

CLIENT ALERT

TO: Employee Benefit Clients of Williams Parker
FROM: Carol L. Myers & Edward Kim
RE: Post-DOMA Developments and Potential Changes to Your Benefit Plans

2013 was a significant year with respect to recognition of same-sex married persons in the United States. The U.S. Supreme Court's recent decision in *United States v. Windsor*, repealed the segment of the Defense of Marriage Act (DOMA) that didn't recognize same-sex married persons in the administration of federal laws. In response, the IRS and Department of Labor issued notices that implement the "state of celebration rule" for certain benefit plans.

The state of celebration rule recognizes persons who are lawfully married under state law (or law of any U.S. territory or possession or any foreign jurisdiction with legal authority to sanction marriages) at the time and location where the marriage ceremony was performed. This rule recognizes all same-sex spouses who were lawfully married in a state that recognized same-sex marriages at the time of marriage.

The state of celebration rule is (i) *required* for non-governmental qualified retirement plans (e.g. 401(k), defined benefit plans), (ii) *optional* for non-governmental welfare plans and (iii) *potentially illegal* for governmental plans subject to state law that only recognize marriage between a man and a woman (such as Florida). Based on these rules, we suggest the following action items with respect to your plans:

Qualified Retirement Plans - Non-Governmental

Determining who the participant's spouse is will impact the operation of the plan. That operation must be changed effective September 16, 2013. The types of operational features impacted include identification of who (i) will be the default death beneficiary and who must sign a consent to name a different beneficiary, (ii) will have rights to obtain a qualified domestic relations order assigning part of a participant's benefit to another person, (iii) will have the right to a survivor annuity from the plan for plans that offer payment in the form of an annuity, (iv) must sign consents to loans and distributions for plans that offer payment in the form of an annuity, and (v) will trigger rights in the participant to a hardship distribution for plans that offer hardship distributions.

Recommended Action: Review plan documents, policies and summary plan descriptions (SPD) to determine whether the definition of "spouse," "marriage," or similar term complies with the state of celebration rule. Examples of non-compliant definitions include (i) a definition of spouse or marriage as between only a man and a woman, (ii) a definition that references the definition set forth in DOMA and (iii) no specific definition but the plan is governed by state law that does not recognize the state of celebration rule.

#1 - If the definition does not comply...
Amend the plan document and provide participants with a summary of material modification (SMM) that substitutes the non-compliant definition with the state of celebration rule. **Per the IRS rules, the amendment must be effective as of September 16, 2013.**

#2 - If the definition complies...
There is no need to amend the plan. However, you may consider providing participants with a reminder notice that the state of celebration rule applies. This can be done without mentioning the concept of same-sex by simply using the definition in bold above.

#3 - If there is no specific definition...
Look to the "applicable law" section of the plan documents. If federal law or state law that recognizes the state of celebration rule applies, then follow column #2. If state law that does not recognize the state of celebration rule applies, then follow column #1.

Welfare Plans - Non-Governmental

Unlike qualified retirement plans, federal law does not mandate that health or welfare plans provide a participant's spouse with any rights whatsoever (at least under the law as it stands today). As a result, each

employer is free to determine how its health and welfare plans will operate. Those decisions need to be clearly reflected in the documents for the plan and communicated to employees.

Recommended Action: Review plan documents, policies and summary plan descriptions (SPD) to determine whether the definition of “spouse,” “marriage,” or similar term is consistent with the state of celebration rule. Unlike qualified retirement plans discussed above, the plan has the option of not following the state of celebration rule and using a different standard for identifying a person’s spouse under the plan (i.e. state of residence or location of job) or providing no coverage at all to same-sex spouses under the plan. However, there are two factors you may want to consider in bypassing the state of celebration rule:

- If you also sponsor a qualified retirement plan (which must conform to the state of celebration rule), a dual standard approach for different plans could be confusing to participants and prone to causing administrative errors in the administration of the plans.
- In the event that state and/or federal law deems sexual orientation a protected class for employment discrimination purposes, providing unequal standards for spousal benefits can put an employer at a higher risk for potential employment discrimination claims in the future. Arguably, the trend is moving towards that direction as the US Senate recently passed a bill which includes sexual orientation as a protected class under federal employment discrimination law.

Retirement & Welfare Plans - Governmental

Federal law does not currently mandate that benefit plans of governmental entities provide either retirement or welfare benefits to an employee’s spouse. As a result, plans of governmental entities are free to determine how the plan will define “spouse” and what benefits the plan will provide to the spouse or domestic partner of an employee. However, the state laws of the governmental entity will impact the entity’s decisions. If the state recognizes same sex marriage, then the plans of the governmental entity need to be written and operated in compliance with those state laws. If the state prohibits recognition of same sex marriage, then the plans of the governmental entity cannot provide benefits to same sex spouses (or domestic partners) as a “spouse” of the employee but must instead make a decision whether to provide the benefits on the basis of a related status defined by the plan document.

Recommended Action: Review plan documents and plan summaries to determine whether the definition of spouse, marriage or similar term complies with state law. If state law does not recognize same sex marriage, make sure that plan documents clearly define how the status that the plan will recognize will be determined. Any changes to the plan should be communicated to participants.

Conclusion

The post-DOMA regime for same-sex marriage is still a work in progress. There are pending cases working their way through the legal system and state and federal governments are still working through this issue. We will continue to monitor these developments. If you have any questions or concerns regarding compliance with the post-DOMA regime and how it relates to your plans, please contact Carol L. Myers, Esq. at (941) 893-4001 or Edward K. Kim, Esq. at (941) 536-2034.

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