

## **ERISA and Employment Benefits Post-DOMA and IRS Ruling**

Amending Plans to Comply with New Mandates and Assessing Potential Retroactive Liability

---

THURSDAY, OCTOBER 31, 2013

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Amanda A. Sonneborn, Partner, **Seyfarth Shaw**, Chicago

W. Andrew Douglass, Partner, **Seyfarth Shaw**, Chicago

Sam Schwartz-Fenwick, **Seyfarth Shaw**, Chicago

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service** at **1-800-926-7926 ext. 10**.

## *Tips for Optimal Quality*

FOR LIVE EVENT ONLY

---

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-888-601-3873** and enter your PIN when prompted. Otherwise, please send us a chat or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com) immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the word balloon button to send



# ***Post Windsor – Now What?***

The Effect of *United States v. Windsor*



# Presenters

---

Andrew Douglass  
adouglass@seyfarth.com

Sam Schwartz-Fenwick  
sschwartz-fenwick@seyfarth.com

Amanda Sonneborn  
asonneborn@seyfarth.com



# Federal Defense of Marriage Act

- Effective September 21, 1996
- DOMA Section 3 provides:

“In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus or 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 a wife.”



# Impact of DOMA Section 3

- No immediate impact; no states recognized same-sex marriages in 1996
- Impact began in 2004
  - Same-sex marriage recognized in Massachusetts in 2004
  - At present, same-sex marriage lawful/allowed in 14 states (and the District of Columbia)
- Legal impact: Same-sex couples who were legally married under state law were considered single in more than 1,000 federal laws that define “marriage” or “spouse”



# ***U.S. v. Windsor, 133 S. Ct. 2675 (2013)***

- Addressed the constitutionality of Section 3 of DOMA
- The Court in a 5-4 decision held that Section 3 of DOMA violated the due process clause of the Fifth Amendment
  - SCOTUS applied a "careful consideration" standard of review, finding that "[i]n determining whether a law is motivated by improper animus or purpose, discriminations of an unusual character especially require careful consideration. DOMA cannot survive under these principles." *Id.* at \*20



# *U.S. v. Windsor*

- The Court held that DOMA Section 3 imposed burdens on legally married same sex couples, as:

Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways. By its great reach, DOMA touches many aspects of married and family life, from the mundane to the profound. It prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive. It deprives them of the Bankruptcy Code's special protections for domestic-support obligations. It forces them to follow a complicated procedure to file their state and federal taxes jointly. (*internal citations omitted*)



# *U.S. v Windsor*

- The Court held that the burdens DOMA imposed on legal married same sex couples was unconstitutional as:

DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage.



# ***Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013)**

- Plaintiffs challenged the constitutionality of Proposition 8, which defined marriage as between a man and a woman in California. Plaintiff prevailed in state court
- Defendant, the State of California, chose not appeal. Intervening defendants, individuals who opposed same-sex marriage, were allowed to intervene
- The Court held that the intervening defendants had suffered no harm and hence had no standing under the Constitution
- The ruling leaves in effect the District Court's finding that Prop 8 was unconstitutional



# Impact of *Windsor* and *Perry*

- Same-sex couples can marry in California effective immediately
- Legally married same-sex couples who live in states that recognize their marriage **will be** eligible for more than 1,000 federal benefits that flow to married couples
- Legally married same-sex couples who live in states that do not recognize their marriage may be eligible for federal benefits that flow to married couples



## What *Perry* and *Windsor* do not do

- Extend federal recognition to same-sex couples with civil unions or domestic partnerships
- Require states to legalize same-sex marriages
- Require states to recognize same-sex marriages legally performed in other jurisdictions



# *Windsor's* Impact on Employer Payroll Procedures and Employee Benefit Plans

- IRS Rev. Rul. 2013-17: All lawful same-sex marriages (including those performed in foreign jurisdictions) are recognized for federal tax purposes, even if the participant lives in a state that does not recognize same-sex marriage
  - What about state income tax?
- DOL Technical Release No. 2013-04: DOL agrees with IRS position in Rev. Rul. 2003-17 for benefit plan purposes



