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Repeal of DOMA Impacts Qualified Plans

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The Supreme Court, in U.S. v. Windsor, ruled on June 26, 2013 that §3 of the federal Defense of Marriage Act (DOMA) is unconstitutional. DOMA §3 states,

> "In determining the meaning of any Act of Congress, or of 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".

By holding §3 of DOMA unconstitutional, qualified plans must now treat the relationship of same-sex married couples as a marriage and each party to that marriage as a spouse in order to maintain the plans' tax-qualified status (but see following discussion for issues that arise in determining *who is married*). This is because the terms "spouse" and "marriage", as used in federal laws, no longer restricts such terms to opposite-sex relationships. To be precise, federal law is now silent as to the parties to a marriage.

The IRS has ruled that it will look to applicable state law to determine the marital status of individuals (Rev. Rul. 58-66). Currently, licenses for same-sex marriages may be issued in Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia. (Rhode Island, Delaware, and Minnesota passed same-sex marriage legislation in 2013. Delaware's law takes effect on July 1, 2013; Rhode Island and Minnesota's laws take effect on August 1, 2013, and California has lifted its stay on same-sex marriages.)

The DOL also looks to applicable state law to determine marital status. 29 CFR 825.102 (regulations under FMLA) states that "*Spouse* means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized."

A key area of likely future controversy (and importance for plan administration) involves employees who were married to same-sex partners in states that permitted such marriages, but who now reside in states where such marriages are *not* recognized. §2 of DOMA – which was not at issue before the Supreme Court – allows states to refuse to recognize the validity of same-sex marriages that were legally performed in other states. Tracking an individual and his or her changing state-determined marital status poses real challenges for Plan Sponsors.

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As a result, it is not clear whether, for purposes of the application of *federal law*, a same-sex married couple will always be considered married regardless of residence or domicile, despite how they are treated under applicable state law.

We will have to wait for guidance with respect to issues that arise where individual spouses live in different states with different laws on same-sex marriage, and with respect to Plan Sponsors with employees in more than one state. In the meantime, it is imperative to recognize these issues exist and to move forward with caution.

Spousal Protections and Distribution Rights

Many qualified retirement plan spousal protections and distribution rights are now extended to legal same-sex marriages under applicable state law. The key provisions to consider include:

- *QJSAs and QOSAs for Surviving Spouses*. Pension plans (including money purchase plans) require that a participant's benefit be paid in the form of a qualified joint and survivor annuity (QJSA), which for a married participant is an annuity that provides benefits for the lifetime of the participant, and a 50% (or more) survivor benefit for the surviving spouse for his or her lifetime. This payment form is mandatory, unless the spouse provides written notarized consent to another form of payment. The plan must also offer a qualified optional survivor annuity (QOSA), which is typically a 75% survivor benefit to the spouse. Therefore, spousal status may impact the minimum funding calculations for pension plans.

Similarly, in a profit-sharing plan, if an annuity option is offered, the payment form must be a 50% joint and survivor annuity with the spouse, unless the spouse consents to another form of payment. If an annuity is not offered, then in the event of the participant's death, the spouse is to receive the entire plan account, unless the spouse consents to another beneficiary. Before *Windsor*, these annuity benefits were not required to be offered under the plan to same-sex spouses, and for a profit-sharing plan without annuity provisions, the plan was not required to pay the death benefit automatically to the same-sex spouse (or otherwise require the consent of the spouse for a distribution or to name a non-spouse beneficiary).

- QPSA. A same-sex spouse will now be automatically entitled to a death benefit upon the employee's death (unless waived). Specifically, pension plans (including money purchase plans) require that if the participant dies prior to retirement, the surviving spouse must receive an annuity (a qualified pre-retirement survivor's annuity (QPSA) for his or her lifetime equal to 50% of what the participant would have received, unless the spouse elects (under the terms of the plan) another form of payment. Similarly, profit sharing plans that provide an annuity option will be required to provide the surviving spouse a pre-retirement annuity purchased with 50% of the account balance.

- Eligibility Rollover Distributions. A Same Sex spouse will now be able to elect to take a plan distribution and roll it over to his or her own IRA or to another qualified plan (including the right to make it an in-plan Roth conversion). Previously, the only option for a same-sex spouse was a direct rollover to an inherited IRA.

- *Hardship Distribution*. An Employee same-sex marriage will now be able to receive a hardship distribution from the plan due to the spouse's medical, tuition, and funeral expenses. Previously, hardship distributions were only available if the employer offered the right to allow hardship distributions for expenses of a "primary beneficiary," and the same-sex spouse was designated as such.

