HINCKLEY ALLEN

ALERT

July 24, 2013

LABOR & EMPLOYMENT

The Supreme Court's Decision on DOMA and Its Impact on Employers

As a follow up to our earlier alert, on June 26 in *United States v. Windsor*, the Supreme Court struck down Section 3 of the federal Defense of Marriage Act ("DOMA"), which had defined "marriage" as a "legal union between a man and a woman," and "spouse" as a person married to someone of the opposite sex. This decision has profound implications for employers because DOMA had affected over 1,000 federal rights and benefits. Unfortunately, not all of these implications are clear-cut. Because states differ in their degree of recognition of same-sex marriages, and because of jurisdictional issues, full implementation of the *Windsor* ruling will require federal agencies to rewrite their rules, and difficult issues involving state lines will need to be addressed.

Some effects of *Windsor* are immediate and obvious. Now, federal benefits can no longer be denied to same-sex couples married in the 13 states (and the District of Columbia) where same-sex marriage is legal. (Same-sex marriage is legal in much of the Northeast, including Connecticut, Massachusetts, New Hampshire, and New York; Rhode Island will issue marriage licenses to same-sex couples effective August 1, 2013 and already recognizes same-sex marriages entered into in other states.) For employers, this means that federal benefits conferred on heterosexual couples, including Family and Medical Leave Act (FMLA), COBRA, HIPAA, and ERISA benefits, will be extended to legally married same-sex couples. For example, a same-sex spouse will now be able to elect COBRA continuation coverage upon termination of the employee-spouse, and the same FMLA benefits to a spouse who has taken a leave of absence will be extended to a same-sex spouse. Employer health plans are also affected. In states where same-sex marriage is legal, group health benefits for same-sex spouses are no longer subject to federal income tax, and health benefits offered under those health plans must be extended to same-sex spouses. The costs of an employee health plan for a same-sex spouse may now be paid on a pre-tax basis, and flexible savings accounts ("FSAs") and health savings accounts ("HSAs") may be used on a pre-tax basis for same-sex couples' expenses. There are also immediate tax implications for same-sex couples regarding personal income tax treatment, based upon joint spousal income, potential head-of-household deductions, and federal estate tax spousal exemptions.

However, not all federal benefits will automatically apply to same-sex spouses. For example, as currently written, IRS guidance treats tax-favored retirement plans differently for same-sex spouses, depending on whether the state they reside in recognizes such marriages, regardless of where they were married. Although the IRS will likely issue new guidance in response to the *Windsor* ruling, it is presently unclear how such retirement plans will be treated.

Even less clear are many state benefit issues. Because the Supreme Court upheld Section 2 of DOMA, which allows states to deny recognition to same-sex marriages performed in other states, same-sex couples who move to states where same-sex marriage is not recognized may still face hurdles related to certain benefits. For employers with employees in one of the 35 states with so-called "mini-DOMA" laws or constitutional amendments prohibiting same-sex marriages, it remains unclear how many of those benefits will extend to legally married same-sex couples. Employers will still be faced with a patchwork of conflicting state laws when confronting workplace situations not explicitly covered by federal law. Although forthcoming agency regulations will offer guidance for many of these, it is likely that some multi-state employers will be faced with situations with no definitive resolutions.

Should you have questions about any issues that affect your company's benefits, contact Lisa A. Zaccardelli at lzaccardelli@hinckleyallen.com or any one of our attorneys in the Labor & Employment Practice Group.

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