

# American Benefits Council

Benefits Briefing Webinar:  
Health & Retirement Benefits *After Windsor*

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# Overview

- Level Set on DOMA and *Windsor*
- Overview of Recent Revenue Ruling and Related FAQs
- Effective Date/Scope of Guidance
- H&W Implications
- Retirement Plan Implications
- Other Post-*Windsor* Guidance (including SSA eligibility, FMLA, Medicare)

# State of Relationship Recognition

- Currently 13 states and the District of Columbia provide for legal same-sex marriage

- |                        |                 |
|------------------------|-----------------|
| ✓ California           | ✓ Massachusetts |
| ✓ Connecticut          | ✓ Minnesota     |
| ✓ Delaware             | ✓ New Hampshire |
| ✓ District of Columbia | ✓ New York      |
| ✓ Iowa                 | ✓ Rhode Island  |
| ✓ Maine                | ✓ Vermont       |
| ✓ Maryland             | ✓ Washington    |

\* And some counties in New Mexico...

\*\* Note that certain of these states may also allow for other relationship recognition (such as registered domestic partnerships)

# State of Relationship Recognition

- 7 other states provide for relationship recognition other than marriage (such as civil unions, registered domestic partnerships)

✓ Colorado

✓ Hawaii

✓ Illinois

✓ New Jersey

✓ Nevada

✓ Oregon

✓ Wisconsin

# The Anatomy of DOMA

- 1996 federal statute
  - Section 1: The title
  - Section 2: Full faith and credit provision
    - Provides that one state does not have to recognize a same-sex marriage from another state
  - Section 3: Provides a federal definition of “spouse” and “marriage”



# The Anatomy of DOMA

- Section 3: Provides a federal definition of “spouse” and “marriage”
  - States that in determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife (Pub. L. No. 104-99, § 1 (Sept. 21, 1996), codified at 1 U.S.C. § 7 (1997))

# Windsor Decision

- Plaintiff, Edith Windsor, and her partner were residents of NY state
  - In 2007 they were married in Canada; the marriage was recognized by NY state following the state legislature's enactment of a law allowing for/recognizing same-sex marriages
  - Following her wife's death, Ms. Windsor filed a claim for refund of approximately \$363,000 of estate taxes. The IRS denied the claim on the basis that she was not an opposite-sex spouse within the meaning of DOMA
  - Ms. Windsor then sued the Department of the Treasury for a tax refund of the \$363,000, alleging that she should have been eligible for a spousal deduction for federal estate tax after her wife died and that DOMA operated to violate her Constitutional rights
- By a 5-4 decision, Supreme Court ruled that Section 3 of DOMA is an unconstitutional deprivation of liberty protected by the Fifth Amendment of Constitution
  - The Court specifically did NOT address constitutionality of Section 2 of DOMA, which remains the law... for now

# The Anatomy of DOMA

Remains Law...

- 1996 federal statute

- Section 1: The title
- Section 2: Full faith and credit clause
  - Provides that one state does not have to recognize a same-sex marriage from another state

- Section 3: ... "definition of spouse" and "marriage"

**Ruled Unconstitutional**



# Potential Implications for ER-Sponsored Health and Welfare Plans

- Full scope and extent of implications may not be known for some time
- Some very important questions remain unanswered at present; additional guidance expected

# Health and Welfare Plans

- Will need to closely review plan terms
- Likely to result in changes to benefits and administration
- Affects a broad array of plans, including:
  - Major medical plans
  - HSAs / HRAs/ FSAs
  - Excludable fringe benefits
- Be very thoughtful regarding plan redesign and administrative changes, especially in the short-term as we await further guidance from the agencies and the courts

# Health and Welfare Plans

- Benefit eligibility generally
- Tax treatment of employer-paid health care generally
- HSAs, HRAs, FSAs
- Code section 125 salary reduction
- COBRA
- HIPAA special enrollment rights
- FMLA
- Excludable employer-paid fringe benefits

# Benefit Eligibility

- **BEFORE *Windsor***

- Generally, no federal requirement to offer spousal H&W benefits to any or every spouse with respect to self-insured plans; thus, not required to offer benefits to a same-sex spouse
  - Subject to applicable federal laws, such as federal nondiscrimination rules regarding race, sex, age, religious affiliation, etc.
    - No federal law prohibiting discrimination based on sexual orientation by private employers
  - Subject to applicable state, city and local laws requiring contractors with the instrumentality to provide certain benefits
- Where the H&W plan is insured, state insurance laws could require the issuer to provide coverage/benefits to a same-sex spouse