- *Minimum Required Distributions*. A same-sex s spouse of a participant that dies prior to commencing benefits will now be able to defer distributions until the participant would have reached age 70-1/2, and those benefits should no longer be subject to incidental death benefit rules that require somewhat more rapid distributions where there is a difference of more than 10 years between the ages of the employee and the beneficiary. Previously, the benefit payments to same-sex spouses would need to commence within one year following the year of the participant's death, and survivor benefits paid would be subject to the incidental death benefit rules.

- QDROs. A divorcing same-sex spouse will be entitled to a portion of the participant's plan benefits as part of the divorce process by submitting a qualified domestic relations order (QDRO). Previously, the QDRO procedures were generally viewed as not available; therefore, same-sex ex-spouses generally were not entitled to a portion of the participant's plan benefit.

- *Loans/Spousal Consent*. If a plan requires spousal consent for a loan or other plan distribution, the same-sex spouse's consent will be required. Previously, no same-sex spousal consent would have been needed for a plan loan or distribution.

- *IRC §415(b)*. For purposes of IRC §415 limits, the value of a subsidized QJSA with a same-sex spouse is not taken into account. Previously, the value of the survivor annuity paid to the same-sex spouse would have been taken into account. This may assist highly paid employees with same-sex spouses avoid exceeding the IRC §415 plan limit (which is currently at $205,000 per year) and, accordingly, may impact the benefits under an excess plan (if any).

- Other ERISA Provisions. The spousal status is also important in a number of other respects under ERISA, such as (1) eligibility of one-participant plan exception, (2) ERISA disclosures to spouses, (3) party-in-interest/disqualified person status, (4) right to bring benefit claims, (5) family attribution rules (e.g., Code § 414), and (5) prohibited transaction class exemptions.

Open Issues

There are many open issues that we eagerly wait for IRS and DOL guidance in this area, with the key issues being:

- Effective Date. As the provision was unconstitutional, and there is technically no statute of limitations within a qualified plan to comply with the Code, the issue is whether the ruling will be effective June 26, 2013, or an earlier date. The IRS has the authority (under Code §7805(b)) to provide transition relief (including anti-cutback relief), and to limit the impact for plan qualification purposes to a prospective date. For example, a prospective IRS effective date would eliminate the need to take corrective measures under EPCRS (Rev. Proc. 2013-12) regarding distributions made without spousal consent (which if no consent is later obtained may result in a spousal benefit under the plan). It is unclear, however, what impact this will have on benefit claims under Title I of ERISA, which is a real concern (and potential cost) for Plan Sponsors. Will there be a divergence of opinion between the IRS, PBGC, and DOL?

- Plan Amendment. As a legal requirement, it appears that Plan Sponsors will have until their tax filing deadline (plus extensions) to amend their plan document to reflect the new spousal protections. It is anticipated that the IRS and DOL will grant an extension and provide some transitional relief for Plan Sponsors in order to maintain the tax-qualified status of the plans.

- Same-Sex Marriages. Plan administration will depend on whether the IRS and DOL can provide any relief for determining which same-sex spouses are subject to the spousal protections, and the appropriate process and timing to gather the same-sex marriage information. It is possible that the application of this ruling will be limited to only same-sex spouses that reside in a state that recognizes the marriage license. However, it is also possible that IRS/DOL guidance or subsequent court decisions may hold otherwise. The administrative complexities and costs of dealing with differing state laws may be significant.

Action Steps

While we await IRS and DOL guidance, Plan Sponsors should consider taking the following initial steps:

1. Obtain Same-Sex Marriage Information from participants/beneficiaries. Start to develop a process to gather same-sex marriage information, if not currently done.

2. Review the plan document (and SPD). Many qualified plans were required to include DOMA language in the plan as part of an IRS determination letter process. This language will need to be eliminated, and the remainder of the plan should be reviewed for the term "spouse," and "domestic partner" to see if any of the provisions need to be modified to comply with post-DOMA rules. All nonqualified plans should also be reviewed for compliance with post-DOMA rules.

3. Review Policies and Procedures for Spouses and Domestic Partners. Plan Sponsors should review their plan policies and procedures, including plan forms, to ensure compliance with post-DOMA rules. This includes benefit distribution packages, minimum required distributions procedures, IRC §415(b) calculations, QDRO procedures, loan procedures, and beneficiary designation forms.

ASPPA will sponsor a Webcast on Wednesday, July 17 at 2:00 PM ET titled The Demise of DOMA and the Effects on Employee Benefit Plans. Please join ASPPA Assistant General Counsel, Ronald J. Triche, Esq., APM, as he discusses the case, its impact on employee benefits, and the many questions left unanswered by the Court