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## Supreme Court Hears Arguments On Constitutionality of State Same-Sex Marriage Restrictions and DOMA

On March 26<sup>th</sup> and 27<sup>th</sup>, the U.S. Supreme Court heard oral arguments on two landmark cases involving same-sex marriage. Among numerous areas of law, the outcome of these cases could significantly impact the design and administration of employer-sponsored retirement and health plans, as well as employers' payroll systems and practices.

**Background** – The Court considered two separate cases involving same-sex marriage. At issue in the first case (*Hollingsworth v. Perry*) is whether California's "Proposition 8" – which amended the California's constitution to define marriage as the union of a man and woman – violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The fundamental question in *Hollingsworth* is whether the U.S. Constitution prohibits states from limiting the institution of marriage to only couples of the opposite sex.

In the second case (*U.S. v. Windsor*), the Court is considering a more narrow, but very important, question: whether a portion of the federal Defense of Marriage Act ("DOMA") – which provides that, for purposes of all federal laws, the word "marriage" refers only to the legal union of a man and woman and the word "spouse" only refers to a person of the opposite sex – violates the Fifth Amendment's guarantee of equal protection as applied to persons of the same sex who are legally married under the laws of their state. DOMA's definition of "marriage" and "spouse" impacts over 1,000 federal laws, including the Internal Revenue Code (the "IRC") and ERISA, which regulate retirement and health and welfare plans. Because DOMA limits the definition of "marriage" and "spouse" under the IRC and ERISA to only opposite-sex couples, same-sex couples that are legally married under the laws of their respective states are subject to differential tax treatment and varied protections of spousal retirement and health care benefits. For example:

- **Survivor Annuities Under Tax Qualified Plans** – Under the IRC and ERISA, tax qualified pension plans are required to provide survivor annuities, where the spouse has a right to certain survivor benefits upon the participant's death (unless previously waived by the participant and spouse). But given that this survivor protection is created (and required) by federal statutes, DOMA generally prevents a plan administrator from recognizing a participant's same-sex spouse under state law as the "spouse" to which the survivor annuity applies. Instead, federal rules require the plan to treat the participant as unmarried – regardless of the validity of the marriage under state law. (A plan may, however, allow the participant to designate the same-sex spouse as a beneficiary, but this requires the plan sponsor to amend the plan to so permit among other steps.) Similar distinctions exist under 401(k) and other profit-sharing plans where the requirement that a "spouse" consent to any non-spouse beneficiary designation does not apply to same-sex spouses.

- **Health Care Benefits** – Although an employer may design its group health plan to permit coverage of a same-sex spouse, there is no requirement that plan sponsors do so. Moreover, even if a plan sponsor permits coverage of a same-sex spouse, there are adverse tax consequences to employees who elect to cover their same-sex spouses. Specifically, because the value of medical coverage received under an employer’s health plan is excludable from federal income tax only for benefits provided to the participant and the participant’s “spouse” and dependents, health coverage provided to a same-sex spouse is generally subject to federal income tax because of DOMA. In contrast, an employee that elects to cover his or her spouse of the opposite sex will *not* have the value of spousal coverage imputed to the employee’s income.

**Potential Outcomes** – A threshold issue that the Court must consider is whether particular litigants in both cases have legal standing to raise the substantive challenges. But if the Court does address the merits of either (or both) cases, its rulings could significantly impact employer-sponsored plans. Many plans, for example, define “spouse” by reference to state law, or may more specifically define “spouse” as being of the opposite sex of the plan participant. If the Court were to rule in *Hollingsworth* that the U.S. Constitution requires states to allow same-sex marriage, employers would have to carefully examine their plans to determine if amendments are required to recognize same-sex marriages. Similarly, if the Court in *Windsor* rules that DOMA’s definition of “marriage” and “spouse” is unconstitutional, employers will need to consider whether amendments to their retirement and health plans are necessary to recognize same-sex marriages – and whether payroll systems need to be changed, for example, to cease imputing income to participants in health plans who name their same-sex spouses as dependents. Of course, there are numerous other human resources, payroll and plan administration issues, too.

Illustrating the importance of the issues under consideration, a coalition of 278 employers, employer organizations, associations and municipalities submitted an *amicus curiae* (friend of the court) brief in the DOMA case. The brief focused on the differential tax treatment that DOMA applies to employees who are in same-sex marriages, and the compliance burdens (and costs) that such treatment imposes on employers. This brief was specifically mentioned during the Court’s oral argument.

**What’s Next?** – The Court’s rulings in *Hollingsworth* and *Windsor* are expected by the end of June. There has been widespread analysis and speculation about the arguments – and, of course, the Justices’ questions and comments – and the possible or likely outcomes. Our sense from the questions asked during arguments is that there are at least five Justices who have serious questions as to the constitutionality of DOMA (assuming they reach the merits of the case), but no clear consensus as to whether states may limit marriage to only opposite-sex couples.

Given the importance of the issues – and the possibility that changes in retirement and health plans may be required – plan sponsors may want to begin examining their plans, payroll and compliance systems now to identify amendments and modifications that may be necessary if the Court does recognize a federal right to same-sex marriage and/or rule that DOMA is unconstitutional. In the latter case, for example, employers might be entitled to refunds of FICA taxes paid on coverage of domestic partners for whom income was imputed (along with potential employee refund claims) for “open” tax years.