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Supreme Court DOMA decision creates compliance conundrum for employers

The Supreme Court's ruling that Section 3 of the Defense of Marriage Act, which had precluded recognition of a same-sex spouse as a spouse under federal law, was unconstitutional will affect the design and administration of employer benefit programs and HR policies. However, lack of clarity as to which states' laws will determine spousal status and lack of guidance on when changes resulting from the Court's ruling will become effective will hamper employers' efforts to bring their programs into compliance. While awaiting guidance, the task for employers is to understand the questions created by the new paradigm, determine the optimum approach to providing benefits for their employee populations, and then assess the steps that can be implemented near term, versus the steps that must wait for agency guidance.

Background

The Defense of Marriage Act (DOMA), signed into law on September 21, 1996, contains two substantive provisions. Section 3 of DOMA defines the term "marriage" for all purposes under federal law, including the provision of federal benefits, as a legal union between one man and one woman. "Spouse" is defined as a person of the opposite sex who is a husband or a wife. Section 2 of DOMA allows states to refuse to recognize same-sex marriages entered into in other states.

Until the passage of DOMA, the federal government relied on the states to define marriage and recognized, for federal law purposes, marriages legally entered into under state law. After the adoption of DOMA, same-sex marriages were not recognized for purposes of more than 1,000 federal laws — including ERISA and the Internal Revenue Code (Code) — regardless of whether a state recognized same-sex marriage.

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Employer-sponsored retirement and welfare benefits have been directly impacted by DOMA. For example, tax-qualified retirement plans were generally not permitted to recognize legally married same-sex spouses for purposes of QDROs and spousal consent rules and were not required to recognize such spouses for survivor annuities or death benefits. For welfare benefit plans, same-sex spouse coverage was generally taxable under federal tax rules, which most often resulted in the imputation of income for the employer's cost of coverage. Similarly same-sex spouses were not eligible for COBRA benefits nor recognized for other purposes such as the Family Medical Leave Act (FMLA).

Currently the following states and the District of Columbia recognize the legal right of same-sex couples to marry:

California (2013)	Maryland (2013)	Rhode Island (August, 2013)
Connecticut (2008)	Massachusetts (2004)	Vermont (2009)
Delaware (2013)	Minnesota (August, 2013)	Washington (2012)
Iowa (2009)	New Hampshire (2010)	
Maine (2012)	New York (2011)	

Thirty-five states have constitutional provisions or statutes that prohibit same-sex marriage.

The varying treatment of same-sex spouses for state purposes complicated matters for employers. For example, in states that recognized same-sex spouses, it was not uncommon for same-sex spouse benefits to be taxable for federal income tax purposes but not taxable for state income taxes. Differences in tax treatment raised complex recordkeeping and reporting issues for employers.

Supreme Court decision

On June 26, 2013, in the case of *United States v. Windsor* (*Windsor*), the United States Supreme Court held that Section 3 of DOMA was unconstitutional because it violated the Fifth Amendment's guarantee of equal protection of laws as applied to persons of the same sex who are legally married under the laws of their state. The Court's decision does not affect the constitutionality of DOMA Section 2, which permits a state to refuse to recognize a same-sex marriage that was legally performed in another state.

The *Windsor* case involved a same-sex couple, Edith Windsor and Thea Spyer, who were married in Canada in 2007. The couple lived in New York, which recognized their marriage. When Ms. Spyer died in 2010, she left her entire estate to Ms. Windsor. Ms. Windsor sought the federal estate tax exemption afforded to opposite-sex spouses that had been denied to same-sex spouses as a result of Section 3 of DOMA. However, due to DOMA, Ms. Windsor was found not to be the spouse of Ms. Spyer for tax purposes and, therefore, was denied the federal tax benefit. Ms. Windsor subsequently challenged the constitutionality of DOMA under the Fifth Amendment guarantee of equal protection, claiming that DOMA treated same-sex legally married couples differently as compared to other similarly situated couples without justification.

The Court agreed. In its 5-4 decision, the Court found that DOMA's principal effect is to "identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons

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like governmental efficiency." The Court further found that DOMA "undermines both the public and private significance of state-sanctioned same-sex marriages."

