

## DOMA Implications for Employee Benefit Plans: Round 2

By Kathryn J. Kennedy



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This report updates Kennedy's earlier *Tax Notes* article on employee benefits guidance issued by the IRS and the Department of Labor soon after the Supreme Court's 2013 decisions in *Hollingsworth v. Perry* and *United States v. Windsor* on the constitutionality of the Defense of Marriage Act. The IRS has since issued additional helpful guidance, and there has been a groundswell of federal and state litigation contesting states' same-sex marriage bans.

In this report, Kennedy discusses the current state of affairs and highlights many of the questions not addressed by the IRS and Labor Department guidance. She argues that without additional regulatory guidance, which appears unlikely, those questions will have to be resolved through future litigation.

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### I. Summary of Previous *Tax Notes* Article<sup>1</sup>

In 1996 same-sex marriages were not legal in any state. However, in that year, the Hawaii Supreme Court, in anticipation of a change, ruled that the state constitution could confer a right to same-sex marriages.<sup>2</sup> Reacting to the prospect of states expanding the definition of marriage to include a union between same-sex partners, Congress enacted section 3 of the Defense of Marriage Act (DOMA), amending the federal Dictionary Act to define "marriage" and "spouse" for federal law purposes, as a union between one man and one woman, thereby excluding same-sex couples.<sup>3</sup> It similarly enacted section 2 of DOMA to affirm that states did not have to recognize same-sex marriages performed in another state, including any rights or claims arising under that relationship.<sup>4</sup>

After DOMA's passage, 35 states adopted a similar definition of marriage to include only marriages between a man and a woman within the state and failed to recognize same-sex marriages performed in other states.<sup>5</sup> In 2001 Massachusetts became the

<sup>1</sup>Kathryn J. Kennedy, "DOMA Implications for Employee Benefits Plans," *Tax Notes*, Sept. 30, 2013, p. 1571.

<sup>2</sup>*Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), *reconsideration and clarification granted in part*, 74 Haw. 645, 852 P.2d 74 (1993). In 1996 Judge Kevin K.S. Chang held that the state had not met its burden and enjoined the state from refusing to issue marriage licenses to same-sex couples. *Baehr v. Miike*, Court for the First Circuit, Hawaii, No. 91-139. The next day, Chang stayed the order, acknowledging that it could be reversed by the Hawaii Supreme Court upon appeal. Sandra Oshiro, "Hawaiian Judge Puts Same-Sex Marriage Ruling on Hold," *The Nation* (Dec. 6, 1996), at A12.

<sup>3</sup>P.L. 104-199, section 3.

<sup>4</sup>P.L. 104-199, section 2.

<sup>5</sup>"Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws," Nat'l Conf. of State Leg. The 33 states currently with "mini-DOMA" statutory or constitutional provisions are Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), Colorado (2008), Florida (2008), Georgia (2004), Idaho (2006), Indiana (2004), Kansas (2005), Kentucky (2004), Louisiana (2004), Michigan (2004), Mississippi (2004), Missouri (2004), Montana (2004), Nebraska (2000), Nevada (2002), North Carolina (2012), North Dakota (2004), Ohio (2004), Oklahoma (2004), Oregon (2004), Pennsylvania (1996), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah

(Footnote continued on next page.)

first state to legally recognize same-sex marriages. In my previous article on this subject, I noted that there were 13 states (mostly in the northeast corridor of the United States) and the District of Columbia that legislatively affirmed that marriage includes same-sex marriages.<sup>6</sup> Since its publication, two states — Hawaii and Illinois — have dropped their “mini-DOMA” statutes, and two state supreme courts — New Jersey’s and New Mexico’s — found those states’ same-sex bans to be unconstitutional. However, the number of states with legalized same-sex marriages is increasing, as federal and state courts continue to hold those bans as unconstitutional.

In *Hollingsworth v. Perry*, at issue was the standing of the individuals appealing an initial lawsuit that challenged a state voter initiative, known as Proposition 8, which amended the California state constitution to recognize only marriages between opposite-sex couples.<sup>7</sup> The California governor, attorney general, and various state and local officials charged with enforcing the state’s marriage law had refused to do so, prompting proponents of Proposition 8 to attempt to enforce it through the courts. Ultimately, the Supreme Court ruled that those proponents lacked standing to enforce the state ban against same-sex marriages. Therefore, it did not rule on the constitutionality of a state’s mandate to prohibit same-sex marriages either through its laws or state constitution, and section 2 of DOMA remained intact, permitting states to refuse to recognize valid same-sex marriages performed in other states.

In *United States v. Windsor*, there was a valid same-sex marriage performed in Canada between

Thea Spyer and Edith Windsor.<sup>8</sup> Spyer died and left her estate to Windsor, who sued for a federal estate tax refund in federal court because she could not qualify for the federal estate tax marital exemption.<sup>9</sup> In a 5-4 decision, the Court struck down the constitutionality of DOMA section 3 under the due process clause of the Fifth Amendment.<sup>10</sup> Because of the broad reach of DOMA — affecting more than 1,000 federal statutes and regulations — the Court held that the law imposed “restrictions and disabilities” that rose to the level of injury to protected “liberty” under the Fifth Amendment.<sup>11</sup> In ascertaining whether the law was motivated by an improper purpose, the Court stated that “‘discriminations of an unusual character,’ especially require careful consideration.”<sup>12</sup> Without stating whether its analysis was guided by strict scrutiny, heightened scrutiny, or a rational basis test, the Court held that DOMA section 3 violated basic due process and equal protection principles.<sup>13</sup> According to the Court, the guarantee of equality under the Fifth Amendment “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group.<sup>14</sup> However, the Court’s holding did not extend equal protection to domestic partnerships or civil unions performed under state or foreign laws.<sup>15</sup> It also did not establish a constitutional right for same-sex couples to marry under state law, because that issue was not before the Court. In his dissent, Justice Antonin Scalia remarked that the central question in the case was whether the equal protection clause would restrict states from defining marriage as only between a man and a woman.<sup>16</sup> Therefore, again, the Court left intact section 2 of DOMA.

*Windsor* was issued on June 26, 2013, and would have immediate consequences for employee benefit

(2004), Virginia (2006), West Virginia (2012), Wisconsin (2006), and Wyoming (1977). Puerto Rico also does not recognize same-sex marriages performed in other jurisdictions. While current litigation will be discussed later, case law in Oregon and Pennsylvania has resulted in legalizing the recognition and performance of same-sex marriages in those states as well, striking down their bans on and refusals to recognize same-sex marriages.

<sup>6</sup>*Id.* There are now 17 states, along with the District of Columbia, that have enacted legislation that explicitly permits same-sex marriage: California, Connecticut, Delaware, Hawaii (Dec. 2, 2013), Illinois (June 1, 2014), Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey (Oct. 21, 2013), New Mexico (Dec. 19, 2013), New York, Rhode Island, Vermont, and Washington. Colorado, Oregon, Wisconsin, and Nevada have civil union spousal equivalents.

<sup>7</sup>570 U.S. \_\_\_, 133 S. Ct. 2652, 2656 (2013). The district court allowed the proponents to intervene and held the ban to be unconstitutional. *Perry v. Schwarzenegger*, 704 F. Supp.2d 921 (N.D. Cal. 2010). The Ninth Circuit affirmed both as to standing of the proponents and the merits of the case. *Perry v. Brown*, 671 F.3d 1052, 1064 (9th Cir. 2012).

<sup>8</sup>*Id.* at 2675, 2679.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* at 2693-2694.

<sup>11</sup>*Id.* at 2692. The Court did not scrutinize DOMA section 3 under the 14th Amendment’s strict scrutiny, heightened scrutiny, or rational basis test.

<sup>12</sup>*Id.* at 2693 (quoting *Romer v. Evans*, 517 U.S. 620, 633, 116 S. Ct. 1620 (1996)).

<sup>13</sup>*Id.* at 2696 (noting that the Fifth Amendment prevents the federal government from degrading or demeaning a person’s liberty in a way that DOMA section 3 seeks to do, the equal protection guarantee of the 14th Amendment makes the Fifth Amendment “right all the more specific and all the better understood and preserved”). *Id.*

<sup>14</sup>*Id.* at 2693.