# Qualified Retirement Plan Overview

- DB plans (and certain defined contribution plans) are required to provide a Qualified Joint Survivor Annuity (annuity to a surviving spouse of between 50%-100% of the value of the benefit).
- DB plans are also required to provide a surviving spouse with a Qualified Pre-Retirement Survivor Annuity (a lifetime-annuity for a surviving spouse when their participant spouse dies prior to retirement)
- Defined contribution plans must pay death benefit to participant's spouse unless spouse consents to different beneficiary



# ***Windsor's* Impact on Qualified Retirement Plans**

- Defined benefit pension plans must provide Qualified Joint Survivor Annuity or Qualified Pre-Retirement Survivor Annuity, unless the participant elects another payment form and the participant's spouse consents
- Defined contribution plans must pay death benefit to participant's same-sex spouse unless spouse consents to different beneficiary
- Same-sex spouse can now roll over an eligible rollover distribution to another eligible retirement plan or IRA (just as opposite-sex spouse can)
- Retroactivity?



# Windsor's Impact on Qualified Plans

- Default Beneficiary Rules
  - Default beneficiary hierarchy is generally a plan design decision
  - Same-sex spouse or domestic partner usually is first default beneficiary
  - Potential for claims by multiple parties
    - *Example: Participant and same-sex partner live in Texas, travel to Massachusetts in 2004, get married, return to Texas. Participant and spouse split up in 2009 but do not divorce (Texas court refuses to grant divorce to married couple of the same sex.) Participant moves to California, designates children as beneficiaries (without consent of estranged spouse), and subsequently dies. Plan says Texas law governs to the extent not preempted by ERISA.*



# Hardship Withdrawal Option for Retirement Plans (Pre-Windsor)

- Plans may allow for hardship withdrawals to help with financial hardships incurred by the participant or the participant's spouse or dependents.
- Plans may also permit a participant to withdraw amounts necessary to help with hardships incurred by a non-spouse, non-dependent (e.g., domestic partner, parent or sibling) if the person is designated as the participant's beneficiary under the plan in the event of death



# Windsor's Impact On Hardship Withdrawal Option for Retirement Plans

## ■ Hardship Distributions

- Same-sex spouse must be treated as spouse
- If plan was previously amended to allow for “designated beneficiary” hardship events, no longer necessary for a participant to designate same-sex spouse as primary beneficiary to take hardship distribution for spouse’s medical, tuition or funeral expenses



## Division of Pension Benefits on Divorce

- Pension benefits generally may not be assigned or alienated; the exception to this rule is for a “qualified domestic relations order” (“QDRO”). ERISA § 206(d)(3)(A), IRC §401(a)(13)(B).
- QDROs are now available when a same sex marriage dissolves.



# Employee Benefits After *Windsor*

- How does invalidity of Section 3 of DOMA affect rights that may have arisen in the past?
  - QJSA or QPSA where the participant retired or died before *Windsor*?
  - Defined contribution plan distribution where the participant died before *Windsor*?
  - QDRO rejected before *Windsor*?



# Post-Windsor Rules Governing Welfare Benefits

- Plans do not have to extend coverage to spouses or dependents
- ERISA does not bar Plans from covering only opposite-sex spouses (but Title VII may)
- If a plan covers “spouses” it will now have to also cover same-sex spouses.



# *Windsor* and Health and Welfare Plans

## ■ Mid-Year Enrollment

- If plan provides for spousal coverage, it appears that employers can permit employees with same-sex spouses who were previously not enrolled in the employer's group health plan to make a mid-year election to enroll same-sex spouses and their dependent children

## ■ Taxation of Group Health Plan Benefits

- Before *Windsor*, employers were required to impute income to the participant for cost of same-sex spouse's coverage
- Post-*Windsor*, employers should no longer impute income for federal tax purposes due to coverage of same-sex spouse
- Income may still have to be imputed for state-tax purposes.