The Court held that Section 3 of DOMA is invalid, "for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."

> Buck Comment. Striking Section 3 of DOMA effectively means that for purposes of federal law, the terms spouse and marriage can no longer be limited to spouses of the opposite sex. However, the ruling does not require employers to treat same-sex spouses the same as other spouses. But employers that provide disparate benefits to same-sex and opposite-sex spouses could face legal challenges as same-sex proponents seek to expand their rights.

Uncertainty about basis for determining spousal status

The Court in *Windsor* based its decision in large part on the fact that the state in which Ms. Windsor and her spouse resided recognized same-sex marriages, and the IRS generally looks to the law of the state of residence to determine marital status. Accordingly, employees' same-sex spouses who live and work in a state that recognizes the marriage should be recognized as spouses for federal purposes. However, the Court did not provide any framework for replacing the void left by the removal of DOMA Section 3. With Section 2 of DOMA still in place, questions remain about the marital status of employees who were married to same-sex spouses in a state that recognizes the marriage but are living or working in a state that does not recognize the marriage. Which state's laws will control in determining marital status — the state of employment, the state of marriage celebration/certificate, the state of residence, or state of employer's headquarters?

Although the general expectation is that the IRS will apply an expansive definition of spouse for federal individual income tax purposes (likely recognizing a legally married spouse as a spouse regardless of state of residence), it is less clear what approach will be used to define spouse for ERISA purposes. Employers may be obligated to provide certain benefit rights (for example, survivor benefits and spousal consent for various option choices) while having choices about providing — or paying for — other benefits. Approaches may vary based on the type of employer. Employers with ERISA plans, for example, may need to require spousal consent for various option choices; governmental and church plan employers might choose not to do so.

> Buck Comment. Within days of the *Windsor* ruling, the Office of Personal Management (OPM), which administers benefit programs for federal employees, extended health and other benefits to federal employees and their same-sex spouses based on an expansive state of ceremony definition. Particularly noteworthy is that OPM will now permit federal employees in legal same-sex marriages to be reimbursed for health care expenses incurred by their spouses and newly acquired stepchildren from their flexible spending accounts. This indicates that the Administration will consider all legally-married spouses eligible for the spousal income tax exclusion of employer-provided health benefits, and that the children of these spouses will be treated as the employee's stepchildren, regardless of their state of residence. Although it may be too soon for private sector employers to act without a formal IRS pronouncement, the Administration's actions suggest that the same rule may ultimately apply to them.

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Effective date?

The Court did not address when its decision to repeal Section 3 of DOMA is effective. Due to Supreme Court rules that allow a 25 day period to request a rehearing of the Court's decision, arguably the decision does not take effect until July 21, 2013. However, once the decision takes effect, will it take effect retroactively and, if so, to what date — the date of the decision (June 26, 2013) or some earlier date? The Court found Section 3 of DOMA to be unconstitutional, which arguably makes it invalid from its inception in 1996. A retroactive effective date raises numerous concerns for employer-sponsored plans. For example, will plans need to take corrective action for distributions made without spousal consent? How quickly must employers respond to implement any plan changes required by the ruling? Should the tax treatment of health plan contributions be adjusted retroactive to the beginning of 2013? Guidance from the IRS is needed to resolve these types of issues.

Implications of Supreme Court decision for health and welfare plans

Although the *Windsor* ruling will have its most immediate effect on employers that currently provide benefits to same-sex spouses, it may also affect employers who do not currently provide coverage. Some of the major implications are discussed below. In many instances, employer action may ultimately depend on yet-to-be-issued guidance from the IRS.

Employers that currently provide health coverage to same-sex spouses

For employers that currently provide health coverage to same-sex spouses, the repeal of DOMA changes the tax treatment of benefits and creates new COBRA rights.

Change in tax treatment. Because of DOMA, a same-sex spouse could not qualify for the income tax exclusion applicable to health coverage provided to an employee's opposite-sex spouse. As a result, unless the same-sex spouse could qualify as the employee's dependent for health coverage purposes, the value of benefits provided by the employer for spousal coverage were includable in the employee's income and subject to federal income and FICA taxes.

