

# **Retroactivity of Windsor Case Regarding Retirement Plans**

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# Guidance on Retroactivity from Government

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- **Treasury.**
  - **No guidance on retroactivity yet. Very helpful guidance in Revenue Ruling on current issues.**
  - **Many possibilities, including:**
    - No retroactive disqualification, provided corrections are made within a specified period.
    - No retroactive disqualification. Compliance required prospectively.



# Guidance on Retroactivity from Government (cont.)

- **Treasury (cont.)**
  - **Meaning of correction: unclear. Example. Past payment of lump sums from defined benefit plan without spousal consent to participants not married for pension purposes at the time of distribution. For correction guidance, see EPCRS (Rev. Proc. 2013-12, especially section 6.04 and Appendix A, section .07.**



# Guidance on Retroactivity from Government (cont.)

- Treasury (cont.)
  - Notice to participants likely required, but to which ones? And how far back in time do plans have to go? Same-sex couples could have been married in a different state or country. Under EPCRS, corrections generally need to be made for closed years.
  - Aside from notice, would plans be required to make affirmative and reasonable efforts to determine which such participants had same-sex spouses?
  - Or could correction be limited to:
    - **Same-sex spouses for which the employer has records, and**
    - **Same sex spouses who make a claim?**



# Guidance on Retroactivity from Government (cont.)

- **Treasury (cont.)**
  - **Meaning of prospectivity: unclear. Example. Participant in 401(k) plan dies in 2012, leaving account to her children. Same-sex spouse did not consent to this beneficiary designation. The account has not been paid. This triggering event occurred in 2012, but the payment has not yet been made. Under a prospective standard, does Windsor apply?**



# Guidance on Retroactivity from Government (cont.)

- **Department of Labor.** Outlook for guidance on retroactivity unclear.
  - **Without guidance, the issue of retroactivity for ERISA purposes would be left fully to the courts. Even with guidance, participant claims would be decided by the courts.**
- **PBGC.** Outlook for guidance on retroactivity unclear, but initial guidance may be limited to the treatment of benefits under plans taken over by the PBGC.



# Possible Effects of ERISA

## Retroactivity

- The following discussion is not comprehensive by any means. It is intended to illustrate the types of issues that may arise. The following discussion is intended to raise issues, rather than to describe definitive answers.
  - **Example: 401(k) plan death benefit issue. Plan paid out participant's death benefit in 2012 to non-spouse beneficiary without consent of a same-sex spouse.**
    - As discussed below, this arguably violates conditions of 401(k) plan exemption from QJSA rules with respect to that participant. Even if so, no effect on applicability of the exemption with respect to other participants.



# Possible Effects of ERISA Retroactivity (cont.)

- Analysis of plan terms: assume plan defines “spouse” as opposite gender.
  - **Arguably, plan simply loses its exemption from the QJSA rules with respect to this participant. This could trigger a right to a payment of 50% of the death benefit to the same-sex spouse as a qualified preretirement survivor annuity benefit (“QPSA”).**
  - **The contrary argument, however is that the Plan’s distinction between opposite-sex marriage and same-sex marriage is invalid, as inconsistent with federal law. In that case, the same-sex spouse is entitled to 100% of the death benefit. See generally Cozen O’Conner, P.C. v. Tobits, Civ. Action No. 11-0045, (U.S. Dist. Ct. for E.D. of Pa., July 29, 2013).**
  - **Recoupment from non-spouse beneficiary?**





# Possible Effects of ERISA

## Retroactivity (cont.)

- **Example. DB plan paid out lump sum to participant in 2010 without consent of same-sex spouse.**
  - Same-sex spouse might make a claim to survivor annuity component of QJSA unless now waived. (EPCRS guidelines not controlling regarding this issue or the examples below, but those guidelines could be used explicitly or implicitly by courts.)
  - Recoupment from participant?
- **Example. DB plan which subsidizes QJSAs but not other benefits began paying out an unsubsidized benefit to a participant with a same-sex spouse in 2010. The participant might make a claim to make a new election to receive the subsidy.**



# Possible Effects of ERISA

## Retroactivity (cont.)

- **Example.** Same facts as preceding example, but the employer also maintains a nonqualified plan that provides the benefits that the DB would have provided but for the section 415 limit and the section 401(a)(17) limit on compensation taken into account. The participant might also make a claim for the subsidy under the nonqualified plan.
- **Example.** A DB plan began paying a single life annuity to a participant in 2010 without the consent of her same-sex spouse. Should the plan offer a choice now between an adjusted QJSA or, with spousal consent, continuation of the single life annuity? If a plan sponsor does so, what precedent would it set with respect to other potential liabilities?



# Possible Effects of ERISA

## Retroactivity (cont.)

- **Example. A DB plan death benefit with respect to a participant is forfeited in 2010, even though the participant had a same-sex spouse. The same-sex spouse might make a claim for a QPSA or other benefits available under the plan to opposite-sex spouses.**



# Possible Effects of ERISA Retroactivity (cont.)

- **Repercussions of DB issues.**
  - Critical issue. For example, DB plan paid out lump sum to participant in 2010 without consent of same-sex spouse. Is any liability to same-sex spouse a 2010 liability? If not, to what year should it relate?
    - **If it is a 2010 liability, this could affect compliance with numerous 2010 requirements; e.g., funding, benefit restrictions, ERISA section 4010 reporting, the application of reportable event exemptions, etc.**
    - **If it is not a 2010 liability, such potentially very disruptive retroactive effects would not exist.**
    - **The better analysis would appear to be that the liability relates to 2010 but did not arise in 2010 because it did not exist until the law changed in 2013.**



# Possible Effects of ERISA

## Retroactivity (cont.)

- **With respect to notifying participants and beneficiaries of their rights under Windsor, and determining who has what rights, what should a fiduciary do? See slide 3 for a discussion of a similar set of issues under the Internal Revenue Code. Possible statute of limitations issue?**



# Possible Effects of ERISA

## Retroactivity (cont.)

- **Under the above analysis, when would the liability arise for, for example, funding purposes?**
  - As of July 22, 2013 for ERISA purposes.
  - Difficulties in estimating scope of liability.
  - If a liability arises in 2013 after a plan's valuation date for 2013, does the liability have to be taken into account for 2013 for funding purposes? Arguably yes if the liability would, if treated as attributable to a plan amendment, cause the plan to violate the rule prohibiting plans under 80% funded from increasing benefits. See Treas. Reg § 1.430(d)-1(d)(2). For reasons noted below, however, this seems extremely unlikely. So extremely likely the liability would first have to be recognized for 2014.



