205 North 10th Street, Suite 300 · Boise, Idaho 83702
208.342.5522 · 866.ERISALAW
www.erisalawgroup.com

Same Sex Marriage Rulings Require Action For All Employee Benefit Plans
by Jeffery Mandell, Esq.

The take home of this *Alert* is this – all sponsors of all employee benefit arrangements must act as a result of the United States Supreme Court's holding that same sex marriages are legal.

This *Alert* contains numerous endnotes for those readers who seek greater detail.[1]

In *United States v. Windsor, 570 U.S. 12, 133 S.Ct. 2675 (2013)*, the U.S. Supreme Court held that "marriage" includes same sex marriages. That ruling and resulting U.S. Department of Treasury and Labor pronouncements (collectively, "*Windsor*") generally have a direct impact on ***all*** employee benefit plans and arrangements.

All employers must consider this matter. Failing to act creates risks which can easily be averted.

All employers and plan sponsors are urged to consider this matter and act promptly. The failure to act now creates risks which can be averted without considerable effort.

I. EFFECTIVE RETROACTIVELY TO 2013

In very recent Notice 2014-19, the Internal Revenue Service states that ***all plans must recognize Windsor as of June 26, 2013***. Plans may, depending on certain factors, be able to instead apply it as of September 16, 2013. This means that if a participant was married to a same sex spouse as of June 26, 2013 or later, and died, and benefits were not paid to that spouse, the issue must be addressed. Also, for a defined benefit or other plan subject to ERISA's annuity requirements,

[1] This detail may particularly interest employers in states that ban same sex marriages.

the written consent of the same sex spouse to a lump sum or other non-annuity form of payment to the participant was required.

II. All Plans Regardless of Location

Each plan sponsor is affected regardless of its location. An employer whose principal place of business, headquarters, or state of formation is in a state that does not recognize same sex marriages must adjust to the new law as must employers of other states. The state in which the employer does business may affect the specific action the employer is required to take, but it does not change the fact that action is necessary now.

Each plan sponsor is affected regardless of its location.

III. All Types of Plans

Windsor affects all employee benefit plans, regardless of type. All "types" include, without limitation, all: (a) retirement plans; (b) health plans; (c) deferred compensation arrangements; (d) cafeteria plans; and (e) other employee benefit arrangements.

Health, flex, deferred compensation, 403(b), and 457 plans must adjust.

Retirement plans include all 401(k), defined benefit, profit sharing, pension, ESOP and other "qualified" plans, all 457(b) and 457(f) plans, all 403(b) plans, all SEPs, SIMPLEs, SARSEPs, severance plans, IRAs and certain other arrangements.

Windsor's reach extends to all deferred compensation, top hat, excess benefit and other deferred compensation arrangements.

Impacted are all health, VEBA, dental, vision, disability, medical expense and other welfare arrangements.

Finally, subjected plans include all cafeteria, flex, dependent care, health FSA, HRA, HSA, transportation and other arrangements.

IV. All Kinds of Employers

Employers of every kind must adjust on account of *Windsor*. This includes private, publicly-traded, tax-exempt, government and any other plan sponsor of an arrangement, including for example, associations and health trusts. State and local government plans (again, regardless of location) are not exempt from the application of *Windsor*.

V. Nature of Action

Action now, for example, with respect to benefit payments and administrative forms, is required for all employers. Other action may be recommended, yet not legally mandated at this moment.

For most employers with respect to one or more of its employee benefit plans, we recommend that they furnish to employees a written notice informing them that same sex partners have certain rights, benefits, and even resulting tax disadvantages, on account of *Windsor*. To serve its intended protective purpose, the notice must be legally carefully crafted yet can be short. For many if not most plans an amendment to one or more summary plan descriptions to be furnished to participants also is compelling.

The specifics of action depend on the particularities of each employer and each plan. The approach depends in part not only on the current wording of each plan and plan-related documents, but also on variables such as the type of plan, the type of employer or plan sponsor, and the location. Consideration should also be given to the plan sponsor's position on same gender marriages and its employee and business relations.

Because the action that is required and/or recommended will vary dependent on each employer's circumstances, some plan sponsors must amend plan documents whereas others need not amend documents. ***For many plans, the deadline to amend is December 31, 2014.***

VI. Risks, Evaluate and Act

Windsor is the law today and I do not expect that it will change. It poses serious and not obvious risks to employers that do not consider *Windsor*'s legal and practical impact on employee benefit plans. The breadth of its reach in routine plan circumstances may surprise you.

The potential risks of nonaction include, without limitation, tax losses to the employer and employees, required Employee Plans Compliance Resolution System ("EPCRS") correction and restorative employer contributions, and litigation to recover plan benefits that were paid to the wrong party.

Forms, SPDs and the plan document must be reviewed.

