" benefits to employees in same-sex relationships to counter their tax liability in order to provide the same after-tax benefits to employees in opposite-sex marriages on a relative basis.

The foregoing are just a few of the immediate issues arising for employers and employees. A number of outstanding issues remain, particularly relating to retroactive application of the *Windsor* decision. For example, guidance is needed to address issues such as whether a same-sex spouse should be given a retroactive chance to make an annuity payment election and whether there should be some sort of retroactive beneficiary change.

The IRS, and other relevant agencies, have indicated additional guidance will be issued likely by year-end. New litigation and court decisions are also likely to shape this rapidly evolving area of law, including cases that affect employers with employees who have been married in countries outside of the United States.