



# Benefits Alert

## Legal developments affecting employee benefits

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### The Supreme Court strikes down DOMA—what it means for employee benefit plans

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In *United States v. Windsor*, the Supreme Court struck down the portion of the federal Defense of Marriage Act (“DOMA”) that prohibited the federal government from recognizing same-sex marriages for purposes of any federal laws. This ruling gives same-sex spouses access to the same rights that opposite-sex spouses enjoy under more than 1,000 federal laws and regulations.

Specifically, the Court ruled that the Constitution required the federal government to recognize the same-sex marriages of individuals who were legally married under the laws of their state. The decision did not expressly require all states to recognize same-sex marriages. This issue is likely to come before the Supreme Court in the future. Currently, 13 states and the District of Columbia permit same-sex marriages.

The decision has important implications to employers and their benefit plans. Pending guidance from the Internal Revenue Service and Department of Labor, employers should consider the following implications:

1. The Internal Revenue Code provides that employer subsidies of health insurance for spouses and for dependent coverage can be tax-free. However, DOMA required employers to impute income to the employees when health benefits were provided to the employees’ same-sex spouses and their children (unless they separately qualified as the employee’s tax dependent). Employers will no longer need to impute income for these types of benefits, and should stop doing so as soon as administratively practical. In addition, employers may be able to file for refunds of the employer share of FICA taxes paid in the last three years on such imputed income. Employers may also be able to file on behalf of their employees for refunds of the employee share of FICA taxes paid in the last three years, but only if the employer obtains from the employee a signed statement promising not to separately pursue a FICA refund. Employers should watch for IRS guidance on how any such refunds should be claimed.
2. Because DOMA applied to federal tax law, same-sex spouses and the spouses’ children were generally not eligible for pre-tax benefits through a cafeteria plan or medical expense reimbursement account (unless they separately qualified as the employee’s tax dependent). As a result, the employee

premium for health coverage for a same-sex spouse or the spouse's children had to be paid on an after-tax basis, and any Flexible Spending Accounts (FSAs) (including dependent care flexible spending accounts), Health Reimbursement Arrangements (HRAs), and Health Savings Accounts (HSAs) generally could not reimburse expenses of a same-sex spouse or the spouse's children. Same-sex spouses and the spouses' children can now be covered by the employer's cafeteria plan, FSA, or HRA or the employee's HSA. Furthermore, a change in family status involving a same-sex spouse, or a change in a same-sex spouse's coverage and employment may be recognized as a "change in status" event that would allow mid-year election changes under a cafeteria plan. Employers should review their cafeteria plan and medical expense reimbursement plan documents or summary plan descriptions to determine whether amendments are necessary to reflect these changes. Employers may also want to notify employees that there has been a change in plan eligibility as a result of the *Windsor* decision, which would permit employees to enroll same-sex spouses and their children in the employer's plan within the time frame allowed for other change in status events (typically 30 days for most plans).

3. COBRA provides health care continuation coverage upon certain qualifying events to qualified beneficiaries. Qualified beneficiaries under COBRA are limited to participants, their spouses, and their children. Same-sex spouses will now have COBRA rights as qualified beneficiaries. Also, because divorce is a qualifying event under COBRA, divorce between same-sex spouses will now be a COBRA qualifying event.

4. Other than for COBRA, the effect of the decision on insured health, life, and disability benefits may be limited. The rights of same-sex spouses under insured programs previously had been governed by state insurance law, and the Supreme Court decision does not change this.

5. The Family and Medical Leave Act (FMLA) requires employers to provide time off from work where certain events impacting an employee's spouse, such as a serious health condition or a qualifying exigency related to a spouse's military leave, qualify the employee for federally protected leave. Employers will now need to provide leave benefits where the qualifying event involves a same-sex spouse.

6. Same-sex spouses will now be treated as spouses for purposes of Medicare secondary payer and late enrollment rules. This will eliminate anomalies created pre-*Windsor* when same-sex spouses were not recognized as spouses under Medicare, but will require most employer health plans to provide coverage that is primary rather than secondary to Medicare where an active employee has a same-sex spouse who is over 65 covered under the employee's health plan.

7. Death benefits paid from retirement and 401(k) plans to beneficiaries other than the participant's spouse require spousal consent. As a result of the Supreme Court decision, same-sex spouses now need to consent to beneficiary designations. Employees with same-sex spouses should be sure to review and update their plan beneficiary designations.

8. A retirement plan administrator is no longer precluded from dividing a participant's account upon the divorce from a same-sex spouse if a court issues a Qualified Domestic Relations Order.

9. Defined benefit pension plans must provide special annuity retirement benefits for a spouse upon retirement or death of the employee, unless the spouse consents otherwise. Plan administrators will now need to consider same-sex spouses in states that recognize same-sex marriage as spouses for purposes of administering these defined benefit pension plan annuity provisions.

10. Retirement plans also provide special hardship distribution, required minimum distribution, and rollover rules that apply to spouses. These rules will now extend to same-sex spouses.

11. There are a number of fringe benefits that can be provided to an employee's spouse that can now be extended to same-sex spouses on a tax-free basis. These include: tuition benefits provided by a university to its employees and their spouses, group life insurance, no additional cost services, and employee discounts.

While some employers may want to wait for official guidance before making some plan changes and taking other steps in response to the new decisions, there are several action items that employers may want to address immediately, including:

- Notify employees of the window (typically 30 days) under your cafeteria plan for family status changes and special enrollment rights for same-sex spouses and their dependents,
- Stop imputing income for health plan benefits and premium payments for same-sex spouses,
- Review definitional and choice-of-law provisions of benefit plans concerning the definition of "spouse,"
- Start obtaining spousal consent from same-sex spouses for any defined benefit plan retirement distributions,
- Advise employees married to same-sex spouses to review their death beneficiary designations,
- Plan to file FICA refund claims, and
- Send the required general COBRA notice to same-sex spouses who have not previously received it.

The new decision creates a number of issues that still need to be resolved. For example, it is not clear how a plan should treat a same-sex spouse who moves to a state that does not recognize same-sex marriage, or what happens with respect to defined benefit plan annuities or retirement plan death benefits paid in prior years to someone other than the same-sex spouse. These issues may be addressed by future administrative guidance or future court decisions.

The *Windsor* decision has wide-ranging ramifications to employers. If you have any questions, about the impact of this decision to your benefit plans or employment policies, we would be happy to help you.

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