The Court's ruling means that the spousal health coverage exclusion will extend to coverage provided to employees' same-sex spouses who are recognized as spouses for federal tax purposes. As a result, employers will no longer have to impute income to those employees, and employees who previously had to pay for same-sex spouse health coverage on an after-tax basis will be able to make those contributions on a pre-tax basis.

> Buck Comment. Employers need IRS guidance on a number of issues related to the change in tax treatment. For example, employers need to know whether the spousal exclusion will apply to all health coverage provided during 2013 or only to coverage provided after the date of the ruling. This is important because payroll systems will need to be modified to ensure that income is not improperly imputed and that employees' income is properly reported on their 2013 W-2 forms. Employers also need to know what impact the ruling will have on their FICA obligations for health coverage provided to same-sex spouses during 2013 as well as whether they and their employees will be able to file for refunds of taxes paid on the income imputed on those benefits in 2010, 2011, and 2012, the years currently open for refund.

Effect on COBRA obligations. Only covered employees, spouses, and dependent children may be qualified beneficiaries with independent COBRA election rights. Because same-sex spouses have not been considered

spouses under federal law, plans were not obligated to offer them COBRA. Although some plans currently provide same-sex spouses with full COBRA-like coverage if they lose coverage as a result of a qualifying event, others provide more limited coverage (for example, only offering COBRA if the same-sex spouse loses coverage on account of the death of the employee). Many plans do not offer a same-sex spouse any type of continued coverage after a qualifying event so that the same-sex spouse can only continue coverage as the employee's dependent.

The DOMA ruling means that plans will have to treat same-sex spouses who are recognized as spouses under the Code as qualified beneficiaries for all purposes. This means, for example, that they will have to be given the opportunity to elect COBRA coverage after the employee's reduction in hours or termination of employment, even if the employee does not elect coverage, and must be offered up to 36 months of COBRA coverage if they experience a second qualifying event. They must also be offered up to 36 months of COBRA coverage when their initial qualifying event is the dissolution of their marriage or the death of the employee. Same-sex spouses must also be permitted to enroll new dependents on the same basis as active employees.

> Buck Comment. Making necessary changes for same-sex spouses who currently have COBRA-like coverage should not be that difficult. However, employers will have to determine how to deal with same-sex spouses who lost coverage on account of a qualifying event but currently do not have COBRA coverage — either because the employee did not elect or subsequently dropped COBRA coverage or because the employee died or the marriage was dissolved while COBRA coverage was in effect.

Employers that currently do not provide health coverage to same-sex spouses

The Court's ruling does not require employers to provide benefits to same-sex spouses, even in states that recognize same-sex marriage. However, whether spousal coverage has to be extended to same-sex spouses may be dictated by the terms of the plan document or insurance policy. For example, a plan document or insurance policy that currently defines spouse as an individual who is of the opposite sex of the employee would not have to permit employees to enroll their same-sex spouses. However, if a plan document or policy currently defines spouse "as an individual who is recognized as a spouse under federal law," eligibility for benefits will turn on how the agencies define "spouse."

> Buck Comment. Employers should carefully review their plan's definition of "spouse" to determine whether it encompasses same-sex spouses and consult with counsel to determine how to proceed. For insured plans, employers should also contact their insurance carriers. Typically, contracts base status on the state in which the contract is issued, but some states may impose their own insurance laws on policies affecting their residents.

Offering mid-year extensions of health coverage to same-sex spouses

Although additional guidance is needed, it appears that mid-year enrollment of same-sex spouses and their children may be permitted or required on several grounds.

HIPAA special enrollment. Previously ineligible same-sex spouses who become eligible for health coverage mid-year may have HIPAA special enrollment rights. This would mean that:

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- An employee already enrolled in the plan would be able to enroll the spouse (and the spouse's children if they are now eligible) and would have to be given the opportunity to change plan options (for example, may change from an HMO to a PPO).
- An employee who previously declined coverage would have to be permitted to enroll himself or herself and the same-sex spouse and children.

