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## Washington Pulse



### Supreme Court Issues Rulings in DOMA and California Proposition 8 Same-Sex Spouse Cases

On June 26, 2013, the U.S. Supreme Court issued long-awaited rulings in two cases involving the rights of same-sex couples. These rulings directly affect employee benefits plans and the taxation of same-sex couples. Understanding the full impact of these rulings will take some time, as many emerging issues will have to be addressed. But even in these early stages, understanding how these Supreme Court decisions might affect the retirement plans industry may help prepare providers for a flood of changes.

#### ***DOMA Case Background***

In December, 2012 the U.S. Supreme Court agreed to hear the case *United States v. Windsor*, which challenged the constitutionality of the 1996 federal Defense of Marriage Act (DOMA). The plaintiff, Edith Windsor, was married under New York state law to her same-sex partner. When her partner died, Windsor was denied the federal estate tax marital exemption, and so had to pay more than \$360,000 in estate taxes on the assets she inherited from her partner. The IRS cited Section 3 of DOMA, which states that only opposite-sex couples may be considered married. Windsor brought suit seeking an IRS refund, which both the U.S. District Court and Court of Appeals awarded to her. The U.S. Department of Justice refused to defend the constitutionality of DOMA—but continued to enforce it—and Windsor's refund remained unpaid.

#### ***The Supreme Court's DOMA Ruling***

In a 5-4 decision, the U.S. Supreme Court ruled that Section 3 of DOMA is unconstitutional. "The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying any person the equal protection of the laws." Although Edith Windsor was legally married under New York state law, DOMA impermissibly stripped her "spouse" status from her, and so "injure[s] the very class New York seeks to protect."

The Court found that the "spouse" and "marriage" definitions *under federal law* were unconstitutional for treating legally married same-sex individuals differently from legally married opposite-sex individuals. But the Court *did not* rule on the constitutionality of any state statute that authorizes same-sex marriage. So while this decision invalidates the *federal* definition of "marriage" and "spouse," both the majority opinion and a blistering dissent emphasize that each *state* is still free to create its own definition of these terms.

#### ***California Proposition 8 Case Background***

Also in December, 2012 the Court agreed to hear *Hollingsworth v. Perry*. This case challenged the constitutionality of California's Proposition 8, which was passed as a 2008 ballot initiative and defined marriage as a union between a man and a woman. Two same-sex couples who wished to marry filed suit in federal court challenging Proposition 8. But because the state officials who were authorized to enforce this law agreed that Proposition 8 was unconstitutional, they refused to defend the lawsuit in federal court. So the U.S. District Court

allowed the original proponents of Proposition 8 to represent the State of California in the proceedings. The couples prevailed in both the U.S. District Court and in the Court of Appeals.

### ***The Supreme Court's Proposition 8 Ruling***

In another 5-4 decision, the U.S. Supreme Court refused to rule on the merits of the case, instead finding that the proponents of Proposition 8—who had been certified under California law to defend Proposition 8 when state officials would not—lacked standing to bring the issue to the Supreme Court. In making this point the opinion noted that

for a federal court to have authority under the Constitution to settle a dispute, the party before it [the proponents of Proposition 8] must seek a remedy for a personal and tangible harm. The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet [these] requirements

The Supreme Court's decision, which rests on the principle that the U.S. Constitution does not permit the Court to rule on the merits of such a case, allows the District Court's decision to stand. This means that Proposition 8 cannot be enforced, thus removing California's prohibition on same-sex marriage.

### ***Decisions' Impact on Retirement Benefits***

All of those who deal with retirement plans seem justifiably concerned about the effect that these landmark decisions will have on plan operations. The federal definitions of "spouse" and "marriage" affect over 1,000 federal laws and countless regulations, including rules for both employer-sponsored retirement plans and IRAs. Let's consider just one example. Under DOMA, 401(k) plan participants legally married to a same-sex partner could have designated that person as the beneficiary. But when the participant died, such beneficiaries could not exercise the option available only to spouses: taking the plan assets as their own. Rather, they would have been treated as nonspouse beneficiaries under federal law. Now all of that changes.

Approximately one-quarter of the states now have in effect laws that permit same-sex marriage. In the absence of a federal definition of marriage, such as that formerly provided by DOMA, these state laws defining marriage will also determine spousal status for federal purposes. So these two Supreme Court decisions will undoubtedly have broad-ranging effects. Here are some of the issues that may need to be addressed.