Most employers will with counsel be able to quickly size up this matter and determine the appropriate course of action. The failure to properly evaluate the impact of *Windsor* on employee benefit plans is a recipe for problems.

Endnotes

1. **DOMA and the attack on it.** Individuals marry under state law, not federal law. However, the Defense of Marriage Act ("DOMA"), that President Clinton signed, provided that for all federal law purposes, the United States would not recognize as valid a marriage of a same sex couple performed in a state or other jurisdiction that recognizes same sex marriages. Section 3 of DOMA reads:

> In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

Windsor held that such federal law's limitation of marriage solely to opposite sex spouses deprives same sex partners of their liberty under the United States Constitution. Although *Windsor* rendered void that portion of DOMA, the Supreme Court left intact the constitutionality of another part of DOMA, leaving that decision for another day (which likely is fairly imminent). Section 2 of DOMA reflects the federal government's deference to state laws respecting marriage, at least if and until the U.S. Supreme Court rules it unconstitutional. Section 2 reads:

> No State, territory, or possession of the United States, or Indian tribe shall be required to give effect to any public act, record, or judicial proceeding of any other State territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Section 2, which still is valid, grants to each state the right to determine the meaning of marriage. No state is required to recognize for ***state*** purposes a same sex marriage that is valid as a legal marriage in another state. Accordingly, the statutes or constitutions of those numerous states which provide that a marriage may only be between a man and a woman (which many call mini-DOMA laws) continue to be valid in the law of those states. Similarly, the statutes of those states that permit same sex marriages also continue to be valid.

Many plaintiffs are challenging the constitutionality of the mini-DOMA laws, and in fact from the date I first started to draft this *Alert* until now, the mini-DOMA statutes or constitutions of several states have been held to be unconstitutional under federal law. Most recently, on May 13, 2014, a Ninth Circuit Federal district court decision held Idaho's same sex prohibition to be unconstitutional, and prior to that the Texas and Utah bans were similarly held to be unconstitutional. In other words, the constitutionality of Section 2 of DOMA, which lets states determine to not marry or recognize same sex couples, is being challenged and as mentioned above likely will eventually get back to the United States Supreme Court.

The totality of the above means this – for most ***federal*** law purposes, a same sex marriage must be respected just like an opposite sex marriage if the same sex marriage was recognized where performed as a valid marriage in ***any*** state, county or other jurisdiction. However, for state law purposes, that same sex marriage is respected as valid ***only*** *if* that state recognizes same sex marriages. How this dichotomy plays out is interesting and beyond the scope of this *Alert*. This means that no state is compelled to perform marriages of or recognize same sex partners, except for those jurisdictions where the court held the mini-DOMA law to be unconstitutional and the court has not stayed the opinion pending appeals. Some hope the United States Supreme Court will be swayed to extend the *Windsor* case and rule that all states must recognize same sex marriages,

overturning DOMA's Section 2, such that the dichotomy between federal and state law will be resolved.

2. **State-by-state.** In general, same sex marriages are allowed in: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Washington, and Washington D.C.. States that do not allow same sex marriages but recognize civil unions and domestic partners are: Colorado, Nevada, Oregon, and Wisconsin. States that ban same sex marriages but that courts have held unconstitutional, some decisions of which are stayed pending appeals are: Idaho, Oklahoma, Texas, Utah, and Virginia. In some states, such as New Mexico, same sex marriages are allowed in some counties and prohibited in others or parts of their laws are unconstitutional. The litigation is fast moving and my listing is probably incorrect by the time you read this. If a same sex marriage situation occurs with your plan, specific review of the law in the applicable jurisdiction is necessary. The confusion and difficulty stemming from the patchwork of different laws from state to state as a practical matter arguably compels the United States Supreme Court to eliminate DOMA in its entirety.

3. **Why must every employer, regardless of location, comply?** Given *Windsor* did not strike Section 2 of DOMA that allows states to prohibit same sex marriages, the question naturally arises as to why ERISA affects every benefit plan regardless of location. For example, why should an employer in Florida, a state that clearly prohibits same sex marriages, have to recognize two spouses of the same sex as married under its ERISA plans?

The reason for this result that the geographics of the employer and employees bear no consequence is because the Treasury Department and Department of Labor have determined that they will impose a "place of celebration" rule. See Internal Revenue Service Revenue Ruling 2013-17 and Department of Labor Technical Release 2013-04. This rule means that if a marriage was performed in a jurisdiction which recognizes the same sex marriage as valid under the laws of such jurisdiction – stated differently, if the marriage was legal where it was "celebrated" – then that marriage is valid throughout the United States for all federal purposes, which includes the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, as amended.