It does not appear that same-sex spouses who were eligible for coverage prior to the ruling but were not enrolled would have special enrollment rights; thus a plan would not have to permit their enrollment. However, enrollment may be permitted as described below.

Election changes permitted by Section 125. A change in legal marital status under federal law would arguably qualify as a change in status event that, if authorized by the plan document, would permit an employee who previously declined coverage for his or her same-sex spouse to now enroll the spouse.

Effect of ruling on health FSAs, HRAs, and HSAs

Until the *Windsor* ruling, health care expenses incurred by same-sex spouses were not eligible for reimbursement by a health FSA unless the spouse qualified as the employee's dependent for health care purposes. Because of the ruling, an employee will be able to obtain reimbursement for the expenses of a same-sex spouse recognized as a spouse for federal tax purposes even if the spouse did not qualify as a dependent. The change in treatment would likely qualify as a change in legal marital status permitting an employee to increase his or her health FSA election.

Generally, health reimbursement arrangement (HRAs) cannot reimburse the expenses of same-sex spouses who are not dependents for health care purposes. However, some employers may have been permitting an HRA to reimburse expenses of a same-sex spouse by imputing the value of the coverage to the employee as additional income. Because of the ruling, they will no longer have to do so when the same-sex spouse is recognized as a spouse for federal tax purposes.

> Buck Comment. As discussed above, guidance is needed about the effective date of the change in tax treatment and whether employers and employees will be able to recover taxes paid on income imputed in prior years.

Recognition as a spouse for federal tax purposes means that the expenses of a same-sex spouse may be reimbursed by a health savings account (HSA) without adverse tax consequences. It also means that the "special" rule limiting the contributions of married couples will apply. Under this rule, if one spouse has family high-deductible health plan (HDHP) coverage, the spouses' combined annual HSA contribution limit is the applicable statutory maximum for family coverage, even if the other spouse has self-only coverage or each spouse has family coverage not covering the other spouse. In contrast, similarly situated domestic partners may each contribute up to the applicable statutory maximum for family coverage.

Treatment of spouse's children

Generally, a stepchild is the child of an individual's spouse. Guidance issued by the IRS in 2011 stated that it would base its determination on whether a taxpayer was the stepparent of the child of a same-sex partner for federal tax purposes on the status of the individual under the laws of the state in which the parties resided. This meant that the tax treatment of health coverage provided to the child of a same-sex spouse could vary depending on the employee's state of residence. For example, for employees living in a state that recognized status of the employee

as a stepparent, coverage provided to the child up to age 26 would not result in imputed income to the employee, while coverage provided to a child in states that did not recognize the employee as a stepparent would be taxable to the employee unless the child could satisfy the definition of a "qualifying relative" for health care purposes.

If the IRS extends spousal recognition to all legally married same-sex spouses, regardless of the state of residence, it appears that the children of same-sex spouses will likely be treated as an employee's stepchildren for federal tax purposes. As the stepchild of the employee, the child would be eligible for coverage under the terms of a plan that covered stepchildren. In addition, the child would likely qualify as the employee's dependent for purposes of the income tax exclusion of the value of health coverage and his or her expenses would be eligible for reimbursement by a health FSA or HRA (but not HSA) up to age 26. Expenses would be eligible for tax-free reimbursement from an HSA only if the child qualifies as the employee's qualifying child or qualifying relative for health purposes.

> Buck Comment. Employers should review their plan's definition of child and/or stepchild to determine whether it would encompass the children of an employee's same-sex spouse living in a state that recognizes the employee's stepchild (which is likely the case in states that recognize same-sex marriage). If it does, the employer should determine whether there are HIPAA special enrollment implications. Also, employers should be aware that under current guidance, the Affordable Care Act will require plans to cover employees' stepchildren in 2015 to avoid the $2,000 pay or play penalty.

Change under Medicare rules if recognized as spouse

The Medicare Secondary Payer rules generally will require an employer plan to pay primary to Medicare for the same-sex spouse of an active employee when the spouse is age 65 or disabled. They are not required to do so for domestic partners. In addition, employers may find that individuals recognized as spouses may be less likely to drop coverage at age 65 because they will now qualify for the waiver of the Medicare Part B late-enrollment penalty (available to individuals who have employer-sponsored coverage due to their spouse's active employment).