- Will retirement plans with participants in multiple states have to treat them differently depending on which state they live in, perhaps granting or denying rights to similarly situated participants?
- Will "spouse" or "marriage" status—even for the same participant or IRA owner—change when moving to a state with a different definition?
- How will conflicts between plan documents and state law be resolved? Consider, for example, an IRA document that requires that the law of the sponsoring financial organization's state be used when a dispute arises, and yet the IRA owner's state law definition of marriage is more expansive.

- Will plan administrators be required to (or be allowed to) seek proof of a legal marriage relationship for purposes of beneficiary designations, spousal consents, or availability of distribution options?
- What kind of retroactive effect (if any) will the Supreme Court rulings create?

### ***Much, Much More To Come***

Many retirement plan issues will have to be addressed in the coming weeks and months. The current administration in Washington, D. C. has indicated that all federal executive departments will be required to cooperate in easing the transition to a “post-DOMA” world. Certainly some relief will have to be granted while we await transitional guidance. But even as we wait for definitive direction on issues that we already know about, we can be sure that new issues will emerge. The following matters are sure to present additional challenges.

**What is the fate of Section 2 of DOMA?** The *Windsor* decision invalidated only Section 3 of DOMA, which provided the federal definition of “spouse” and “marriage.” Section 2 is still intact. This part of DOMA provides that no state is required to give effect to the laws of another state regarding same-sex marriage. This state of affairs is likely to create a cumbersome patchwork of conflicting state laws—laws that will apply in one jurisdiction but that may not apply when a state border is crossed.

**What about state laws on “domestic partnerships” and “civil unions”?** Will the precise term “marriage” in the Supreme Court’s *Windsor* ruling be pivotal in federal treatment of same-sex couples’ state-sanctioned relationships that are substantially like marriage? Or will the facts and circumstances of a state’s recognition of such relationships play a role in determining rights at the federal level? In other words, if a state’s laws treat a same-sex couple in a way that is substantially identical to marriage—differing only in terminology—will such couples be afforded the same treatment for federal purposes as same-sex couples whose states recognize their relationship using the term “married”?

**What is the likelihood of significant political reaction?** It is virtually guaranteed. One consistent thread that was woven through the Court’s opinion and dissents in both of these cases is this: defining marriage is the constitutional prerogative of the individual states. Even the dissenting opinion in *Windsor*—which argued for the federal definition of marriage *for federal tax and benefits purposes*—acknowledged that the definition of marriage historically falls within the domain of state law. So now, with the absence of a federal definition of marriage for certain purposes, state marriage definitions have suddenly become all-important. The momentum to create or change state-law definitions of marriage had picked up steam even before the Supreme Court rulings. Now the political fight will surely gain more urgency as legislators and activists and voters may see the demise of DOMA as a rallying call to protect traditional marriage or as an opportunity to expand same-sex partners’ marital rights.

**Is this the last word from the Supreme Court on this issue?** Hardly. Even as the *Windsor* and *Perry* cases were being deliberated, another related case is waiting in the wings for potential Supreme Court consideration. *Sevcik v. Sandoval* is a Nevada case in which eight same-sex plaintiff couples were either denied marriage licenses or had recognition of their legal

marriages in other states denied by the State of Nevada. The U.S. District Court has ruled against the plaintiffs. The Ninth Circuit Court of Appeals, the plaintiffs' next recourse, has placed the case on hold until the U.S. Supreme Court ruled in *Windsor* and *Perry*. A group opposing same-sex marriage in Nevada, the Coalition for the Protection of Marriage, has petitioned the Supreme Court to hear the case without its first being heard at the appeals court level. That petition has not been acted on by the Supreme Court. But in one court or another—if not eventually in both the appeals court and the U.S. Supreme Court—more is expected to be heard on this case. A Supreme Court ruling on this Nevada case could potentially be even more sweeping in its consequences than *Windsor*, since it would address directly the constitutionality of a state statute that defines marriage as only between a man and a woman.

### **Conclusion**

The “airwaves” are already brimming with recaps, analysis, and predictions. No matter what your outlook on these momentous Supreme Court decisions, this is sure: if you interact with employee benefits, these rulings will affect you in some way. And as states respond in different ways to *Windsor* and *Perry*, even more challenges are likely.