<sup>15</sup>*Id.* at 2696 (as it refers to states’ marriage laws).

<sup>16</sup>*Id.* at 2705 (remarking that the majority holding that the federal government is limited in defining marriages to exclude same-sex marriages leaves “the second, state-law shoe to be dropped later, maybe next Term”).

plans that confer rights and benefits only to employees' spouses, but not to other beneficiaries.<sup>17</sup> The two fundamental issues for employee benefit plans that needed to be addressed were: (1) who was a spouse for ERISA and federal income tax code purposes (for example, a spouse as determined by the state of celebration; the employee's state of domicile; or the state in which the employer resides); and (2) what is the effective date by which employee benefit plans should treat same-sex spouses as spouses.

On August 29, 2013, the IRS issued Rev. Rul. 2013-17,<sup>18</sup> effective as of September 16, 2013, affirming that the state of celebration would control whether the same-sex marriage was valid under federal tax law even if the married couple resided in a domestic or foreign jurisdiction that did not recognize same-sex marriages. Thus, the state of celebration, not the state of domicile, would become applicable. However, registered domestic partners and individuals in civil unions under valid state laws would not be treated as married for federal tax purposes. The ruling applied to all qualified retirement plans and health plans, regardless of whether the plan amendments had yet to be adopted. For qualified retirement plans, there are mandated spousal benefits and rights that must now be extended to same-sex spouses, whereas there are individual tax implications for spouses covered under an employee's health plan, a cafeteria plan, or other employer-provided fringe benefits. For employee benefit plan purposes, individual taxpayers were given the choice to file amended returns for open tax years to recover overpaid federal income and employment taxes on health coverage or fringe benefits that were provided by the employer and should have been excluded from the employee's income.

There were three holdings in Rev. Rul. 2013-17:

- the terms "spouse," "husband and wife," "husband," and "wife" were to be interpreted for federal tax purposes to include an individual married to a person of the same sex if the individuals were lawfully married under state law or in a foreign jurisdiction;
- in determining whether the marriage of a same-sex couple is valid for federal tax purposes, the Service will use the state of celebration as controlling, even if the same-sex couple

is domiciled in a state that does not recognize same-sex marriages; and

- for federal tax purposes, a marriage does not include a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under that law.

Rev. Rul. 2013-17 had immediate tax implications, as the following benefits would no longer be taxable for the same-sex spouse of the employee: healthcare coverage under section 106; qualified tuition reduction under section 107; meals and lodging for the convenience of the employer under section 119; reimbursements for a cafeteria plan under section 125; reimbursements for dependent care assistance plans under section 129; and fringe benefits (for example, employee discounts) under section 132. The Service noted that it would issue future guidance on the retroactive application of *Windsor* to other employee benefits and employee benefit plans. Similarly, the Labor Department issued Technical Release 2013-14<sup>19</sup> on September 18, 2013, and affirmed the use of the state of celebration for purposes of Title I of ERISA. Unfortunately, the Labor Department's guidance provided no effective date and did not discuss retroactivity issues, as DOMA was enacted in 1996 and struck down on June 26, 2013. Unlike the requirement that spousal benefits and rights be afforded under retirement plans, Title I does not require health and welfare plans to provide spousal coverage.<sup>20</sup> However, there is a colorable Title VII claim if the employer-provided health and welfare plan extended coverage to opposite-sex spouses but not same-sex spouses after *Windsor*.<sup>21</sup>

At the same time the Service issued Rev. Rul. 2013-17, it released frequently asked questions in which it elaborated on its advice in the revenue ruling.<sup>22</sup> It provided more tax filing information for

<sup>19</sup>Technical Release 2013-14, "Guidance to Employee Benefit Plans on the Definition of 'Spouse' and 'Marriage' Under ERISA and the Supreme Court's decision in *United States v. Windsor*" (Sept. 18, 2013). Note that under the Reorganization Plan No. 4 of 1978, the secretary of Labor has the authority to interpret provisions that have parallel provisions in both ERISA and the code.

<sup>20</sup>Insured health and welfare plans may have to comply with state insurance laws that have not been preempted by ERISA. ERISA section 514(b)(2)(A).

<sup>21</sup>See *In re Fonberg*, 736 F.3d 901 (9th Cir. 2013) (holding that the exclusion of a same-sex domestic partner from the employer-provided health coverage was discrimination based on sexual orientation and constituted a deprivation of due process and equal protection).

<sup>22</sup>"Answers to Frequently Asked Questions of Individuals of the Same Sex Who Are Married Under State Law" (hereinafter referred to as FAQs for Same-Sex Married Spouses) and "Answers to Frequently Asked Questions for Registered Domestic

(Footnote continued on next page.)

<sup>17</sup>While the case was issued on June 26, 2013, Supreme Court law is generally effective 25 days after the decision, which would be July 23, 2013. See Rule 44 of the Rules of the Supreme Court of the United States (2010).

<sup>18</sup>Rev. Rul. 2013-17, 2013-38 IRB 201.

same-sex individuals who are lawfully married. It also answered five questions for employers about the tax treatment of health and welfare coverage, giving examples of the amounts eligible for refund and providing the refund process if the employer wished to pursue a refund for federal income and FICA taxes paid on benefits.<sup>23</sup> In the final five questions, it addressed the impact of *Windsor* on qualified plans, noting that effective September 16, 2013, a spouse must include same-sex spouses for qualification requirements that relate to “spouses.”<sup>24</sup> The Service noted that it intended to issue further guidance on the application of *Windsor* for periods before September 16, 2013, including on the necessity of plan amendments (and the timing of any required amendments) and any necessary corrections relating to plan operations.

To encourage employers to pursue refunds for overpayments of federal income and FICA taxes regarding benefits provided to same-sex spouses and remuneration paid to same-sex spouses, it issued Notice 2013-61, detailing special administrative procedures to streamline the claims for refund.<sup>25</sup> The notice provided two alternative administrative procedures. The first allowed employers to use the fourth quarter 2013 Form 941, “Employer’s Quarterly Federal Tax Return,” to correct overpayment of taxes for the first three quarters of 2013. The second allowed employers to file one Form 941-X, “Adjusted Employer’s Quarterly Federal Tax Return or Claim for Refund,” for the fourth quarter of 2013 to correct overpayment of taxes for all quarters of 2013.<sup>26</sup>

Despite the IRS and Labor Department guidance in 2013, there remained a host of unanswered questions, which were outlined in the previous article. As a result of 2014 guidance, several of those questions have been resolved. A practical problem that seems to continue to plague plan administrators is how to determine the validity of a same-sex marriage. For opposite-sex couples, a simple repre-

sentation on the part of the employee that he is married is usually sufficient. However, in the context of same-sex couples, it is unclear whether plan administrators will require proof of the same-sex marriage, including the date of the marriage (as the date may be relevant in determining whether state law was valid at the time). If the latter approach is used, then it is likely that a marriage certificate will be required of all employees to determine whether there is a valid marriage for the employer to avoid treating opposite-sex couples differently than same-sex couples.

## II. 2014 IRS Guidance

### A. Notice 2014-1

The guidance issued by the IRS in Notice 2014-1, 2014-2 IRB 270, provided answers for cafeteria plans, including health and dependent care flexible spending accounts, as well as health savings accounts and dependent care assistance programs, since those arrangements may involve participation by same-sex spouses.

**1. Cafeteria plans.** Normally, participant elections to choose between taxable and nontaxable benefits would result in imputed income under the code. An exception exists under section 125 (subject to a dollar maximum per calendar year) for elections of pretax salary deferrals under a cafeteria plan (that is, an FSA) to offset the cost of healthcare for the participant, spouse, and dependents incurred during the calendar year — either for premiums to cover that healthcare or for healthcare expenses that are not otherwise covered by the employer-provided health plan. The FSA can also reimburse for some dependent care expenses incurred by the participant. The employer-provided health plan may — but is not required to — offer coverage for the participant’s spouse and dependents. If the plan permitted coverage of the participant’s same-sex spouse before *Windsor*, those premium costs for health coverage had to be paid by the participant in after-tax dollars, and the health costs of the same-sex spouse could not be reimbursed under the cafeteria plan. Hence, if the employer-provided health plan covers spouses and dependents, the definition of spouse will clearly be relevant in determining the spouse’s rights and tax benefits in the future.