Implications for dependent care flexible spending accounts

Recognition of a same-sex partner as a spouse may affect employees currently participating in a dependent care flexible spending account in several ways. First, the employee may not be reimbursed for payments to the partner caring for the employee's child. Second, if the employee and spouse file jointly, the employee will not incur any eligible expenses unless his or her spouse is working, looking for work, a full-time student, or incapable of self-care.

> Buck Comment. Employers should review their plan documents to determine whether they would permit employees to change their dependent FSA elections. Also, guidance is needed to determine what retroactive effect, if any, the *Windsor* ruling will have on the reimbursement of expenses that were eligible expenses prior to the ruling but may not be eligible expenses now.

Implications for other benefit programs

The *Windsor* ruling may affect the tax treatment of other benefits provided to same-sex spouses and their children. For example, the exclusion for *de minimis* amounts of dependent life insurance and the exclusion for tuition reimbursement benefits may permit employers to provide these benefits to employees' same-sex spouses and their children without having to impute income to the employee. Adoption assistance programs may also be affected because although they can reimburse expenses that the employee incurs to adopt the child of his or her domestic partner, they cannot reimburse expenses incurred to adopt the child of a spouse.

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Buck Comment. Employers should review all of their benefit programs to identify areas in which recognition of a same-sex partner as a spouse may affect program administration.

Implications of Supreme Court decision for tax-favored retirement plans

The effect of the Court's ruling on retirement plans will vary based on whether or not the plan is an ERISA plan and the degree to which the plan sponsor seeks to provide parity between same-sex and opposite-sex spouses. The issues for ERISA plans primarily involve survivor benefits, spousal consent, and qualified domestic relations order requirements. All retirement plans are potentially affected by the rollover and minimum distribution rules. As noted above, how the term "spouse" is defined for purposes of ERISA and the Code will significantly impact how these issues must be addressed and what discretion, if any, is available to plan sponsors in harmonizing their treatment of same-sex spouses. If a more expansive definition of spouse is required for federal purposes (for example, spouse is determine based on state of celebration and not residency) then virtually all same-sex spouses will be considered spouses for retirement plan purposes in ERISA plans.

Effect of ruling on survivor benefit requirements

Retirement plans that are subject to ERISA have several obligations to the spouse of the plan participant. These include providing survivor benefits under the plan, together with the requirement to obtain the consent of the spouse when the participant endeavors to waive those survivor benefits by choosing other forms of benefit payment or other beneficiaries. Spousal consent rights can apply to plan loans and withdrawals, the commencement of retirement benefits, and preretirement death benefit rights. These rules will now be applicable to a same-sex spouse who meets the definition of spouse based on how spouse is defined for federal tax and ERISA purposes.

Pension plans (including money purchase plans and defined contribution plans offering annuity forms of benefits) must provide that married participants are entitled to receive their benefits in the form of a Qualified Joint and Survivor Annuity (QJSA) (including the qualified optional survivor annuity and other survivor annuity forms) unless the participant's spouse consents to a different form of payment. Legally recognized same-sex spouses will be entitled to receive such benefits unless an alternate form of payment is elected with the spouse's consent. In addition, these types of plans must also provide a Qualified Preretirement Survivor Annuity (QPSA) for legally recognized same-sex spouses. Similarly, participants in defined contribution plans that do not offer annuity forms of benefit must obtain the consent of their legally recognized same-sex spouse to name a nonspouse beneficiary.

Plan sponsors can provide the survivor benefits described above to other beneficiaries such as domestic partners who are not legally recognized same-sex spouses. However, if the plan also extends consent rights to a domestic partner or person other than a legal spouse, the restriction on the participant's unfettered right to select distribution options and name beneficiaries could be considered an assignment or alienation of plan benefits that would endanger the plan's tax-qualified status. Providing consent authority to such an individual may be acceptable if the extension is voluntary and subject to disclosure.

