# CLIENT ALERT: Supreme Court Strikes Down Defense of Marriage Act: What This Means for Employers

On June 26, 2013, the United States Supreme Court issued a ground-breaking decision that greatly expanded same-sex marriage rights and that will have wide reaching consequences for employers. In *United States v. Windsor*, the Court struck down Section 3 of the Defense of Marriage Act of 1996 ("DOMA"), which defined "marriage" as a "legal union between one man and one woman" for purposes of over 1,000 federal laws. DOMA's definition of marriage had far reaching effects whereby same-sex couples in states that recognize same-sex marriage were afforded the same rights and privileges as opposite-sex couples under state law but not under federal law (e.g., health insurance, federal tax, immigration, and Family and Medical Leave Act).

*Windsor* involved Edith Windsor and her late same-sex spouse, Thea Spyer. The couple's marriage was legally recognized in the state of New York; however, pursuant to Section 3 of DOMA, the marriage was not recognized under federal law. As a result, Windsor was required to pay more than $363,000.00 in federal estate taxes on her inheritance of Spyer's estate when Spyer died. Windsor would not have been subjected to this federal tax had she been married to a man. Windsor sued the United States, claiming she was discriminated against on the basis of her sexual orientation. The U.S. District Court and the U.S. Court of Appeals for the Second Circuit both sided with Windsor and held that Section 3 of DOMA unconstitutionally violated the Fifth Amendment's equal protection clause. The Supreme Court agreed.

With the overturning of Section 3 of DOMA, the definition of "spouse" and what constitutes "marriage" will depend upon an individual state's definition. Same-sex marriage is currently legal in twelve states: Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Washington, Maine, Maryland, Rhode Island, Delaware and Minnesota, along with the District of Columbia. The Supreme Court's decision in *Hollingsworth v. Perry*, issued on the same day as *Windsor*, resulted in California being added to this list.

This definitional change will result in significant implications for employers located in same-sex marriage states or who have employees employed in such states. The *Windsor* decision could also affect employers operating in states which do not recognize same-sex marriage whose employees were married in a same-sex marriage state, and who then relocated.

*Windsor*'s overall impact is expected to be extremely broad, possibly affecting hundreds of laws and regulations upon which payroll, human resources and employee benefit systems are based. However that impact will not be clear until the various federal and state regulatory authorities issue revised guidance. In the meantime, the following highlights some of the potential implications for employers residing in states that recognize same-sex marriage:

- Family and Medical Leave Act ("FMLA"): FMLA requires covered employers to provide employees time off to care for their sick spouses, to care for a covered service member and/or to address certain qualifying exigencies when his or her spouse is on covered active duty or called to covered active duty. Employers must now provide this benefit to same-sex spouses.
- Health Insurance/Imputing Federal Taxable Income: Employees may no longer be required to pay federal income taxes on the income imputed for an employer's contribution to a same-sex spouse's medical, dental, or vision coverage. Likewise, employers may no longer have reporting and withholding obligations on such benefits.
- COBRA offerings: COBRA continuation coverage must be offered to same-sex spouses.
- Section 125 Flexible Spending Plans: Employers must allow tax free reimbursements for the

needs of same-sex spouses.

- HIPPA Special Enrollment Rights: To the same extent as applied to opposite-sex spouses, an employee may make a mid-year election to add his or her legally married same-sex spouse to the employee's health plan coverage if the spouse loses coverage under another plan.
- Qualified Profit Sharing and 401(k) Plans: Same-sex spouses now have the right to be the default beneficiary as opposite-sex spouses.
- Immigration benefits: Same-sex married couples are expected to enjoy the same benefits as opposite-sex couples. Likely outcomes include the same-sex spouse of a green-card sponsored employee to obtain permanent resident in the U.S. as members of the immediate family.

The impact of *Windsor* will be particularly complicated for employers which have operations in both states which recognize same-sex marriage and states which do not recognize such marriages. *Windsor* also does not address the extent to which same-sex spouses are to be regarded as spouses if the same-sex couple were married in a state that recognizes same-sex marriage but reside and/or is employed in a state that does not recognize same-sex marriages.

*Windsor* also does not address whether it will be given retroactive effect. If made retroactive, a same-sex spouse could claim previously denied benefits for past years and employees could claim refunds for taxes paid for the cost of benefits provided to their same-sex spouses. Employers may be able to seek refunds for their portion of payroll taxes paid for the cost of such benefits and may be required to amend tax forms for open tax years.

As we await further guidance from federal regulators and agencies, employers should review their payroll and employee policies, along with plan documents, summary plan descriptions, and insurance policies, in order to determine what changes need to be implemented in response to *Windsor*. A good place to begin this review is to examine all employer policies or benefit plans which mention or have applicability to spouses of employees.

Because of *Windsor's* broad and uncertain impact, employers are encouraged to contact their MBJ attorney with questions.

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