The government rejected a rule that based the validity of a same sex marriage on the place of the participant's residence (except in limited circumstances, such as regarding the Family and Medical Leave Act). The government correctly reasoned that any other rule would be an administrative nightmare – for example, what would a plan do for employees domiciled in different states, some that approve and some that disapprove same sex marriages, or for a same sex couple that moves between states that have different same sex marriage prohibitions?

4. **Cafeteria plans.** *Windsor's* tentacles reach far, wide and unexpected in the employee benefit arena. For example, take a garden variety cafeteria plan. Mid-year changes by participants are generally prohibited unless the participant experiences a "change in status." A change in status includes, without limitation, a marriage, divorce, change in dependents or change of the spouse's employment. Prior to *Windsor*, generally the expenses of the same sex spouse could not have been reimbursed under the plan, and any circumstances involving the participant and same sex spouse (for example, the spouse's change in employment) were immaterial to determine whether a change in status occurred. Now, a same sex spouse must be treated just like an opposite sex spouse which will have a direct impact on a plan's process and operations. For limited cafeteria plan guidance, see Internal Revenue Service Notice 2014-1. Regarding HIPAA, COBRA, and the Family and Medical Leave Act, the Department of Labor has staked a different position in some cases on same sex marriages.

5. **Health plan taxation.** Except in a state where its mini-DOMA law prohibits this, some health plans offered coverage to same sex spouses, domestic partners and civil unions prior to *Windsor*. Pre-*Windsor*, because under DOMA federal tax benefits did not extend to such marital relationship, the same sex partner was required to include in his or her taxable income the cost of coverage for the same sex spouse. Post-*Windsor*, there no longer is such imputation of taxable income. In fact the Internal Revenue Service has set out a procedure by which participants can claim tax refunds for the prior year's unconstitutional resulting tax liabilities. In states that ban same sex marriages, the state law tax treatment differs from the federal nonimputation of taxes.

6. **Government plans.** Plans that are maintained by governments require particular attention. Unlike employee benefit plans that are maintained by non-governments, where ERISA preempts all state law, government plans must not only adhere to the Internal Revenue Code but also to the state laws governing plans. Accordingly, a government plan must adjust to *Windsor* in certain respects that would apply to non-government plans but *not* in all respects. For example, a government plan generally is not required to offer a death benefit to a spouse, unlike a non-government plan. But, many retirement plans maintained by governments do offer a death benefit to a spouse. In that circumstance, the plan must only make available and offer to the same sex spouse the right to roll over benefits to another plan or IRA just like the opposite sex spouse has such right.

A government plan's required response to *Windsor* will vary from state to state, and even among different counties and municipalities. The variations arise because each state has enacted, or not, its own laws with respect to marriage, and no two states are necessarily alike with respect to their mini-DOMA laws. Some states, either through a constitutional amendment and/or a statute, simply state that only a marriage between a man and a woman will be recognized, in so many words. Other states, such as Texas, and under the likely interpretation of Idaho law, go a step further and say that no state government or agency can do anything to promote or encourage same sex unions, and cannot enact laws that give marital rights to same sex couples. Accordingly, some government plans may, if they so choose, extend rights to same sex couples whereas other government plans are prohibited from doing so, at least for the time being before the United States Supreme Court addresses the constitutionality of Section 2 of DOMA (again, which section *Windsor* did not overturn and which does not prohibit states from refusing marital status to same sex couples).

7. **Garden variety 401(k) plans and risks.** Plans very directly at immediate risk are qualified retirement plans. Let's first look at a typical 401(k) plan that is not subject to ERISA's joint and survivor annuity rules. That plan can pay benefits to the participant without the consent of the participant's spouse to the distribution. However, any benefits remaining unpaid upon the death of the participant must be paid to the participant's spouse on the participant's death unless the spouse has knowingly and effectively waived his or her rights to the death benefits in compliance with the Internal Revenue Code's and ERISA's spousal consent waiver requirements. (Note – a significant percentage of beneficiary designation and other forms used in the employee benefit marketplace still fail to satisfy these requirements and still give rise to unnecessary litigation between spouses and the participant's heirs to death benefits). If a participant is married to a same sex spouse, and a participant and spouse live in a jurisdiction that does not recognize same sex spouses, how likely is it that the plan will pay benefits to the same sex spouse? Also consider such question particularly in a jurisdiction like Idaho which does not prohibit sexual orientation employment discrimination. Will the plan even know that there is a same sex spouse to whom death benefits must be paid? Will the participant prior to death be fearful of losing a job and thus not come forward to the employer to disclose his or her same sex relationship?