Buck Comment. This presents a conundrum for the employer that wishes to harmonize the treatment of all same-sex spouses (including those who may not be recognized as spouses for federal purposes) and, perhaps, same-sex domestic partners. Guidance on who is a spouse for ERISA purposes will be needed before plan sponsors can make these types of decisions. Employers exempt from the ERISA spousal protection and anti-alienation rules, such as governmental and church employers, have greater flexibility and will need to observe the requirements of their own state or doctrine.

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Effect of ruling on defined contribution plan hardship withdrawals

An employee's elective contributions under a cash or deferred arrangement (for example, elective deferrals under a 401(k) or 403(b) plan) can only be distributed upon the occurrence of certain events, one of which is the employee's hardship. Hardship distribution regulations enumerate various reasons that are deemed to satisfy the hardship criteria — some of which include expenses of the participant's spouse. With the removal of Section 3 of DOMA, expenses of legally recognized same-sex spouses (based on the criteria defined by IRS) can be included.

> Buck Comment. The 2006 Pension Protection Act (PPA) expanded the hardship distribution rules to permit a 401(k) or 403(b) plan to offer hardship distributions to cover the medical, tuition, and funeral expenses of a primary beneficiary. If the same-sex spouse is one of the participant's primary beneficiaries, and if the plan has been amended to include the expanded PPA definition of expenses, the Court's decision will not change administration on this score.

Effect of ruling on QDRO administration

It appears that same-sex marriages will be treated the same as opposite-sex marriages for QDRO purposes. Prior to the *Windsor* decision, a domestic relations order assigning a benefit to other than a child, dependent, or opposite-sex spouse or former opposite-sex spouse of the participant (for example, an assignment on behalf of a same-sex spouse or domestic partner) would not be valid under ERISA or the Code.

Free QJSA coverage with 415 limitation

Code Section 415 limits the amount of retirement benefits that can be provided from a defined benefit plan, but the value of a QJSA benefit is not taken into account. This rule is expected to be applied based on how the IRS defines spouse for federal tax purposes.

Code Section 401(a)(9) minimum required distribution period

Certain minimum distributions required by the tax rules in Code Section 401(a)(9) are determined using the life expectancy of the participant and his or her spouse and certain deferral options are not available to nonspouse beneficiaries. Guidance on what rules must or may be applied for determining access to these options will be needed.

The payment deferral rules for beneficiaries will be impacted for defined benefit and defined contribution plans. Nonspouse beneficiaries are required to draw down plan benefits by the end of the calendar year that contains the fifth anniversary of the death of the participant or start a lifetime benefit by the end of the calendar year following the year in which participant's death occurred. Contrast this with the rule for a spouse that permits the spouse to defer to the end of the calendar year in which the participant would have been age 70 ½. A same-sex spouse who meets the definition of spouse as defined under federal law will now be able to defer distribution commencement until the end of the calendar year in which the participant would have attained age 70 ½, and their benefits payments will no longer be subject to the incidental death benefit rules requiring a restricted payment schedule when the age difference between the participant and beneficiary exceeds 10 years.

The life expectancy rule used for determining minimum distributions is generally of interest to defined contribution plans that permit installment payments and to defined benefit plans that allow period certain, or certain and life, options. Plans that limit period certain options to just 10 or 15 years generally do not cross the line with this rule unless they have participants retiring beyond age 84 when the single life limit is 15.5 years. Longer payout periods are permitted based on the life expectancy of the participant and legally recognized spouse.

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Rollovers

The spouse of a plan participant currently has more rollover options than a nonspouse beneficiary. A spouse is permitted to roll over death benefit proceeds to his or her IRA or another eligible retirement plan. A nonspouse beneficiary can only roll over to an "inherited" IRA and distribution restrictions limit prolonged deferral. Same-sex spouses who are recognized as spouses for federal purposes will now have access to the more flexible IRA and other eligible retirement plan alternatives.

Retroactivity for retirement plans?