# Possible Effects of ERISA Retroactivity (cont.)

- **How would such a liability be treated for purposes of the prohibition on plan amendments to plans that are (or would become) less than 80% funded?**
  - Arguably, the liability could be attributable to a plan amendment (adopted currently or in a later year, but retroactively effective), which could be prohibited by the restriction on plan amendments. It seems clear that the government will clarify that this is not the case. See, e.g., Treas. Reg. § 1.436-1(c)(4)(iii) (regarding Treasury's general power to make changes in this regard).



# Possible Effects of ERISA

## Retroactivity (cont.)

- **Would such a liability trigger a requirement in 2013 to recertify an AFTAP for purposes of the benefit restrictions, such as the restriction on lump sums?**
  - If the liability is treated as attributable to a plan amendment (adopted currently or in a later year but retroactively effective) but that amendment is exempted from the restrictions on plan amendments, it is unclear if a new certification for 2013 would be required. See *Treas. Reg. sec. 1.436-1(h)4*.





# Possible Effects of ERISA

## Retroactivity (cont.)

- Distributed annuity contracts/terminated plan.
  - **Example. A plan has been terminated with some participants receiving lump sums and other receiving distributed annuity contracts.**
    - Claim of same-sex spouse who did not consent to lump sum?
    - Claim of same-sex spouse to spousal rights under an annuity contract issued before the Windsor decision?



# Is Windsor Retroactive for ERISA Purposes?

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- Nature of claim under Windsor.
  - **Example. Claims for survivor annuity benefits by same-sex spouses who did not give required consents to past lump sums paid under DB plan.**



# Is Windsor Retroactive for ERISA Purposes? (cont.)

- These claims might well not be claims for benefits under the terms of the plan, pursuant to ERISA section 502(a)(1)(B).
  - **Some plans explicitly define “spouses” as opposite-sex spouses in light of DOMA.**
  - **Some plans are silent on the meaning of “spouse”, but have been interpreted to be limited to opposite-sex spouses. Generally, plan administrator’s interpretations are entitled to deference under court decisions.**
  - **Some plans may provide that all terms shall be interpreted so as to comply with ERISA and the Code. Previously, such plans were reasonably interpreted to refer to opposite-sex spouses. Effect of Windsor?**



# Is Windsor Retroactive for ERISA Purposes? (cont.)

- These claims could arguably be brought as requests to reform the plan to comply with Windsor (and ERISA in light of Windsor). Plan reformation claims might be made under the equitable remedies of ERISA section 502(a)(3).



# Is Windsor Retroactive for ERISA Purposes? (cont.)

- Retroactivity of equitable remedies.
  - **In the context of Title VII, the Supreme Court has held that if the following conditions are satisfied, a court's ruling should not be given retroactive effect for purposes of the equitable remedies of Title VII.**



# Is Windsor Retroactive for ERISA Purposes? (cont.)

- The court ruling establishes a new principle of law that affected parties reasonably would not have acted upon prior to the court's action.
- Retroactive remedies are not needed to ensure future compliance.
- Retroactive remedies would have significant adverse and inequitable results.
- See *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Arizona Governing Comm. For Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073 (1983); *Florida v. Long*, 487 U.S. 223 (1988).



# Is Windsor Retroactive for ERISA Purposes? (cont.)

- These cases were specifically applied in pension cases involving women receiving smaller annuity benefits or paying more for equivalent annuity benefits.
- The first two criteria are clearly met with respect to the application of Windsor to retirement plans. The third criteria might well be also met, depending on the extent of the burdens imposed by retroactivity.



# Is Windsor Retroactive for ERISA Purposes? (cont.)

- Some argue that the “Manhart trilogy” cited above have been overruled by the “Harper” trilogy. See *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *James B. Beam Distilling Company v. Georgia*, 501 U.S. 529 (1991); *Lampf, Pleva, Lipkind, Prupis & Petig-Row v. Gilbertson*, 501 U.S. 350 (1991). These cases generally take the position that courts announce what the law is and has always been, and thus court decisions are retroactive by their nature.





# Is Windsor Retroactive for ERISA Purposes? (cont.)

- **There are good arguments that the Manhart trilogy is still valid. None of the Manhart trilogy has been described as overruled by the Supreme Court. And the Manhart trilogy did not address a rule of law but rather addressed the proper scope of an equitable remedy, which is similar to the ERISA equitable remedy. See Cooper v. IBM personal Pension Plan, 2004 WL 322918 (S.D. Ill. 2004) (holding Manhart trilogy still good law).**



# Is Windsor Retroactive for ERISA Purposes? (cont.)

- There is a reasonable argument that Windsor may not be retroactive with respect to retirement plans for purposes of ERISA section 502(a)(3). But without a court decision (or any other authority) to that effect, it would be hard to rely on this position. (Cozen O’Conner, P.C. v. Tobits, cited earlier, assumed retroactivity, but did not address the Manhart issue and thus is of little precedential value on this point.)