8. **Pension plans.** Let's now look at a defined benefit or other plan subject to the joint and survivor annuity requirements, where the risk is heightened. For those plans, benefits are required by law to be paid in the form of an annuity for the lifetime of the participant, and upon the participant's death for the lifetime of the participant's spouse if the spouse survives the participant. Specific disclosures are required to be made to both the participant and the spouse, and both the participant and spouse must knowingly and voluntarily waive their rights to such joint and survivor annuity if the two parties desire instead that the participant receive a non-annuity form of payment, such as a lump sum distribution. As with an opposite sex spouse, a plan may pay a non-annuity form of payment, such as a lump sum distribution, only if the same sex spouse is informed of his or her rights to the joint and survivor annuity and voluntarily and knowingly waives such benefit. The employer, particularly in an anti-same sex state, and/or the participant and/or his or her same sex spouse, need to know this.

9. **Revise forms.** The plan's distribution and beneficiary designation forms should be revised to inform the parties that whenever the terms "spouse" or "surviving spouse" are used, they refer to same sex spouses as well as opposite sex spouses. The appropriate disclosures and written consents by the same sex spouse are required in the same manner that they would be required for opposite sex spouses. The failure to extend these rights and operate the plan on this basis is **a plan qualification defect**, the violation of which requires the plan sponsor to take corrective action under the Employee Plans Compliance Resolution System ("EPCRS"). See April 14, 2014 Internal Revenue Service's Frequently Asked Questions.

10. **Numerous plan provisions impacted.** There are many other instances involving a retirement plan where a participant's marital status comes into play. Loans, age 70½ and required minimum death distributions, hardship withdrawals, Section 415 limits, Section 409A deferred compensation requirements, whether an employee is a highly compensated employee or whether multiple entities are a controlled or affiliated service group due to spousal ownership attribution, special rollover rights of spouses, ESOP allocations, and qualified domestic relations orders are all affected. Many of these requirements go directly to the qualified tax status of the plan, and thus every plan sponsor should identify the application of *Windsor* to its specific plan.

11. **Can an employer disregard *Windsor*?** Let's take an employer that understands *Windsor* but does not want to treat a same sex spouse as a spouse for its employee benefit purposes. Can that employer do that? Very generally the answer is no. The employer must treat the same sex spouse in the same way it treats an opposite sex spouse. Does it matter whether the employer is in a state that prohibits same sex marriages? No, the location of the employer does not matter, nor does the location of the employees, on account of the government's decision that the state of celebration will be followed. However, looking more deeply, the specific answer to that question depends on a number of factors. With respect to a non-government plan, my reasoning at this time is that any provision in any plan that involves a spouse must apply equally to same sex and opposite sex spouses. But for government plans, the question is thornier because it depends on determining whether a provision is required by law, or merely optional if the employer chooses to offer it. If an employer feels strongly enough against the *Windsor* decision, then that employer can, in some respects, amend the plan to deny benefits to spouses altogether (same and opposite sex alike).

12. **Must plans be amended?** IRS Notice 2014-19 includes six questions and answers governing plan amendments. The amendment deadline differs depending on the circumstances set forth therein. With respect to the question as to whether a plan is required to be amended or not, that depends upon whether the definition of "spouse" in the plan document is consistent with the *Windsor* definition of spouse. Many plans have inconsistent definitions, whereas many other plans do not have inconsistent definitions. An inconsistent definition is, however, a plan qualification failure, giving rise to significant Internal Revenue Service sanctions. In addition, some plans contain

"choice of law" provisions which will render the definition inconsistent with *Windsor*. Determining whether a plan will or not require an amendment is an easy task for most plans.

13. **Retroactive application.** The most potentially disruptive issue is the extent to which *Windsor* will be applied retroactively by the courts. The reason why the pre-*Windsor* prohibition on same sex marriages may effectively be repealed retroactively without limit is because *Windsor* held that the prohibition was unconstitutional, which in turn means that such prohibition was never effective in the first place. It is not as if the United States changed the law, but rather that Section 3 of DOMA was void *ab initio* (meaning from the beginning).

As a result, for employee benefit and federal tax purposes a same sex spouse has been denied certain rights in the past (which past rights the spouse did not receive) and such spouse may, and some will, either through the government guidance or litigation, be empowered to successfully claim those denied rights. The easiest example is that undoubtedly there are or will be same sex spouses who should have received benefits that were paid upon the death to another party, such as the survivor portion of the joint and survivor annuity, and that one or more same sex spouse may now be required to receive those death benefits (that were in most cases paid to another beneficiary of the deceased plan participant).

The Internal Revenue Service is requiring that plans pay benefits to same sex spouses which they would have received had DOMA not existed, whether they be death benefits in a profit sharing plan or the annuity portion of the required joint and survivor annuity, but only retroactively to June 26, 2013, the date of the *Windsor* decision. Regardless of such regulatory decisions, same sex spouses nonetheless will have causes of action back without limitation to before 2013.

Please contact Jeffery Mandell (jeff@erisalawgroup.com) or John Hughes (john@erisalawgroup.com) at 208-342-5522 or 866-ERISALAW if you wish to discuss your plan specifics.

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