The Court did not set an effective date for the change to DOMA. By declaring Section 3 of DOMA to be unconstitutional, it is possible that claims will be asserted for benefits back to the enactment date. Under such an interpretation, retirement plans could face a host of negative consequences. The same-sex spouses of participants who had died during the intervening period might assert claims for QJSA and QPSA survivor benefits under defined benefit plans even though benefits had been paid to other beneficiaries. Same-sex spouses of participants in 401(k) and other defined contribution plans might assert claims for death benefits that had long ago been distributed from the plan. Plans that give the administrator or fiduciary discretionary authority to determine eligibility for benefits and to construe the terms of the plan are often accorded deference by courts. Under this standard, it is hoped that the courts will find that interpreting the plan in accordance with DOMA was reasonable and within in the scope of the administrator or fiduciary's authority.

> Buck Comment. Although it is not possible to predict what guidance the IRS and other agencies will provide on retroactive or prospective requirements, or what the courts will do even if the agencies declare prospective application is permitted, employers can take some steps currently to protect their plans from disputes. For example, it's always wise to remind participants to keep their written beneficiary designations up to date to avoid having to apply the plan defaults. A written designation naming the same-sex spouse would not need consent from any other party and yet would go a long way in assuring that the spouse gets the participant's benefits if that's what the parties intend.

Implications of Supreme Court decision for ownership attribution determinations

In addition to affecting various types of retirement and other benefit plans, as a general matter, the *Windsor* decision can change an individual's status as a spouse for determining ownership of business entities when evaluating controlled and affiliated group status, nondiscrimination requirements, ERISA disclosures, and party-in-interest or disqualified person status.

Implications of Supreme Court decision for employment-related policies and executive compensation

Although future guidance will clarify what employers can and cannot do, they should begin to consider what, if any, policy changes they may have to make to facilitate personnel administration that may vary based on location.

Effect of ruling on leave laws

Because of DOMA, same-sex married couples were not entitled to leave to care for a seriously ill spouse or for certain military family leaves available to opposite-sex spouses under the FMLA. (See our March 29, 2013 *For Your Information*.) The *Windsor* decision increases the availability of FMLA leave and likely the complexity of leave

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administration by eliminating the distinction between same-sex and opposite-sex marriages for FMLA purposes while allowing states to retain the distinction under state leave laws.

DOL regulations. Because current DOL regulations look to the employee's state of residence to determine whether his or her partner is a spouse for FMLA purposes, employers may have to provide job-protected leave for some — but not for other — employees to care for a same-sex spouse. Lawfully married same-sex couples who live in a state where same-sex marriage is recognized will be entitled to up to 12 weeks in a 12-month period of leave to care for a seriously ill spouse or for activities that arise in connection with a military spouse's deployment, and up to 26 weeks of caregiver leave for a military spouse who is seriously injured or ill. However, under current regulations, an employer would not have to provide same-sex spousal leave for an employee who lives in a non-recognition state.

> Buck Comment. Whether the DOL will amend its regulations to recognize spousal status based on the state of celebration rather than state of residence remains to be seen.

While the *Windsor* decision generally expands FMLA protections for same-sex married couples, it may also reduce leave entitlement in at least one circumstance. Under DOL regulations, spouses who work for the same employer are limited to a combined total of 12 workweeks off when the leave is for bonding with a new child or caring for a sick parent. When they were not considered spouses under DOMA, each one could take 12 weeks for either purpose.

Civil unions and domestic partnerships. Some states permit same-sex civil unions or domestic partnerships, but employees in those relationships — even those designed to be marriage-equivalent for state law purposes — have not had spousal standing under the FMLA. It appears that spousal leave under the FMLA will continue to be unavailable to an employee to care for a civil union or domestic partner under existing regulations.

Coordination with state leave laws. Whether the *Windsor* decision complicates or eases administrative burdens for employers largely depends on where they have operations and the state leave laws that apply to their workforce. Because California employers, for example, will be able to extend FMLA, as well as the California Family Rights Act (CFRA), to married same-sex spouses, FMLA and CFRA leave administration for those employees will be simplified. The complexities of administering FMLA and CFRA leave for same-sex and opposite-sex registered domestic partnerships will not change. In states that recognize civil unions or domestic partnerships but not same-sex marriage, the rules have not changed and leave entitlements under state and federal laws will still differ.