Generally, for constructive receipt reasons, the participant’s election to make pretax salary deferrals must be made before the beginning of the plan year and cannot be changed during the plan year. However, the cafeteria plan may permit (and most do) a participant to revoke an election during the period of coverage (usually the calendar plan year) and make a new election that corresponds with the

Partners and Individuals in Civil Unions” (hereinafter referred to as FAQs for Registered Domestic Partners and Individuals in Civil Unions), available at <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>. FAQs appear on the IRS’s website and are regarded as subregulatory authority.

<sup>23</sup>*Id.* at Q&A 10-Q&A 14, noting that an employer could pursue a refund for FICA taxes paid on benefits for open tax years on its benefit and on behalf of the affected employees, but could not pursue a refund for overwithheld income tax for prior years on its own behalf.

<sup>24</sup>*Id.* at Q&A 15-Q&A 19.

<sup>25</sup>Notice 2013-61, 2013-44 IRB 432. Note that most employers are not relying on that notice to process refunds on behalf of employees.

<sup>26</sup>*Id.*

special enrollment rights set forth in the regulations.<sup>27</sup> One of the special enrollment rights is the participant's change in status. That change in election is permitted if there is a change in the participant's marital status (for example, marriage, death of spouse, divorce, or legal separation or annulment), a change in the employment status of the spouse, or a change in the place of residency of the spouse.<sup>28</sup> Under the regulations, there is a second circumstance in which the plan may permit an employee to revoke an election and make a new one — if there is a significant change in the cost of coverage.<sup>29</sup>

Rev. Rul. 2013-17 permitted participants who made pretax salary deferrals for employer-provided health coverage under a cafeteria plan and elected to provide coverage to a same-sex spouse on an after-tax basis under the plan to treat the amounts as pretax salary deferrals and to claim a refund of taxes paid on those premiums for all open tax years.<sup>30</sup> However, it left open the question of whether employers could permit midyear election changes for same-sex couples on the theory that there was a change in status or a significant change in the cost of coverage (for example, a change in the taxation of premiums for spousal health coverage and pretax reimbursement for spousal health benefits not covered by the employer-provided plan).

Notice 2014-1 amplified Rev. Rul. 2013-17 by addressing that question and permitting midyear election changes for same-sex couples either married as of June 26, 2013 (the date of the issuance of the *Windsor* decision) or later during 2013.<sup>31</sup> If the employer had acted quickly after the issuance of *Windsor* and permitted employees to make a midyear election change to add a lawfully married same-sex spouse for coverage purposes, that midyear change would be effective immediately, as long as it was filed at any time during the cafeteria plan year that included June 26, 2013, or December 16, 2013 (the date of the issuance of Notice 2014-1).<sup>32</sup>

<sup>27</sup>Reg. section 1.125-4(b).

<sup>28</sup>Reg. section 1.125-4(c)(1)-(2). The change in status rules under the regulations also include events that change an employee's number of dependents (e.g., birth, death, or adoption).

<sup>29</sup>Reg. section 1.125-4(f).

<sup>30</sup>See *supra* note 18; see also FAQs for Same-Sex Married Spouses and FAQs for Registered Domestic Partners and Individuals in Civil Unions, Q&A 11, *supra* note 22. See also Notice 2013-61, *supra* note 25, in which the IRS sets forth special administrative procedures for employers that wish to make adjustments or claims for a refund or credit of employment taxes paid on the value of same-sex spousal benefits that are excludable from the employee's income and wages.

<sup>31</sup>2014-3 IRB 407.

<sup>32</sup>*Id.* at Q&A 3.

That midyear election would be allowed on the basis that the participant experienced a change in legal marital status.

For example, Employee A is married to same-sex Spouse B in October 2012 in a state of celebration that validly recognizes the marriage. During open enrollment for the 2013 plan year, Employee A elects to pay the employee portion of the cost of self-only health coverage through tax-deferral salary reductions under the cafeteria plan. The employer-provided plan permits same-sex spouses to participate. On October 5, 2013, Employee A elects to add health coverage for Spouse B and makes a new salary deferral election under the cafeteria plan to pay for the employee portion of Spouse B's health coverage. Because of the uncertainty of the *Windsor* decision, the employer declines to implement the election change. After publication of the notice, the employer implements the election as a change in status election, enrolls Spouse B in the health plan as of December 20, 2013, and begins to take salary deferrals from Employee A's compensation for the pay period beginning December 20, 2013. That cafeteria plan is deemed to be in compliance with the rules of section 125. Alternatively, if the employee's election to add spousal coverage was made on September 1, 2013, and the employer implemented the change as of October 1, 2013, with appropriate pretax salary deferrals, the plan would also be deemed to be in compliance with the rules of section 125.

For employers whose cafeteria plans allow for midyear election changes for changes in legal status but that delayed implementation of those changes until guidance was issued by the Service, the effective date would be on the date that any other change would be effective.<sup>33</sup> For example, Employee A made a revised election covering his same-sex spouse under the health plan with pretax salary deferrals on October 5, 2013. The employer declined to implement the change as of that date, but may now enroll the same-sex spouse in the health plan as of December 20, 2013, and make appropriate salary deferrals beginning with the pay period starting December 20, 2013.

For those employers that waited and then permitted midyear election changes on the basis of a "significant change in the cost of coverage," the notice affirms that those midyear elections would be valid even though a change in the tax treatment of a benefit generally does not constitute a significant change in the cost of coverage.<sup>34</sup> Hence, the cafeteria plan will not be treated as failing to satisfy

<sup>33</sup>*Id.* at Q&A 3, Example 1.

<sup>34</sup>*Id.* at Q&A 2.

the requirements of section 125 solely because the plan administrator interpreted the change in tax treatment as resulting in a significant change in cost of coverage. The effective date for midyear election changes is the later of the date the election would have otherwise been effective under the cafeteria plan or a reasonable period of time after December 16, 2013.<sup>35</sup>

As to when the employer must begin treating an employee's cost of health coverage for a same-sex spouse under the health plan as pretax deferrals (after receiving notice of a midyear election), the notice states it must be no later than the date the employer is required to reflect the amounts for income tax withholding purposes or a reasonable period of time after December 16, 2013.<sup>36</sup> However, the participant who had elected to pay the employee portion of healthcare costs through pretax salary deferrals and the same-sex spouse's portion of healthcare costs through after-tax contributions may exclude the after-tax contributions from gross income for the 2013 cafeteria plan year and any prior open tax years for federal income and FICA taxes.<sup>37</sup>

As for FSA reimbursements (including health, dependent care, or adoption assistance), the notice allows reimbursement of covered expenses as of the beginning of the cafeteria plan year that included June 26, 2013 (which for calendar plan years is January 1, 2013), or, if later, the date of marriage.<sup>38</sup> Hence, if the same-sex spouse was married as of the beginning of the plan year, all expenses incurred would be eligible for reimbursement. It goes on to say that the same-sex spouse will be treated as covered by the participant's FSA for the entire period even if the participant initially elected self-only coverage under the FSA for that period.<sup>39</sup> For example, if Employee A elected \$2,500 in coverage under the health FSA but added his same-sex spouse under the employer health plan on October 5, 2013 (making a new salary reduction election), the FSA may reimburse for a properly substantiated

healthcare expense incurred by the spouse before October 5, 2013.<sup>40</sup> Many employers will question how to determine whether the participant has a lawful same-sex spouse. In its example, the Service noted that the participant's reimbursement request may include simply his representation that he was legally married to his same-sex spouse on the date the healthcare expenses were incurred.<sup>41</sup> That appears to answer another open question about what verification the employer should request in determining whether an employee is validly married to a same-sex spouse. Just as an employee's representation that he is validly married to an opposite-sex spouse was usually sufficient pre-*Windsor*, that approach appears to be valid for same-sex couples.

