



For your information

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Same-sex marriage: new developments

A number of recent legal developments could impact the recognition of same-sex marriage under both federal and state laws. This month, the US Supreme Court announced that it would consider two cases – one challenging the constitutionality of the federal Defense of Marriage Act (DOMA) and the other challenging the constitutionality of a California law banning same-sex marriage. In November, voters in Maine, Maryland, and Washington state voted to legalize same-sex marriage, while Minnesota voters rejected a state constitutional amendment that would have limited marriage to opposite-sex couples. In light of these events, employers offering benefits to same-sex couples should consult with their advisors to ascertain whether these developments affect their benefit programs and practices.

Background

DOMA provides that for purposes of any federal law, the word “marriage” means only a legal union between one man and one woman, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife. Federal benefits available to opposite-sex spouses, such as the estate tax exclusion or the exclusion of employer-provided health coverage, do not apply to same-sex spouses, even when they are legally married under state law. In addition, ERISA preempts state regulation. Health and welfare benefit plans subject to ERISA are not required to provide benefits to same-sex spouses recognized under state law. Although the Department of Justice (DOJ) previously announced that it will no longer defend the constitutionality of DOMA, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives has repeatedly defended the law when challenged.

While some states have laws similar to DOMA, which restrict marriage to opposite-sex couples, a growing number of states recognize same-sex marriages or unions and extend the same legal rights and privileges to those couples as are provided to opposite-sex married couples.

Recent Developments

Supreme Court to consider same-sex marriage cases

On December 7, 2012, the Supreme Court [announced](#) that it would consider two cases relating to same-sex marriage.

DOMA challenge

In October 2012, the Second Circuit Court of Appeals, in [Windsor v. United States](#), became the second federal appellate court to find DOMA unconstitutional. (In May, 2012, the First Circuit Court of Appeals was the first to do so. See our July 2, 2012 [For Your Information](#).) In *Windsor*, the plaintiff sued the federal government when she was required to pay \$363,000 in estate taxes for money she inherited after the death of her same-sex spouse, to whom she was legally married. She asserted that DOMA deprived her of the equal protection guarantee under the Fifth Amendment because she and her spouse were not given the same treatment under the law as opposite-sex spouses. An opposite-sex surviving spouse would not have had to pay estate taxes. BLAG argued that DOMA furthered important government interests by maintaining a consistent federal definition of marriage and encouraging “responsible procreation.”

The Second Circuit found that sexual orientation was a “quasi-suspect” class under the equal protection laws justifying “intermediate scrutiny.” As a result, the federal government was required to show that its policy in treating same-sex married couples differently than opposite-sex married couples was substantially related to an important governmental interest. The court found that DOMA did not do this and therefore was unconstitutional.

The Supreme Court will review the Second Circuit's ruling. In addition to considering whether DOMA is constitutional, the court has asked to be briefed on two other issues: (1) whether the Obama Administration's agreement with the appellate court that DOMA is unconstitutional deprives the Supreme Court of jurisdiction, and (2) whether BLAG has standing to defend DOMA. If the Court finds that it does not have jurisdiction or that BLAG does not have standing, it will not reach a decision on the constitutionality of DOMA, and DOMA will continue to be law unless addressed again by other court cases or by Congressional action.

INSIGHT

Pending the Supreme Court's decision, the application of DOMA in the states of the Second Circuit (Connecticut, New York, and Vermont) is not clear. Although the DOJ will no longer defend DOMA, the law still stands. While it appears that employers in the Second Circuit should continue to impute income for benefits provided to legally married same-sex spouses, they must consult with counsel for all the legal implications of the decision.

Proposition 8 challenge

On February 7, 2012, a three-judge panel of the Ninth Circuit Court of Appeals upheld a California district court's ruling that Proposition 8, a 2008 California ballot measure that restricted marriage to one man and one woman, is unconstitutional because it violates the equal protection clause of the 14th amendment. The court's ruling in the case was very narrow, only affecting the right to marry in California. (See our March 9, 2012 [For Your Information](#).) The Supreme Court will review the Ninth

Circuit's decision in this case, *Hollingsworth v. Perry*. The court will also consider whether private citizens have standing to defend Proposition 8.

INSIGHT

If the Supreme Court rules in the *Windsor* case that DOMA is unconstitutional, states would still be able to decide whether or not to recognize same-sex marriages. When considering *Hollingsworth*, the Court could take up the narrow view of the Ninth Circuit, affecting only those in California. However, if the Court takes a broad view in the *Hollingsworth* case and rules generally that state laws prohibiting same-sex marriage violate the equal protection clause of the 14th amendment, these types of laws could no longer be enforced.

States vote on same-sex marriage

On November 6, 2012, voters in Maine, Maryland, Minnesota, and Washington state considered ballot initiatives relating to same-sex marriage. While several states (Connecticut, Iowa, Massachusetts, New Hampshire, and New York) and the District of Columbia have legalized same-sex marriage through court decisions or legislative action, no state had approved same-sex marriage by popular vote – until November.

Maine reverses 2009 vote against same-sex marriage

In 2009, the Maine legislature enacted a [law](#) permitting same-sex marriage. After opponents of the law had the issue placed on the state ballot, Maine voters rejected it. However, this November, Maine voters reversed the 2009 vote by endorsing same-sex marriage. Same-sex couples can obtain marriage licenses in Maine beginning on December 29, 2012.

Maryland voters approve same-sex marriage

Previously, Maryland recognized same-sex marriages performed in other jurisdictions, but did not allow same-sex couples to marry within the state. In [March 2012](#), Maryland became the eighth state to pass a law legalizing same-sex marriage. While opponents of the law succeeded in placing the issue on the November ballot, Maryland voters approved the law enacted earlier this year. Maryland began issuing marriage licenses to same-sex couples on December 6, 2012.

Washington state voters approve same-sex marriage

Since 2007, Washington state has provided certain legal protections to same and opposite-sex domestic partnerships. In February 2012, Washington passed a law legalizing same-sex marriage. The [new law](#) provides that marriage in Washington “is a civil contract between two persons.” On November 6, 2012, voters rejected an attempt to repeal the law by referendum and approved the same-sex marriage law. Washington began issuing marriage licenses to same-sex couples on December 6, 2012. (Note that the law still recognizes registered domestic partnerships where one individual is over age

62.) Because Washington already treated same-sex domestic partners the same as married spouses, the November 6th vote recognizing same-sex marriage has no impact on employer-provided benefits from a state law perspective.

Minnesota voters reject state constitutional amendment to prohibit same-sex marriage

On November 6, 2012, Minnesota voters rejected an [amendment to the state's constitution](#) that would have defined marriage as a union only between a man and a woman. Because same-sex marriage is otherwise prohibited by statute in Minnesota, the voters' rejection of the proposed constitutional amendment does not alter the tax treatment of employer-provided benefits under state law.

In Closing

Look for additional developments relating to the legality of same-sex marriage in the coming years. The Supreme Court will not hear oral arguments before March 2013 and may not rule until the following June. In the meantime, as more states allow same-sex marriage, further challenges to the constitutionality of DOMA are likely. Employers that offer benefits to same-sex domestic spouses should monitor the results of these legal challenges and statutory changes.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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