Employers will want to review their current leave policies and revise them as needed to reflect the new legal landscape. Policies, forms, and procedures should be evaluated to ensure that employees and those responsible for administering leave clearly understand under what circumstances leave may be permitted.

Effect of ruling on executive compensation

The Court's decision may have a variety of executive compensation implications. For example, the survivor rights and income and estate tax effects pertaining to equity-based compensation, deferred compensation, and supplemental executive retirement plans are among the areas that may be impacted. Employers should determine whether the term "spouse" is defined in their executive compensation plans and contracts and how the Court's ruling may affect their executive compensation and benefit arrangements.

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Payroll and withholding issues

Because same-sex married couples will be eligible for the same federal benefits and tax treatment as opposite-sex couples, payroll tax and withholding practices will have to be revised. Employers will want to make sure their payroll administrators and/or vendors are aware of system changes that may be needed and are preparing for them. As the IRS releases guidance on past and future tax treatment, employers can expect an uptick in requests to change W-4s as well as for amended W-2s in connection with refund claims for currently open tax years. For those employees who will be able to use pre-tax dollars to pay for same-sex spousal coverage, employers should get ready to put new voluntary salary reduction arrangements in place and reset payroll deductions pending further guidance.

Effect of ruling on immigration

The decision invalidating DOMA Section 3 opened the door for the extension of federal immigration benefits to legally married same-sex couples. Secretary of Homeland Security Janet Napolitano has already announced that U.S. Citizenship and Immigration Services (USCIS) will now review immigrant visa petitions (i.e., green card sponsorship petitions) filed on behalf of same-sex spouses in the same manner as petitions filed on behalf of opposite-sex spouses.

In determining whether to extend marriage-related benefits at the visa application or adjustment of status stage to a same-sex spouse, USCIS generally will look to the state or country where the marriage occurred to determine its validity. Whether USCIS intends to extend immigration benefits to same-sex spouses of non-immigrant visa holders (such as H-1B holders) remains to be seen.

> Buck Comment. Because federal immigration agencies have also considered the law of the state of residence in certain limited circumstances, USCIS has indicated that it may provide future guidance.

While these issues are being worked through, employers must make certain that appropriate work authorizations are on file and visas they may have sponsored are adjusted for any status changes. (See our April 25, 2013 *For Your Information*.)

In closing — action steps

Buck recommends employers identify plans, benefits, and polices impacted by the *Windsor* ruling, review current plan terms and/or policies and practices defining spouses, review existing domestic partner provisions, if any, and determine a preferred compliance approach (for example, inclusive or restrictive). This preparation will allow the employer to understand what impact the change will have on benefits at both the federal and state levels as guidance is issued.

> Buck Comment. As the number of states recognizing same-sex marriage grows, employers who take an inclusive approach to providing plan benefits may decide to roll back coverage for domestic partners — a benefit that had been extended in the days when state-sanctioned marriage was not possible. If an employer has been grossing up employees to compensate them for the denial of federal tax preferences, they may wish to re-evaluate whether to continue the practice and for what groups of employees. Whether an employer will be able to seek a refund of payroll tax paid on gross-up is unclear, but it appears employers may be able to claim refunds for any open years of federal payroll taxes paid on imputed income

for health care benefits for same-sex spouses. Employers should factor in the size of the expected refund in determining whether to seek one.

Using multiple definitions of spouse, in addition to complicating the administration of employer plans and uniform application of various employment policies, may inadvertently create employee relations issues. For that reason, employers may want to consider a uniform definition of spouse for as many plans and policies as possible.

As a practical matter, employers may not know which of their employees, if any, are in a same-sex marriage. Although there appears to be no requirement for employers to clarify marital status, they may want to consider asking employees to self-identify or sending a reminder to all employees to keep their employee information current.

All changes in plans and policies merit communication to employees. Employees will want to know how they will be impacted. Employers should take time to think through the many legal issues surrounding the *Windsor* decision, and be prepared to adjust employee communications in light of expected guidance. Company culture and business considerations should be factored into these decisions.

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