U.S. Supreme Court's Decision on DOMA

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On June 26, 2013, the U.S. Supreme Court struck down a key provision of the Defense of Marriage Act. The court struck down the federal definition of "marriage" and "spouse" and held that same-sex marriages valid under state law are recognized at the federal level. This decision affects more than 1,100 sections of federal law that have a provision based on marriage, including some requirements that affect employee benefit plans. This is certainly of significance to the employee benefit community! In general, the decision is effective as of June 26, 2013, but there is a question about whether the opinion may apply on a retroactive basis. We still need additional guidance to truly understand the implications of this ruling for health and welfare plans, but you will find some brief details on the ruling in this article.

What Does the Ruling Mean?

The decision essentially provides that same-sex spouses residing in a state that recognizes the marriage will be treated as a spouse for all purposes of federal law, including tax treatment of health insurance benefits, COBRA continuation coverage rights, HIPAA special enrollment rights and FMLA protection. The ruling is limited to lawful same-sex marriages and does not extend to civil unions or registered domestic partnerships. It is, however, important to note that the ruling does not invalidate all of DOMA – it leaves intact a state's ability to not recognize same-sex marriage. Since, to date, 35 states ban same-sex marriage, this ruling creates uncertainty as to how couples who are legally married in a same-sex marriage jurisdiction, but residing in a state that does not recognize the marriage are treated for purposes of federal law. We need further guidance on this and will likely see future legal challenges to DOMA.

Which States Allow Same-Sex Marriage?

To date, same-sex marriage is legal in the following states:

- California
- Connecticut
- Delaware
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota (effective 8/1/13)
- New Hampshire
- New York
- Rhode Island (effective 8/1/13)
- Vermont
- Washington

Can a Health Plan Exclude Same-Sex Spouses?

The answer is likely no for both fully insured and self-insured health plans. For fully insured plans, it may depend on the

insurance carrier and state laws. In general, a spouse who is validly married in a state that recognizes same-sex marriage will be considered a spouse for purposes of health plan coverage. In such states, insurance laws generally already cover same-sex spouses on the same basis as opposite-sex spouses. An issue arises where the insurance contract is written in a state that does not recognize same-sex marriages legally performed in another state. Again, we need further guidance to clarify how a plan and carrier will define a spouse for this purpose.

Self-insured health plans that are subject to ERISA are generally preempted from state law. Most of the time the terms of the plan will define who is a "spouse." If the federal definition of a spouse is used, under the Court's ruling, this term now automatically includes same-sex spouses that are validly married and residing in a state that recognizes same-sex marriages. It is unclear to what extent, if any, a self-insured plan may limit the definition of a spouse to an opposite sex spouse.

What about Tax Treatment?

Employers should not continue to make the portion of premiums attributable to same-sex spouses taxable to employees. Under the Court's ruling, a spouse recognized under state law will be treated as a spouse for purposes of federal law. This means the value of the employer paid portion of health insurance coverage provided to a same-sex spouse is not imputed as income to the employee for federal income tax purposes. Additionally, employees can make a pre-tax election to pay the spouse's share of the premiums on a pre-tax basis; however, we still need guidance to understand whether this new recognition of a same-sex spouse as a "spouse" from a federal perspective will allow an employee to make a mid-year election change to provide coverage on a pre-tax basis through a cafeteria plan or to look back to past tax returns. Further, eligible medical expenses of the same-sex spouse may be reimbursed through a health FSA, HRA or HSA of the employee. At this point, it remains unclear whether employees and employers will be required to, or able to, make retroactive adjustments to reflect the favorable tax treatment that would have been afforded had the section of DOMA that was struck down had not been applied.

How Should Same-Sex Spouses Be Treated for COBRA, HIPAA and FMLA Purposes?

In states that recognize same-sex marriage, the Court's decision affects these laws as follows:

COBRA: Federal law extends COBRA continuation of coverage rights to covered employees, spouses and dependent children of the covered employee. To the extent a same-sex spouse is covered by a group health plan, the spouse will be entitled to COBRA continuation of coverage rights upon the occurrence of certain qualified events, including rights upon divorce.

HIPAA Special Enrollment: Special enrollment rights under HIPAA that permit an enrollment opportunity in group health plan coverage upon marriage will need to include valid same-sex marriages, as well as valid opposite-sex marriages.

FMLA: A spouse for purposes of protected FMLA leave will include same-sex spouses.

What Action Should Employers Take?

- Existing plan documents should be carefully reviewed to understand the impact of this ruling on employers' health and welfare benefit programs. In general, employers covering same-sex spouses in a state that allows same-sex marriage may already satisfy the coverage requirements. The situation becomes more complex if such valid marriages are not recognized under the terms of the contract or state law. Employers may want to consider adopting plan provisions to treat all spouses the same, regardless of state recognition of marital status. Implications of the ruling should be discussed with carriers.

- Employers should be able to discontinue imputing the value of the employer paid portion of health insurance coverage provided to same-sex spouses domiciled in states that recognize same-sex marriage.

- Cafeteria plan documents should be reviewed to ensure spousal definitions align with new federal guidelines, but we need further guidance about mid-year election changes. Employers may want to consider communicating that qualified expenses of same-sex spouses may be eligible for reimbursement through the various tax favored accounts (health FSA, HRA, HSA).

- Employers should work with payroll vendors to understand any potential state income tax ramifications.

- Employers should ensure all spouses domiciled in states that recognize same-sex marriage are treated equally with respect to COBRA, HIPAA special enrollment rights and FMLA practices and coordinate with carriers.

- Employers should await further guidance for same-sex spouses domiciled in states that do not recognize same-sex spouses and for open issues including retroactive application of these provisions.

While employers should begin to identify and address the potential impact to their benefits programs, it would also be wise to await further guidance from the regulators on the various issues as a result of the Supreme Court's decision.