Segal Consulting Bulletin

Benefits, Compensation and HR Consulting

July 2013

What the U.S. Supreme Court's DOMA Decision Means for Benefit Plans

On June 26, 2013, the U.S. Supreme Court, in *United States v. Windsor*, ruled that individuals in legal same-gender marriages are no longer prohibited from being treated as married under federal law.[1] The Court accomplished this by declaring the language that created the prohibition unconstitutional, thereby removing it from the federal Defense of Marriage Act (DOMA).

This one change will have sweeping consequences — according to the Court, more than 1,000 federal laws are affected — including consequences for benefit plans. Although there is still uncertainty about the nature and extent of the consequences, trustees should take some steps now, both to implement the change on a preliminary basis and to prepare for future compliance.

Windsor raises complicated legal issues, some of which might be resolved only through litigation. As always, trustees should consult fund counsel before taking any actions with regard to benefit payments or plan changes.

BACKGROUND

Before DOMA, the regulation of marriage generally had been a matter of state law, with federal law looking to state law to determine an individual's marital status. DOMA's passage in 1996 changed this division of authority by creating a federal "opposite-gender" definition of "spouse" and "marriage" for any marriage-based federal benefit. This meant that any favorable benefit or treatment under the Internal Revenue Code (IRC) or the Employee Retirement Income Security Act (ERISA) designated for spouses (*e.g.*, non-taxable employer-paid health coverage for spouses or mandatory survivor annuity coverage in retirement plans) could not be given to same-gender spouses, although alternatives generally could be offered (*e.g.*, health coverage with taxable income imputed to the participant).

IMPACT ON PLANS

For any plan, the first task is to determine the current treatment of same-gender spouses under the relevant documents and whether changes will be necessary for purposes of plan design or compliance. Following *Windsor*, the meaning of various plan terms might have changed. For example, language defining "spouse" as a spouse recognized "by federal law" or "by DOMA" no longer excludes same-gender spouses. Other definitions could be affected by a plan's "governing law" provision.

Before taking additional steps, however, trustees should consider two critical, unresolved issues that affect how the ruling will be implemented for benefit plans. The first critical issue relates to the treatment of same-gender couples who live in states that do not license or otherwise recognize same-gender marriage (non-recognition states). After *Windsor*, marital status for federal law purposes generally will be determined under state law.[2] Certain federal laws, including the IRC, typically but not always look to the state in which a person lives to determine whether the person is married. Under such laws, when legally married same-gender couples live in non-recognition states, it is not clear whether they will be treated as married.

The second critical issue relates to the retroactive application of the ruling. The Court did not discuss whether the *Windsor* ruling applies retroactively, and when the Court

[1] *United States v. Windsor* is available at http://www.supremecourt.gov/opinions/12pdf/12-307_g2bh.pdf. A second case decided on the same day, *Hollingsworth v. Perry*, had the result of returning California to the list of states licensing same-gender marriage. *Hollingsworth v. Perry* is available at http://www.supremecourt.gov/opinions/12pdf/12-144_8ok0.pdf.

[2] Jurisdictions licensing same-gender marriage are California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota (as of 8/1/13), New Hampshire, New York, Rhode Island (as of 8/1/13), Vermont, Washington and the District of Columbia. New Jersey and New Mexico are silent on the issue of same-gender marriage. The remaining 35 states ban same-gender marriage by constitutional amendment or legislation.

does not provide the answer, there is no "usual" approach. The Obama Administration and the federal agencies, including the Internal Revenue Service (IRS), are working on guidance on both of these unresolved issues.[3]

Group Health Plans

Group health plans are not required to cover spouses. Insured plans with insurance contracts issued in states that license same-gender marriage will generally find that insurance laws require the plan to cover same-gender spouses if it covers opposite-gender spouses, as was the case pre-*Windsor*. Self-insured plans may have more flexibility and should review their options with legal counsel. Trustees may choose to extend coverage to same-gender spouses, as they could pre-*Windsor*, and many plans have done so. Going forward, whether income will need to be imputed to the participant for federal income and payroll-tax purposes, as well as the recognition of these spouses under other federal laws, may depend on whether the couple lives in a recognition state or a non-recognition state.

Plans that currently cover same-gender spouses who live in recognition states may stop imputing income for federal tax purposes and should extend federal rights to same-gender spouses. Examples include rights to continued coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA) and special enrollment rights under the Health Insurance Portability and Accountability Act (HIPAA). It is unclear whether plans may stop imputing income for spousal coverage provided to couples living in non-recognition states or whether they must be treated as spouses under other federal laws. Plans that impute income for coverage provided to unmarried same-gender domestic partners should continue to do so, because the rights of unmarried individuals are not affected by *Windsor*.

Retirement Plans

Retirement plans generally are required to provide benefits to spouses and should treat same-gender spouses that live in recognition states as they would any other spouse for purposes of the various spousal benefits under the IRC, including spousal consent and surviving spouse annuities or death benefits, required minimum distributions and qualified domestic relations orders. It is unclear what treatment will be required for spouses living in non-recognition states, and plans might wish to delay taking any action with respect to these spouses until guidance is issued. Multiemployer plans that are beyond their funding or rehabilitation plan adoption periods should consult fund counsel about *Windsor*-related plan amendments that might be considered benefit improvements (*e.g.*, subsidized pre-retirement survivor annuities).[4]

ADDITIONAL STEPS FOR TRUSTEES

While many questions remain, there are steps trustees will want to consider now with counsel's advice. Trustees will want to:

- Identify participants in legal same-gender marriages and their state of current residence.
- Decide when to implement changes in coverage and administration (including when to stop imputing income for health benefits) and when to make plan amendments or other document revisions determined to be necessary.
- Consider whether benefits provided to domestic partners and/or partners in a civil union, if any, need to be clarified or revised.

■ ■ ■

As with all issues involving the interpretation or application of judicial decisions, laws or regulations, trustees of multiemployer plans should rely on their fund counsel for authoritative advice on the implications of the Windsor *ruling for their plans. Segal Consulting can be retained to work with trustees and their fund counsel on benefits issues related to the implementation of the ruling, and related issues.*

---

[3] President Obama, in a statement issued after the Supreme Court ruling, directed the Attorney General and other members of his Cabinet to act swiftly to implement the decision. The IRS has the authority to determine the retroactive application of judicial decisions affecting the tax laws. The Office of Personnel Management issued guidance for federal employees on July 17, 2013: http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf

[4] There is no exception for benefit improvement amendments required by law for post-adoption period plans.