If the terms of the cafeteria plan already permitted a change in election upon a change in legal marital status, generally a plan amendment will not be required to implement *Windsor*.<sup>42</sup> However, if the plan document did not so provide for those election changes and the employer chooses to permit them, the plan document must be amended to permit them on or before the last day of the first plan year beginning on or after December 16, 2013.<sup>43</sup>

**2. Contribution limits for HSA and dependent care assistance programs.** Under DOMA rules pre-*Windsor*, the participant could not contribute the maximum dollar amount (for example, \$6,450 for the 2013 tax year) to his HSA if the participant or the opposite-sex spouse had family health coverage under a high-deductible health plan.<sup>44</sup> The effect of *Windsor* is to apply that limit to same-sex couples treated as married for the 2013 and later tax years.<sup>45</sup> If the same-sex couple had elected to make contributions to separate HSAs that when combined, exceeded the HSA limit for a married couple, contributions for one or both spouses may be reduced for the remaining portion of the tax year to avoid exceeding the limit.<sup>46</sup> If excess contributions were made, they should be distributed from the HSAs of

<sup>35</sup>*Id.* at Q&A 3.

<sup>36</sup>*Id.* at Q&A 4. For that purpose, the participant need only provide notice of his marriage to his same-sex spouse by making a midyear election change attributable to a change in legal status or by filing a revised Form W-4 representing that he is married.

<sup>37</sup>*Id.* at Q&A 5. For that purpose, the employee may choose to pay the employee cost of same-sex spousal coverage on a pretax basis for the remaining pay periods in the 2013 cafeteria plan year by providing notice of the participant's marital status to the employer or to continue to pay the costs on an after-tax basis, seeking a refund for any taxes that were paid using after-tax contributions.

<sup>38</sup>*Id.* at Q&A 6.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at Q&A 6, Example 4.

<sup>41</sup>*Id.* at Q&A 6, Example 5.

<sup>42</sup>*Id.* at IV.

<sup>43</sup>*Id.* The amendment may be effective retroactively to the first day of the plan year including December 16, 2013, as long as the cafeteria plan operates in accordance with Notice 2014-1.

<sup>44</sup>Section 223(b)(5). For 2013, the limit for family coverage was \$6,450 and for individual coverage was \$3,250. Section 223(b)(2). For a married couple in which either spouse has family coverage under a high-deductible health plan, the HSA deduction is divided equally between the spouses unless they agree to a different division.

<sup>45</sup>Notice 2014-1, *supra* note 31, at Q&A 7.

<sup>46</sup>*Id.* at Q&A 8.

one or both spouses no later than the tax return due date for the spouses to avoid any excise taxes.<sup>47</sup>

Similarly, same-sex spouses are subject to the annual exclusion limit of \$5,000 (for married couples filing jointly) for dependent care FSAs. To the extent the same-sex married couple elected to make dependent care FSA contributions that when combined, would have exceeded the limit, contributions for one or both spouses may be reduced for the remaining portion of the tax year to avoid exceeding the limit.<sup>48</sup> To the extent the combined contributions to the dependent care FSA exceeded the limit, the amount of the excess will be included in the couple's gross income.<sup>49</sup>

## B. Notice 2014-19

On April 4, 2014, the IRS issued more guidance in the form of Notice 2014-19 relating to key code provisions affecting qualified plans, setting forth the effective dates (thereby addressing the retroactivity issues for qualified plans outstanding under Rev. Rul. 2013-17) and the timing of any plan amendments.<sup>50</sup> It also issued "Frequently Asked Questions Regarding the Application of the Windsor Decision and Post-Windsor Published Guidance to Qualified Retirement Plans (FAQs)."<sup>51</sup> The notice addressed some, but not all, of the qualification rules applicable to married participants in qualified retirement plans.

The notice contains the following qualification rules:

- Under section 401(a)(11), some qualified retirement plans must provide a qualified joint and survivor annuity (QJSA) upon retirement to married participants and a qualified pre-retirement survivor annuity (QPSA) to the surviving spouse of a married participant who dies before retirement unless those annuities are waived by the married participant with a valid spousal waiver. Likewise, qualified plans that must provide QJSA and QPSA benefits must obtain spousal consent before making a plan loan to the participant under the terms of the plan.<sup>52</sup>

<sup>47</sup>*Id.* Any excess contributions that remain undistributed as of the due date for the filing of the spouse's tax return (including extensions) are subject to excise taxes under section 4973.

<sup>48</sup>Notice 2014-1, *supra* note 31, at Q&A 10.

<sup>49</sup>*Id.*, as required by section 129(a)(2)(B).

<sup>50</sup>Notice 2014-19, 2014-17 IRB 979.

<sup>51</sup>"Answers to Frequently Asked Questions Regarding the Application of the *Windsor* Decision and Post-*Windsor* Published Guidance to Qualified Retirement Plans" (hereinafter referred to as FAQs Regarding the Application of *Windsor* and Post-*Windsor* Published Guidance).

<sup>52</sup>Section 417(a)(4).

- For qualified retirement plans that are exempt from the QJSA and QPSA requirements, the terms of the plan must provide that the married participant's benefits are payable in full, on the death of the participant, to the participant's spouse, unless the surviving spouse consents to an alternate beneficiary.<sup>53</sup>
- The minimum distribution plans and rollover rules of section 402(c) provide alternatives to surviving spouses not otherwise available to non-spousal beneficiaries.
- The attribution rules of sections 1563(e) and 318(a)(1) consider shares owned by a spouse to be owned by the other spouse for purposes of the controlled group rules of section 414(b) and the key employee determinations under section 416(i)(1), respectively.
- For employee stock ownership plan purposes, the accrual rules take into account stock owned by a participant's spouse.<sup>54</sup>
- The anti-alienation rules do not apply to assignments of an alternate payee's rights under a qualified domestic relations order.<sup>55</sup>

The Service stated that a QDRO must reflect the *Windsor* decision as of June 26, 2013.<sup>56</sup> The Service will apply the state of celebration approach in determining the marital status of a same-sex couple prospectively as of September 16, 2013 (the issuance date of Rev. Rul. 2013-17).<sup>57</sup> As a result, the employer has a choice to apply either the state of celebration or state of domicile approach as of the effective date of *Windsor* until September 16, 2013. Before the effective date of *Windsor*, the employer may, but is not required to, elect an earlier date for

<sup>53</sup>Section 401(a)(11)(B)(iii).

<sup>54</sup>Section 409(n) generally prohibits the allocation or accruals of securities under the ESOP for the benefit of certain individuals, including the spouse of the seller and the spouse of any individual who owns 25 percent or more of the securities. Section 409(p) prohibits any portion of the assets of an ESOP attributable to employer securities consisting of S corporation stock from accruing during a non-allocation year for the benefit of any disqualified person or certain family members of the disqualified person (including the spouse) in certain circumstances.

<sup>55</sup>Section 414(p). An alternate payee may be a spouse or former spouse of the participant and thus may be treated as a distributee of a QDRO distribution. *See* section 402(e)(1). It is unclear what state will determine the validity of a same-sex divorce. Hopefully, guidance will be issued confirming that a same-sex divorce may occur in any state that permits same-sex marriages, not necessarily the state of celebration.

<sup>56</sup>Notice 2014-19, *supra* note 50, Q&A 2.

<sup>57</sup>*Id.* The IRS relied on its authority under section 7805(b)(8) not to invoke retroactive effect.

some or all qualification purposes (hence, retroactivity can be on a selective basis); those retroactive effective dates may result in unintended consequences.<sup>58</sup>

As an aside, the IRS's prospective application of *Windsor* does not control for a benefits claim under Title I, which is under the Labor Department's purview. But to the extent that an employer decides to apply *Windsor* retroactively for qualification purposes, there are numerous unanswered questions such as:

- if a plan amendment is applied retroactively, will the IRS through its Employee Plans Compliance Resolution System (EPCRS) inform employers how to correct operational errors, as the plan would not have been operating in accordance with the retroactive plan amendment;
- how will a retroactive plan amendment affect benefits that are currently in pay status or distributions that have already been made that were contrary to the retroactive plan amendment; and
- how will a retroactive plan amendment affect domestic relations orders extending benefits to same-sex spouses that were not previously qualified by the plan administrator but are now permitted under the retroactive plan amendment?