# *Windsor* and Health and Welfare Plans

- Taxation of Group Health Plan Benefits (cont'd)
  - Employer will no longer have to pay federal payroll taxes based on imputed income for an employee who has a lawful same-sex spouse
  - Employer can file for refund of employer portion of federal payroll taxes (and employee portion if employee's whereabouts are known) ([IRS Notice 2013-61](#))
- Payment on a Pre-Tax Basis
  - May now use pre-tax payroll deductions to cover cost of group health plan coverage for same-sex spouse



# ***Windsor* and Health and Welfare Plans**

- Health Flexible Spending Accounts, Health Reimbursement Arrangements and Health Savings Accounts
  - May now reimburse medical expenses of same-sex spouse
- Dependent Care Assistance Programs
  - May now reimburse dependent care expenses of:
    - same-sex spouse's children; or same-sex spouse who is incapable of caring for self
- COBRA Continuation Coverage
  - If same-sex spouse is covered under plan, now entitled to the same COBRA continuation coverage rights as any other COBRA qualifying beneficiary



# Looming Questions

- Conflicting State Laws
  - IRS Rev. Rul. 2013-17 provides clear answer to federal tax questions
    - Possible differences remain under state income tax laws
  - Guidance needed from other agencies
- Does *Windsor* apply retroactively?



# Action Items for Employers

- Review definition of “spouse” in plan documents, SPDs and administrative forms and procedures
- Stop imputing income for welfare benefits for same-sex spouses
- Consider filing claim for refund of FICA tax withholding
- Implement process to identify same-sex spouses and current state of residence
- Communicate changes to participants and inform participants that further guidance is needed
- Consider amending plan documents
- Contact third party administrators and insurers



# ***Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D. Pa. July 29, 2013)**

- First post-*Windsor* employee benefits decision
- Widow of same-sex couple who married in Canada and resided in IL is entitled to surviving spouse benefit under pension plan
- ERISA and the IRC establish the “floor” for spousal rights in pension plans; *Windsor* “leveled the floor”
- Administrator of PA-based plan not bound by PA law, notwithstanding PA choice of law



# ***Obergefell v. Kasich*, 2013 WL 8314262 (S.D. Ohio July 22, 2013)**

- Granting TRO to prohibit local Ohio registrar from accepting death certificate that did not list decedent as married and same-sex spouse as surviving spouse
- Couple married in Maryland, resided in Ohio
- 2004 Ohio law prohibits recognition of same-sex marriages performed out of state
- Law denies equal protection by discriminating between opposite-sex couples married out of state and same-sex couples married out of state



# Post-Windsor Litigation Trends

- Challenges to state laws barring same sex-marriage and divorce.
- Challenges to civil unions as being separate but not equal.
- State officials issuing marriages licenses regardless of state bans.
- Retroactive denial of benefit claims
- Title VII as a sword to obtain benefits.



# Employment Law Implications

- Family Medical Leave Act (FMLA) Entitlement
  - Eligible workers entitled to up to 12 weeks of unpaid, job-protected leave for specified family/medical reasons
  - Up to 12 workweeks of leave per year for specified reasons, including:
    - care for the employee’s “spouse” who has a serious health condition
    - a qualifying emergency for a “spouse” who is a military member on covered active duty.
  - Up to 26 weeks of leave per year to care for a covered service member or veteran



# Employment Law Implications

- Before *Windsor*, definition of “spouse” was limited to member of opposite sex.
- Post-*Windsor*, Department of Labor issued Fact Sheet
  - Updated definition of “spouse” for the purposes of FMLA leave
    - “Spouse” means husband or wife under law of the state of residence
      - Includes common law and same-sex marriages
    - Requires employers to review:
      - FMLA policies and procedures;
      - Impact of changes on “FMLA-like” leave policies;
      - Overlap between state and federal leave laws;
      - Certification or “proof” of marriage requirements;
      - Same-sex parental leave.
- Parties to a marriage equivalent relationship such as civil unions are not covered by the FMLA.



# Does *Windsor* foreshadow changes in federal employment laws?

- While *Windsor* was predicated on the due process clause not the 14<sup>th</sup> amendment, the language of the opinion may be used to effect change in areas unrelated to marriage.
- Federal Non-Discrimination Statutes
  - Title VII expansion by courts or the EEOC
  - Implications for the Employment Non-Discrimination Act (ENDA)



# Questions

