



After DOMA: Next Steps for Employers

by Matt Lynch

The U. S. Supreme Court's June 26, 2013 ruling in *United States v. Windsor* that invalidated section 3 of the federal Defense of Marriage Act (DOMA) will require employers to take action now to ensure compliance with various federal employment laws. Unfortunately, the decision also raises questions regarding the scope of the Supreme Court's decision, and how federal agencies will react to the court's ruling.

Twelve states, including Washington, recognize same-sex marriages and have passed laws providing benefits to same-sex couples on the same terms as apply to opposite-sex couples. Under section 3 of DOMA, however, the federal government was prohibited from acknowledging same-sex marriages for purposes of administration and enforcement of federal laws. For example, the Family and Medical Leave Act did not entitle employees to take leave to care for a same-sex spouse with a serious health condition. In Washington, which recognizes same-sex marriages, employers must review the policies and benefits that are regulated by federal law to make sure employees in same-sex marriages are treated the same as co-workers in opposite-sex marriages.

Where to begin? The following are good first steps:

Check Terms of Self-Funded Insurance Plans. In Washington, insurance carriers must sell plans to employers that cover same-sex spouses and registered domestic partners. Employers with insured plans, therefore, will see little change resulting from the *Windsor* decision. An employer with a self-funded plan, however, that provides spousal benefits coverage must extend such benefits and protections to same-sex spouses. Consequently, employers whose plans specify that they cover only opposite-sex spouses will need to revise their plans to cover same-sex spouses or risk challenges under federal discrimination laws.

Adapt your Payroll to Change Employee Tax on Benefits. Employees will no longer have to pay federal income taxes on the income imputed for an employer's contribution to a same-sex spouse's medical, dental or vision coverage. Also, workers can pay for same-sex spouse coverage on a pretax basis under a Section 125 plan. Payroll should change withholding so that no FICA or FUTA taxes are withheld on employer-provided coverage for same-sex spouses.

Change COBRA Administration. Employers will have to offer COBRA continuation coverage to same-sex spouses.

Review Terms of Pension Plans. Employers with pension plans will be required to recognize same-sex spouses for purposes of determining surviving-spouse annuities. Same-sex spouses must also agree to receive payment of their deceased spouses' pension benefits in a form other than a 50 percent joint and survivor annuity, with the same-sex spouse as the beneficiary

Review Your 401(k) Plans. Organizations with 401(k) plans will have to recognize same-sex spouses for purposes of determining death benefits, and same-sex spouses must consent to beneficiary designations.

Extend FMLA Leave to Employees with Same-Sex Spouses. Under the Washington Family Leave Act, employers are already required to provide family and medical leave to employees with a same-sex spouse who has a serious health condition. The federal FMLA will now require this as well, and employers should be aware that federal leave entitlements for military leave will also extend to employees with same-sex spouses (Washington law does not provide the same entitlement to military caregiver and military-related exigency leave).

Review and Change Handbook Policies. Review policies and change them as needed to reflect changes to benefits and coverages required by *Windsor*, and to ensure consistency in the administration of the policies.

It is unclear if the *Windsor* case applies retroactively. If it does, affected employees may seek to amend tax returns for open years and seek refunds. It is also likely that same-sex spouses in states such as Washington may qualify for a special open enrollment as a newly-qualified plan beneficiaries. Because there are over 1,000 federal laws and regulations addressing "spouses," we will have to await guidance from federal agencies as to how they will administer other laws and regulations post-DOMA.

One final note: Employers in Washington should also remember that registered domestic partners receive equal treatment under Washington employment laws, such that employers already must extend many benefits and protections to that category of individual. Same-sex domestic partnerships do not appear to be impacted by *Windsor* and will be converted to marriages or dissolve as of June 30, 2014. "Registered domestic partners" also include partners of the opposite sex where one partner is age 62 or over. These opposite-sex domestic partners are not covered by the *Windsor* decision, so changes to federal laws required by *Windsor* will not apply to these individuals.

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