A plan amendment may be required depending on the terms of the existing plan.<sup>59</sup> For example, if the plan's terms define a marital relationship either by referencing DOMA section 3 or limiting it to opposite-sex persons, the plan must be amended to reflect the outcome of *Windsor*.<sup>60</sup> Likewise, if any of the plan's provisions would be inconsistent with *Windsor*, a plan amendment would be required. It does not appear that model language will be issued by the Service. A plan amendment would also be required if the employer was going to adopt an effective date before June 26, 2013.<sup>61</sup> While not addressed in the notice, the situation in which the terms of the plan set forth a choice of law (for

example, in Michigan) and the plan administrator uses that law in determining who is a same-sex couple is addressed in the FAQs. In that case, the plan administrator cannot recognize that law to the extent it is inconsistent with *Windsor*.<sup>62</sup> That situation may need a clarifying amendment if the terms of the plan refer to the laws of a state that does not recognize same-sex marriages.

The notice addresses the question whether an amendment needed to implement *Windsor* and the IRS guidance will be deemed a plan amendment to a single-employer defined benefit plan for purposes of section 436(c) and holds that it will not.<sup>63</sup> Similarly, a plan amendment to a multiemployer plan to implement *Windsor* and the IRS guidance is not subject to the benefit increase requirement under section 432, unless the amendment extends retroactive effect before June 26, 2013.<sup>64</sup>

If no plan amendment is necessary, the plan must nevertheless be operated in accordance with *Windsor* as of June 26, 2013. The Service suggests that a clarifying amendment may be useful for purposes of plan administration.<sup>65</sup>

As to the deadline for making any plan amendments, the Service provides that it's the later of (1) the interim amendment deadline under section 5.05 of Rev. Proc. 2007-44 (for example, the tax filing deadline, including an extension for the plan year for which the change is effective), or (2) December 31, 2014.<sup>66</sup> The Service did not address whether an amendment to a preapproved plan to specify who is a spouse or what constitutes a marriage would

<sup>58</sup>*Id.* at Q&A 3. The Service notes that recognizing same-sex spouses for all purposes under a plan before June 26, 2013, may create provisions that are difficult to implement retroactively, such as the ownership attribution rules. However, it notes that the plan sponsor may wish to apply *Windsor* before June 26, 2013, for purposes of the QJSA and QPSA requirements of section 401(a)(11) and, in that case, solely regarding participants with annuity starting dates or dates of death on or after a specified date.

<sup>59</sup>*Id.* at Q&A 4.

<sup>60</sup>*Id.* at Q&A 5. A plan amendment would be required if the plan's terms were inconsistent with the *Windsor* decision, Rev. Rul. 2013-7, or Notice 2014-19.

<sup>61</sup>*Id.* at Q&A 7.

<sup>62</sup>FAQs Regarding the Application of *Windsor* and Post-*Windsor* Published Guidance, *supra* note 51, at FAQ-2.

<sup>63</sup>Notice 2014-19, *supra* note 50, at Q&A 9. Section 436(c) prohibits a plan amendment to a single-employer defined benefit plan that increases plan liabilities from taking effect unless the plan's adjusted funding target attainment percentage is sufficient or the employer makes additional contributions specified under section 436(c)(2). But section 436 (section 432 for multiemployer plans) applies to an amendment that is effective before June 26, 2013. *Id.*

<sup>64</sup>FAQs Regarding the Application of *Windsor* and Post-*Windsor* Published Guidance, *supra* note 51, FAQ-6.

<sup>65</sup>Notice 2014-19, *supra* note 50, Q&A 6.

<sup>66</sup>*Id.* at Q&A 8. There is a special deadline for governmental plans, inserting in place of "December 31, 2014," the close of the first regular legislative session of the legislative body with the authority to amend the plan, which ends after December 31, 2014. However, plans filing for a favorable determination letter during Cycle D, which runs from February 1, 2014, through January 31, 2015, must comply with the guidance set forth on the 2013 cumulative list, which includes Notice 2013-17, but not Notice 2014-19, and thus, the plan's definition of spouse must be consistent with the *Windsor* decision.

make it an individually designed plan and therefore no longer entitled to reliance on the previous advisory opinion.<sup>67</sup>

The FAQs provide some examples applying guidance to specific fact patterns. In the first FAQ, the Service questions how *Windsor* will affect beneficiary designations under a qualified profit-sharing or stock bonus plan for participants who die on or after June 26, 2013.<sup>68</sup> Because *Windsor* governs as of June 26, 2013, death benefits must be paid to the same-sex spouse (married on or after June 26, 2013) for deaths on or after that date, unless, of course, the same-sex spouse consented to an alternate beneficiary.<sup>69</sup> But FAQ-1 affirms that the plan administrator could have recognized a same-sex spouse only if the participant was domiciled in a state that recognized same-sex marriages before September 16, 2013.<sup>70</sup>

When operating the plan before the retroactive plan amendment, FAQ-3 directs the plan administrator to use principles similar to those set forth in the EPCRS.<sup>71</sup> For example, if a distribution was made to a nonspouse beneficiary after June 26, 2013, in the absence of a required same-sex spouse's consent, the EPCRS recognizes that spousal consent may be given retroactively.<sup>72</sup> However, if spousal consent cannot be obtained, then the plan must still pay the survivor portion of the benefit to the surviving spouse.<sup>73</sup>

The Service also addresses the question of whether new rights and benefits can be granted to participants with same-sex spouses (for example, amending the plan to provide a qualified joint and survivor annuity that was not previously available to participants with same-sex spouses). The answer is yes, if the other qualification rules are satisfied

<sup>67</sup>But see Notice 2014-37, 2014-23 IRB 1100, in which the Service holds that a midyear plan amendment needed to comply with the *Windsor* decision could be made to a section 401(k) or (m) safe harbor plan without jeopardizing its safe harbor status.

<sup>68</sup>FAQs Regarding the Application of *Windsor* and Post-*Windsor* Published Guidance, *supra* note 51, FAQ-1.

<sup>69</sup>*Id.* This is true regardless of any conflicting plan terms and any prior beneficiary or other designation to which the participant's spouse has not consented specifying an individual other than the spouse to receive those benefits (except as provided in a QDRO).

<sup>70</sup>*Id.*

<sup>71</sup>The EPCRS principles are set forth in section 6.04(1) of Rev. Proc. 2013-12, 2013-4 IRB 313.

<sup>72</sup>*Id.*, section 6.04(1) of Rev. Proc. 2013-12.

<sup>73</sup>*Id.* at section 6.04(2)(c). Under the EPCRS, the plan has the option of paying the surviving spouse the QJSA upon the participant's death (with the participant's portion of the QJSA offset by payments already made) or providing a lump sum equivalent of the actuarial value of the survivor's benefits.

(for example, nondiscrimination requirements).<sup>74</sup> As to the applicability of the IRS guidance on section 403(b) plans, the FAQs state that it is effective except as it relates to the timing of any plan amendments.<sup>75</sup> An open question exists for section 403(b) plans on the timing for adopting an amendment to comply with *Windsor* if the plan is subject to ERISA. Because the remedial amendment period for section 403(b) plans is still open, it would appear that there is no explicit deadline for adopting a plan amendment.<sup>76</sup>

**1. Dependent care assistance.** Employers may reimburse an employee for dependent care assistance or offer a dependent care assistance account as part of a cafeteria plan whereby an employee can defer on a pretax basis amounts used to reimburse for eligible child care expenses.<sup>77</sup> That exclusion from income did not extend to payments made to the employee's spouse, which for federal tax purposes did not include same-sex spouses pre-*Windsor*.<sup>78</sup> An exception does exist for dependent care FSAs when the payments are for the care of an employee's disabled spouse, a disabled child of the spouse (if that individual has lived with the employee for more than half a year), or a child of the spouse who is under the age of 13. Therefore, after *Windsor*, payments made to same-sex spouses will not qualify for dependent care assistance for federal income tax purposes unless one of the exceptions applies, which may negatively affect the same-sex spouse.