# Benefit Eligibility

- **AFTER Rev. Rul. 2013-17**
  - There is still no federal requirement to offer spousal H&W benefits to any or every spouse with respect to self-insured plans; thus, not required to offer benefits to a same-sex spouse
    - Subject to applicable federal laws, such as federal nondiscrimination rules regarding race, sex, age, religious affiliation, etc.
      - No federal law prohibiting discrimination based on sexual orientation by private employers
    - Subject to applicable state, city and local laws requiring contractors with the instrumentality to provide certain benefits
    - **But see VT DOI release – attempting to apply mandatory parity for civil union-ers with respect to self-insured plans**
  - Where the H&W plan is insured, state insurance laws could require the issuer to provide coverage/benefits to a same-sex spouse

# Benefit Eligibility

- **Considerations and/or Open Issues**
  - Strategies for reducing potential liability for back benefits
  - Shoring up existing plan documents, SPDs, and enrollment materials to clarify which individuals are eligible for spousal benefits

# Tax Treatment of ER-Paid Health Care

- **BEFORE *Windsor***

- Employer-paid coverage is excludable from an employee's wages (just like coverage paid for by an employer with respect to an employee's opposite-sex spouse) if the domestic partner or same-sex spouse qualifies as IRC section 152-modified "dependent"

- Generally, to be an IRC section 152-modified "dependent", the same-sex spouse or domestic partner must satisfy the following criteria:
  - Live with the employee; AND
  - Receive over ½ of his or her financial support from the employee
    - » Note: no income threshold imposed
- Applies for both federal income and payroll taxes

# Tax Treatment of ER-Paid Health Care

- **AFTER** Rev. Rul. 2013-17:
  - For same-sex spouses regardless of state of domicile, employer-paid coverage is excludable from an employee's wages .
  - What about domestic partners and civil union-ers?
    - Nothing has changed



# Tax Treatment of ER-Paid Health Care

- **Considerations and/or Open Issues**
  - Whether an employer must cease imputing income for an employee with a same-sex spouse as of September 16, 2013 (or, for example, whether the employer could “true-up” at the end of the calendar year)
  - Does an employer need to provide amended Forms W-2 for 2012 or prior tax years?
  - IRS FAQs regarding same-sex marriage provide guidance on availability of refunds- see FAQs 10 through 14
  - Does filing for refund make business sense for employers?
  - Issue of state tax law and possible changes

# FSAs, HRAs and HSAs

- An employee can only reimburse tax-free the qualifying medical expenses of his or her “spouse” or Code section 152-modified “dependent”
  - **BEFORE** *Windsor*: Qualifying medical expenses of an employee’s same-sex spouse, domestic partner or civil union-er were not eligible for tax-free reimbursement unless he or she qualified as Code section 152-modified “dependent”
  - **AFTER** **Rev. Rul. 2013-17**:
    - Same-sex spouse’s expenses are eligible for tax-free reimbursement (regardless of state of domicile)
    - Expenses of employee’s domestic partner or civil union-er remain eligible for tax-free reimbursement **ONLY** if such partner or civil union-er qualifies as the employee’s Code section 152-modified “dependent”
      - Alternative: With respect to FSAs and HRAs, may be able to impute as income the FSA/HRA coverage on the front-end to allow for reimbursements; not possible with HSAs, which are subject to a 20% penalty tax

# FSAs, HRAs and HSAs

- Additional comment regarding HSAs:
  - Applicable tax rules require annual HSA maximum contribution limit to be apportioned among “spouses”
    - **BEFORE** *Windsor*: Couples in a same-sex marriage, domestic partnership, or civil union, did not qualify as “spouses.” Thus, such couples were able to effectively contribute 2X the maximum statutory amount (albeit into separate HSAs)
    - **AFTER** **Rev. Rul. 2013-17**: It appears that same-sex spouses will now be subject to the same spousal apportionment rule that applies to opposite-sex spouses. Domestic partners and civil union-ers appear able to continue to contribute 2X the maximum amount

# FSAs, HRAs and HSAs

- **Considerations and/or Open Issues**
  - When are/were same-sex spouses no longer permitted to make 2X the maximum contribution limit?
  - Whether certain or all expenses incurred prior to September 16, 2013 by an HSA accountholder's same-sex spouse are reimbursable from the accountholder's HSA
  - When the special rules regarding divorce and death apply to HSAs owned by a married same-sex spouse

# Code Section 125 Salary Reduction

- Generally, an employee can only elect to pay for coverage for a “spouse” or Code section 152-modified dependent via Code section 125 salary reduction
  - **BEFORE** *Windsor*: An employee with a same-sex spouse, domestic partner or civil union-er generally could not elect to pay for the coverage for such individuals on a pre-tax basis through a cafeteria plan
  - **AFTER** **Rev. Rul. 2013-17**:
    - An employee may now pay for his or her same-sex spouse’s coverage on a pre-tax basis through a cafeteria plan
    - An employee cannot pay for his or her domestic partner or civil union-er on a pre-tax basis (unless he or she qualifies as a Code section 152-modified dependent)

# Code Section 125 Salary Reduction

- **Considerations and/or Open Issues**
  - Ability of employers to permit employees with a same-sex spouse to modify their cafeteria plan election for the 2013 plan year.