**2. HSAs.** Likewise, the participant could not be reimbursed for medical expenses from the HSA to a same-sex spouse. With *Windsor*, a same-sex spouse must be considered in determining whether the participant can contribute the maximum dollar amount to an HSA, thereby reducing the maximum they each could have previously used. Hence, validly married same-sex spouses will not be able to each contribute the maximum amount (in 2013 the maximum family limit was \$6,450) to their HSA. The default is that they each will be limited to 50 percent of the maximum unless they elect alternate

<sup>74</sup>FAQs Regarding the Application of *Windsor* and Post-*Windsor* Published Guidance, *supra* note 51, FAQ-4.

<sup>75</sup>*Id.* at FAQ-5.

<sup>76</sup>However, in an IRS phone forum held on July 28, 2014, the Service noted in its PowerPoint slides that the general deadline for section 403(b) plans for adopting a *Windsor* amendment is the expiration date of the preapproved plan remedial amendment period. See slide 25, available at [http://www.irs.gov/pub/irs-tege/403\\_plans\\_update\\_phoneforum\\_presentation.pdf](http://www.irs.gov/pub/irs-tege/403_plans_update_phoneforum_presentation.pdf).

<sup>77</sup>Section 129 provides for a federal tax exclusion for payments made for eligible dependent care services (up to a maximum dollar amount).

<sup>78</sup>Section 129(c)(1).

percentages. Medical expenses of the same-sex spouse may be reimbursed similarly from the HSA.

**3. COBRA.** COBRA mandates the continuation of medical coverage for the employee and his “qualified beneficiaries” in the event that coverage is lost because of a “qualifying event.”<sup>79</sup> Of course, the employee and beneficiaries must pay the cost of the coverage, but COBRA guarantees the availability of health coverage for a minimum period of time (referred to as the COBRA continuation period). Qualified beneficiaries include the spouse of the employee, assuming the spouse was covered under the plan as a beneficiary on the day before the qualifying event.<sup>80</sup> If the employee marries during the COBRA continuation period, the employee is permitted to enroll the spouse within 30 days of the marriage.<sup>81</sup> Similarly, a qualified beneficiary includes any dependents that were covered under the plan on the day before the qualifying event or born (adopted) during the COBRA continuation period.<sup>82</sup> Thus, the effect of *Windsor* is to grant federally recognized same-sex spouses and their children an independent right to elect COBRA coverage during the continuation period. The open question is the effective date of that right. If the employee had elected COBRA coverage but COBRA-type benefits were unavailable to the same-sex spouse and children, must that coverage now be made available to them, and if so, would retroactive COBRA premiums be required?

### C. Notice 2014-37

The Service clarifies in Notice 2014-37 that if a plan amendment is needed for a section 401(k) or (m) safe harbor plan to comply with *Windsor*, it will not be regarded as a midyear amendment.<sup>83</sup> Generally, midyear plan amendments are prohibited for safe harbor plans.<sup>84</sup>

### III. Outstanding Title I Issues

As mentioned in the previous article, it is unclear what the retroactive effect will be of the *Windsor* decision on Title I claims for benefits. As the Labor Department has jurisdiction over Title I but has yet to issue guidance on *Windsor*'s retroactivity, the plan administrator of an employee benefit plan will need to proceed with caution, as it is a fiduciary and must act solely in the interests of the plan partici-

pants and beneficiaries and for the exclusive purpose of providing benefits to them.<sup>85</sup>

The previous article mentioned two federal cases issued immediately after *Windsor* — *Obergefell v. Kasich*<sup>86</sup> and *O'Connor v. Tobits*<sup>87</sup> — but only the latter specifically conferred spousal employee benefits to a same-sex spousal beneficiary, whose spouse died in 2010. In the latter case, the same-sex couple were married in Canada in 2006.<sup>88</sup> They moved to Illinois, which at the time did not issue marriage licenses to same-sex couples, but did allow them to enter into a civil union. Farley died in 2010, and both Tobits and Farley's parents filed for death benefits under an ERISA plan.<sup>89</sup> As the plan did not define the term “spouse,” the court looked to ERISA and the code.<sup>90</sup> It cited *Windsor* for the proposition that Farley was the surviving spouse and then looked to the couple's place of domicile, Illinois, to determine if that state recognized the couple's same-sex marriage.<sup>91</sup> Because federal law must now look to state law, the court applied Illinois law in determining that Tobits was the surviving spouse and found that she was entitled to survivor benefits retroactively to 2010.<sup>92</sup> Although the plan had a choice of law provision (under Pennsylvania law), the court held that the plan would not be bound by Pennsylvania law. It is unclear whether that decision would be upheld on appeal, as the Labor Department has stated that it will follow a state of celebration approach, but has said nothing about retroactivity for Title I purposes.

One Missouri Supreme Court case, *Glossip v. Mo. DOT & Highway Patrol Emples. Ret. Sys.* — although it does not implicate ERISA because the plan in question was a public retirement plan governed by the laws of Missouri<sup>93</sup> — may be illustrative of how state supreme courts may approach their own same-sex bans in contrast to federal courts. In *Glossip*, a same-sex domestic partner applied for surviving spousal benefits under the retirement plan, but was denied for lacking a valid marriage license.<sup>94</sup> The state law governing survivor benefits

<sup>79</sup>P.L. 99-272 (1985).

<sup>80</sup>Section 4980B(g)(1)(A)(i).

<sup>81</sup>Section 9801(f)(2)(B).

<sup>82</sup>Section 4980B(g)(1)(A).

<sup>83</sup>Notice 2014-37, *supra* note 67.

<sup>84</sup>Reg. section 1.401(k)-3(e)(1).

<sup>85</sup>ERISA section 404(a)(1)(A).

<sup>86</sup>*Obergefell v. Kasich*, No. 1:13-cv-501 (S.D. Ohio 2013).

<sup>87</sup>*O'Connor v. Tobits*, No. 2:11-cv-00045-CDJ (E.D. Pa. 2013).

<sup>88</sup>*Id.*

<sup>89</sup>*Id.* at \*7. The law firm that maintained the ERISA profit-sharing plan, Cozen O'Connor PC, filed an interpleader action with the court in January 2011. The court granted a leave to intervene to the United States of America and the House Bipartisan Legal Advisory Group in light of the *Windsor* decision.

<sup>90</sup>*Id.* at \*15.

<sup>91</sup>*Id.* at \*18.

<sup>92</sup>*Id.* at \*18-\*21.

<sup>93</sup>411 S.W.3d 796 (Mo. Feb. 27, 2014).

<sup>94</sup>*Id.* at 799.

under the retirement plan defined “spouse” only in the context of a marriage between a man and a woman. The surviving domestic partner alleged that the statute violated the state equal protection clause by excluding him on the basis of his sexual orientation.<sup>95</sup> The court rejected his argument because the state’s survivor benefits statute did not discriminate on the basis of sexual orientation, but instead drew a distinction based on marital status.<sup>96</sup> Therefore, in applying a rational basis standard to the survivor benefits statute, the court upheld the statute because it promoted the state’s legitimate interest in extending benefits to persons economically dependent on the deceased employee.<sup>97</sup> The dissent argued that the statute’s distinction of “spouse,” coupled with the inability of same-sex couples to marry in Missouri, is based on sexual orientation.<sup>98</sup> Because of the historic patterns of discrimination against gays and lesbians, he would advocate for a heightened scrutiny standard.<sup>99</sup> While that case may not have much relevance for ERISA attorneys, it does illustrate how state courts can differ in their approach from federal courts post-*Windsor*.

Another ERISA case, *Passaro II v. Bayer Corporation Pension Plan*, involves a complaint by a surviving spouse for spousal benefits resulting from his same-sex spouse’s death in 2009.<sup>100</sup> That complaint was filed on May 12, 2014, and is still pending. Gerald Passaro II married Thomas Buckholz under Connecticut’s same-sex marriage law in 2008. Under the terms of Buckholz’s employer-provided pension plan, he was eligible to receive a benefit as early as February 1, 2016 (the first of the month following his 55th birthday), and his surviving spouse would be eligible to receive the 50 percent joint and survivor annuity as well. He named Passaro as his beneficiary and indicated he was married. Buckholz died before his 48th birthday, and Passaro made a claim for benefits as his surviving spouse and beneficiary. The plan rejected that claim, stating that same-sex marriages were not recognized under section 3 of DOMA. Passaro exhausted his administrative appeals and then, along with several other individuals, brought suit in federal district court, challenging the constitutionality of DOMA and claiming surviving spousal benefits under the Bayer pension plan (referred to as *Pedersen et al. v. Office of Personnel Management et*

*al.*).<sup>101</sup> The defendants included the executive branch and the Bipartisan Legal Advisory Group of the House of Representatives (BLAG) (as intervenors).

In 2012 (pre-*Windsor*), the federal district court in Connecticut ruled in favor of the plaintiffs and granted summary judgment on all the plaintiffs’ claims, including those asserted by Passaro.<sup>102</sup> Appeals were filed from that judgment in the Second Circuit,<sup>103</sup> and the *Pedersen* plaintiffs filed for certiorari to the U.S. Supreme Court.<sup>104</sup> In light of the *Windsor* decision, the parties, including BLAG, dropped their appeal to the Second Circuit, and therefore, the Second Circuit never ruled on the lower court’s holding.<sup>105</sup> The Bayer plan invited Passaro to formally apply again for spousal survivor benefits in early 2014, but then it denied to “voluntarily extend” spousal survivor benefits to him. Therefore, Passaro is now seeking to enforce the prior district court ruling that the unconstitutionality of DOMA section 3 applies in the context of Title I claims.

Surely, the recent cases mark the beginning of Title I claims for same-sex spouses who have not been extended spousal benefits under employee benefit plans. Plan administrators will have to remain vigilant in processing claims by same-sex spouses made before *Windsor*’s issuance date of June 26, 2013, and in determining when same-sex marriages are valid under a given state law (as those dates may vary depending on ongoing federal and state case law).

#### IV. Post-*Windsor* Litigation on States’ Bans

##### A. Introduction of Case Law by Circuits

Since *Windsor*, there have been many lawsuits challenging state mini-DOMA laws or state constitutions on the theory that they violate the due

<sup>101</sup>*Pedersen et al. v. Office of Personnel Management et al.*, Civil Action, No. 3:10-cv-1750 (VLB).

<sup>102</sup>*Pedersen et al. v. Office of Personnel Management et al.*, 881 F. Supp.2d 294 (D. Conn. 2012).

<sup>103</sup>Notice of Civil Appeal, *Pedersen et al. v. Office of Personnel Management et al.*, Civil Action, No. 12-3273 (Aug. 21, 2012) (ECF No. 1), by the executive branch; Notice of Civil Appeal, *Pedersen et al. v. Office of Personnel Management et al.*, No. 12-3872 (Sept. 26, 2012) (ECF No. 53). Those two appeals were never formally consolidated.

<sup>104</sup>See Sup. Ct. Dkt., *Pedersen et al. v. Office of Pers. Mgmt. et al.*, Nos. 12-231 and 12-302, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-231.htm> and <http://www.supremecourt.gov/Search.aspx?FileName=/docketfile/s/12-302.htm>.

<sup>105</sup>See *Pedersen et al. v. Office of Pers. Mgmt. et al.*, 881 F. Supp.2d 294 (D. Conn. 2012), appeal withdrawn, Nos. 12-3273 and 12-3872 (2d Cir. 2013) (in light of the Supreme Court’s grant of certiorari in *Windsor*, BLAG withdrew its appeal).

<sup>95</sup>*Id.* at 800-801.

<sup>96</sup>*Id.* at 804.

<sup>97</sup>*Id.* at 806.

<sup>98</sup>*Id.* at 810-811.

<sup>99</sup>*Id.* at 813.

<sup>100</sup>Complaint, *Passaro II v. Bayer Corporation Pension Plan*, No. 3:14-cv-00671 (D. Conn. May 12, 2014).

process and equal protection clauses of the 14th Amendment of the U.S. Constitution. This section of the article will examine current case law on the constitutionality of state mini-DOMA laws, which will be relevant to a plan administrator in determining the validity and the date of a same-sex marriage. For example, if a federal district court rules that a given state ban on same-sex marriages is unconstitutional and marriages commence in that state, but are later stayed by a federal or state court, determining when the same-sex marriage occurred will be relevant in ascertaining whether it was valid. Similarly, if a federal district court's ruling that a state ban on same-sex marriages is unconstitutional is later overturned, the intervening marriages may no longer be valid.

There are 15 states plus the District of Columbia that statutorily permit same-sex marriage; New Jersey and New Mexico permit same-sex marriage as a result of state supreme court rulings. The other 33 states, either by statute or constitutional ban, prohibit same-sex marriages and fail to recognize same-sex marriages that were performed in other states. Post-*Windsor*, federal district court challenges to those bans have unanimously found the laws unconstitutional, but the courts have generally stayed their decisions pending appeal. Appeals are pending in the Third, Fifth, and Sixth circuits. Pending before the Ninth Circuit is a pre-*Windsor* decision challenging Nevada's ban on same-sex marriages. The Tenth Circuit just affirmed the district court's ruling striking down Utah's ban on same-sex marriages, but stayed its decision pending the likely appeal to the Supreme Court.<sup>106</sup> On July 28, 2014, the Fourth Circuit struck down Virginia's ban on same-sex marriages, affirming the lower court's decision to enjoin that ban, and denied a request for a stay of its holding on August 13, 2014. The Supreme Court granted an emergency stay on August 20 preventing same-sex couples from being married in Virginia as of that day.

*Whitewood v. Wolf*<sup>107</sup> was filed in July 2013 in the U.S. District Court for the Middle District of Pennsylvania, alleging that Pennsylvania's 1996 statutory ban on same-sex marriages and its prohibition on recognizing other states' same-sex marriages were unconstitutional, as they violated the due process and equal protection clauses.<sup>108</sup> The court

agreed with the plaintiffs' arguments by applying an intermediate scrutiny standard and entered an order to permanently enjoin the provisions' enforcement.<sup>109</sup> The ruling was effective on May 20, 2014, and was not stayed, permitting same-sex couples to receive marriage licenses in Pennsylvania (pending the mandatory three-day waiting period). Gov. Tom Corbett (R) announced on May 21 that he would not appeal the decision. On June 6 the Schuylkill County court clerk charged with handling marriage licenses, Theresa Santai-Gaffney, filed a motion to intervene in the case and appeal it. The Third Circuit ordered that the case be sent to panel to determine if summary action (no oral or written arguments) was appropriate. Santai-Gaffney's motion was denied, but she appealed, filing for a stay with the Third Circuit. When the Third Circuit denied the stay, Pennsylvania began allowing same-sex marriages.<sup>110</sup>

*Geiger v. Kitzhaber*<sup>111</sup> was filed in October 2013 in the U.S. District Court for the District of Oregon, challenging Oregon's ban on same-sex marriages for the same reasons as *Whitewood* in Pennsylvania.<sup>112</sup> The case was consolidated with another case, *Rummell v. Kitzhaber*, and the court granted the plaintiffs' motion for summary judgment on May 19.<sup>113</sup> A nonparty, the National Organization for Marriage, made an unsuccessful attempt to intervene in the case, and its appeal to the Ninth Circuit was rejected for lack of standing.<sup>114</sup> On June 4 the Supreme Court rejected the National Organization for Marriage's request for a stay of the district court's holding, thus finalizing that decision.<sup>115</sup> Therefore, as of May 2014, same-sex marriages are legal in Oregon.

The challenges to Pennsylvania's and Oregon's same-sex marriage bans are outliers because the

<sup>109</sup>*Id.* at \*49-\*50.

<sup>110</sup>See *Whitewood v. Wolf*, No. 1:13-cv-1861 (M.D. Pa., May 20, 2014), *appeal dismissed*, No. 1:13-cv-1861 (3d Cir. July 3, 2014) (dismissing Santai-Gaffney's appeal of denial of motion to intervene). *But see* Santai-Gaffney's petition for rehearing or rehearing *en banc* with the Third Circuit, No. 1:13-cv-01861-JEJ.

<sup>111</sup>See *Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC (D. Ore., May 19, 2014).

<sup>112</sup>*Id.* at \*8. Note that the defendants in the case (the state registrar, governor, attorney general, and assessor for Multnomah County) conceded that Oregon's marriage laws were unconstitutional and legally indefensible but that they felt legally obligated to enforce the laws until a court declared them unconstitutional.