# COBRA

- Generally requires that continuation coverage be provided to a “qualified beneficiary,” which is defined, in part, as a “spouse” and “child” of the employee
  - **BEFORE** *Windsor*: No affirmative requirement to provide COBRA coverage to domestic partners or same-sex spouses, but many employers provided for voluntary continuation coverage
  - **AFTER** **Rev. Rul. 2013-17**:
    - To the extent an employer offers health coverage to a same-sex spouse, an employer will need to extend COBRA coverage to such same-sex spouse
    - Still no affirmative requirement to provide COBRA coverage to domestic partners or civil union-ers; but can provide continuation coverage voluntarily

# COBRA

- **Considerations and/or Open Issues**
  - To the extent an employer offered same-sex spousal coverage prior to *Windsor*, but not continuation coverage, whether the employer must provide new COBRA election window for past “qualifying events”



# HIPAA Special Enrollment Rights

- Requires employers to provide an enrollment opportunity to an employee's new spouse, or where the spouse loses coverage under another employer's plan
  - **BEFORE** *Windsor*: Employers were only required to extend these rights to an opposite-sex spouse; however, an employer could voluntarily extend these enrollment rights to an employee's same-sex spouse, domestic partner or civil union-er
  - **AFTER** **Rev. Rul. 2013-17**: Appears employers must now extend these rights to a same-sex spouse to the extent an employer provides same-sex coverage generally
    - An employer may voluntarily extend these enrollment rights to an employee's domestic partner or civil union-er

# HIPAA Special Enrollment Rights

- **Considerations and/or Open Issues**
  - To the extent an employer offered coverage to an employee's same-sex spouse prior to *Windsor*, but not voluntary special enrollment rights, whether the employer must provide new special enrollment rights in accordance with HIPAA to such same-sex spouse now

# FMLA

- Requires employers to permit employees to take a time-limited leave of absence to care for a “spouse” or child.
  - **BEFORE** *Windsor*: Employers were only required to extend these leave rights to an opposite-sex spouse; however, an employer could voluntarily extend these enrollment rights to an employee’s same-sex spouse, domestic partner or civil union-er
  - **AFTER** *Windsor*: Recent DOL guidance suggests that an employer must extend these rights to an employee to care for a same-sex spouse ONLY WHERE THE EMPLOYEE RESIDES IN A STATE THAT RECOGNIZES SAME-SEX MARRIAGE
    - “State of Domicile” rule is inconsistent with IRS/Treasury position
    - Will DOL’s position evolve?
    - Note: An employer may voluntarily extend equivalent leave rights to an employee’s same-sex spouse, domestic partner or civil union-er

# ER-Paid Fringe Benefits

- The IRC provides for a host of tax-free employer-paid fringe benefits. They are generally limited to the employee, his “spouse” and dependents
  - **BEFORE** *Windsor*: Otherwise excludable fringe benefits provided to a same-sex spouse, domestic partner and civil union-er generally were taxable as wages to the employee
  - **AFTER** **Rev. Rul. 2013-17**:
    - Qualifying fringe benefits provided to a same-sex spouse should be excludable from the employee’s income (such as “de minimis” employer-paid group term life insurance for an employee’s spouse)
    - The same qualifying fringe benefits provided to an employee’s domestic partner or civil union-er should remain taxable as wages to the employee (unless, in certain instances, they qualify as a dependent of the employee)

# ER-Paid Fringe Benefits

- **Considerations and/or Open Issues**
  - Whether some or all of the employer-paid fringe benefits delivered prior to September 16, 2013 are eligible for income exclusion

# Benefit Considerations for Children of Same-Sex Couples

- Benefit eligibility and tax treatment of employer-paid benefits largely turns on state law definition of legal parent/child relationship
  - State relationship recognition laws (such as same-sex marriage law) may operate to make both members of the same-sex union a parent of a child; however, often state laws require an independent adoption proceeding
  - Where an employee is not a legal parent to a minor age individual, then existing rules apply
    - Such as employer may extend voluntary coverage generally, as well as voluntarily comply with HIPAA, FMLA, and COBRA with respect to such minor age individual
    - Coverage/benefits are taxed unless the minor age individual is a Code section 152-modified dependent (which is unlikely)

# Other Post-Windsor Agency Guidance

- **SSA-** August 9, 2013 press release indicates they are now processing some retirement spouse claims for same-sex couples [“State of Domicile” rule?]
- **DOL-** For FMLA, “Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage” [Fact Sheet #28F]
- **HHS/CMS-** August 29, 2013 memorandum provides that Medicare Advantage organizations must cover services in a skilled nursing facility (SNF) in which a validly married same sex spouse resides to the extent that they would be required to cover the services if an opposite sex spouse resided in the SNF. [“State of Celebration” rule]

# QUESTIONS?

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