<sup>113</sup>*Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC (D. Ore., May 19, 2014), and *Rummell v. Kitzhaber*, No. 6:13-cv-02256-MC (D. Ore., May 19, 2014).

<sup>114</sup>*Geiger v. Kitzhaber*, 2014 No. 14-35427 (9th Cir., May 19, 2014).

<sup>115</sup>572 U.S. \_\_\_, Order in Pending Case *Nat'l Organization for Marriage v. Geiger*, 13A1173 (June 4, 2014).

<sup>106</sup>*Kitchen v. Herbert*, No. 13-4178 (10th Cir., June 25, 2014). Utah has decided to challenge that ruling and petition the Supreme Court. Also note that state officials in Virginia and Nevada have refused to defend the state's ban on same-sex marriages.

<sup>107</sup>*Whitewood v. Wolf*, No. 1:13-cv-1861 (M.D. Pa., May 20, 2014).

<sup>108</sup>*Id.* at \*12.

courts did not issue stays pending appeal. It is uncertain how the circuits encompassing those states (the Third and Ninth, respectively) will ultimately rule.

There is also the potential for litigation in the remaining circuits. All of the states in the First Circuit permit same-sex marriage, but Puerto Rico does not, nor does it recognize marriages performed in other jurisdictions. Therefore, any litigation challenging that law would be appealed to the First Circuit. All other circuits have at least one state within their jurisdiction banning same-sex marriages.

## B. Ninth Circuit

In *Sevcik v. Sandoval*, a pre-*Windsor* case, the plaintiffs challenged Nevada's constitutional prohibition of same-sex marriages and its state law's recognition of foreign marriages and foreign quasi-marriage relationships that only qualify as "domestic partnerships."<sup>116</sup> Nevada's governor and the clerk-recorder asked the court to dismiss the case "for want of a substantial federal question" because, in *Baker v. Nelson*,<sup>117</sup> an analogous equal protection challenge in Minnesota had been precluded by the Supreme Court.<sup>118</sup>

The court in *Sevcik* found that the equal protection claim in the existing case was the same as it was in *Baker* (that is, the equal protection clause prevents a state from prohibiting same-sex marriages).<sup>119</sup> However, *Romer v. Evans* (issued 24 years after *Baker*) permits challenges that involve a withdrawal of existing rights or a major change to a minority group's legal status.<sup>120</sup> Therefore, the court dismissed the traditional equal protection challenge relying on *Baker* but did not dismiss the one relying on *Romer*.<sup>121</sup> It then conducted a full equal protec-

tion analysis to avoid a remand if the appeals court held that *Baker* did not control.<sup>122</sup>

Nevada argued that its law created no distinction because a gay person may marry anyone that a straight person can.<sup>123</sup> The court rejected that argument, instead finding that the law's distinction was based on sexual orientation.<sup>124</sup> Because the Supreme Court has not imposed a higher standard of review based on sexual orientation, the court looked to the Ninth Circuit's standard of review.<sup>125</sup> The Ninth Circuit imposes rational basis scrutiny when reviewing sexual orientation classification for purposes of the equal protection component of the due process clause.<sup>126</sup> Under that scrutiny, the court affirmed that traditional moral disapproval was not a sufficient state interest to prohibit private, consensual activity; however, preventing "abuse of an institution the law protects" (that is, civil marriage) was found to be a valid state interest.<sup>127</sup> The court then concluded there was a rational connection in prohibiting same-sex marriages, as they may undermine the link between marriage, procreation, and family structure.<sup>128</sup> It then upheld Nevada law, as it survived the rational basis review under the equal protection clause.<sup>129</sup> The case was appealed to the Ninth Circuit, with oral arguments expected in September 2014. Since the district court's ruling, Nevada has declined to defend its ban on same-sex marriages. But, given the Ninth Circuit's decision in *Perry v. Brown*, finding that a state's designation of marriage for opposite-sex couples violated the Constitution's equal protection clause, a similar holding is expected in the Nevada case.<sup>130</sup>

In two other states within the Ninth Circuit — Idaho and Oregon — federal district courts have struck down bans on same-sex marriages.<sup>131</sup> The Ninth Circuit issued a stay of the Idaho district

<sup>116</sup>*Sevcik v. Sandoval*, 911 F. Supp.2d 996, 1000 (D. Nev. 2012).

<sup>117</sup>409 U.S. 810 (1972).

<sup>118</sup>*Sevcik*, 911 F. Supp.2d at 1002, citing *Baker v. Nelson*. Generally, the Supreme Court's refusal to hear a case is not an affirmation of the lower court's holding. However, when the case comes to the Court through mandatory appellate review, a summary dismissal is a decision on the merits of the case. If *Baker* is binding precedent, it would prevent lower courts from taking a contrary holding when presented with the same issue. Note that the Second Circuit in the *Windsor v. United States* case held that *Baker* did not control because of the "manifold changes to the Supreme Court's equal protection jurisprudence" in the last 40 years and because *Baker* involved a same-sex marriage controversy with a state whereas *Windsor* was challenging a federal law. *Windsor v. United States*, 699 F.3d 169, 178-179 (2d Cir. 2012).

<sup>119</sup>*Sevcik v. Sandoval*, 911 F. Supp.2d at 1003.

<sup>120</sup>*Id.* citing *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996).

<sup>121</sup>*Id.* at 1021.

<sup>122</sup>*Id.* at 1003.

<sup>123</sup>*Id.* at 1004.

<sup>124</sup>*Id.* at 1005.

<sup>125</sup>See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

<sup>126</sup>*Sevcik v. Sandoval*, 911 F. Supp.2d at 1006. The district court notes that it disagrees with a contrary conclusion reached by the Second Circuit in the *Windsor v. United States* opinion, 699 F.3d at 181.

<sup>127</sup>*Id.* at 1014, citing *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472 (2003).

<sup>128</sup>*Id.* at 1016-1017.

<sup>129</sup>*Id.* at 1017.

<sup>130</sup>*Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012).

<sup>131</sup>*Latta v. Otter*, 2014 No. 1:13-cv-0482 (D. Idaho, May 13, 2014) (holding that Idaho's law limiting marriages to opposite-sex couples and prohibiting the recognition of same-sex marriages performed elsewhere violated the due process and equal protection clauses of the 14th Amendment); *Geiger v. Kitzhaber*, No. 14-35427 (D. Ore., May 19, 2014) (holding that Oregon's law limiting marriages to opposite-sex couples and prohibiting the

(Footnote continued on next page.)

court decision pending appeal and will hear oral arguments on September 8, 2014. As noted in this article, a federal district court struck down Oregon's ban, but no stay on its decision has been issued. In the three remaining states within the Ninth Circuit's jurisdiction with bans on same-sex marriages — Alaska, Arizona, and Montana — lawsuits have been filed challenging those bans.<sup>132</sup>

### C. Sixth Circuit

The 2013 case of *Obergefell v. Wymyslo* is more limited than the traditional challenge against a state's ban on same-sex marriages.<sup>133</sup> The plaintiffs included two individuals who were validly married in a state that permits same-sex marriages but were denied recognition of that marriage on their respective sex-same spouse's death certificates by the state of Ohio.<sup>134</sup> The Ohio Constitution prohibited same-sex marriages in the state and recognition of same-sex marriages from other states.<sup>135</sup> At issue was not the plaintiffs' fundamental right to marry, but instead their right not to be deprived of an existing legal marriage and its benefits under Ohio law.<sup>136</sup> The court held that while the right to marry had not historically been deemed a fundamental right, it certainly fell within the protected status of existing marriage, family, and intimate relationships, deserving of an intermediate standard of review between the rational basis and strict scrutiny standards.<sup>137</sup> Reviewing the burdens imposed on same-sex married couples whose marriages were not recognized in attending to finances, property, and family lives outweighed the "vague, speculative, and unsubstantiated state interests" offered by the defendants.<sup>138</sup> Therefore, the court found that Ohio's refusal to recognize same-sex marriages performed elsewhere violated the substantive due process rights of the parties involved.<sup>139</sup> Similarly, it found that Ohio's marriage recognition bans violated the plaintiffs' constitutional rights under the

recognition of same-sex marriages performed elsewhere violated the equal protection clause of the 14th Amendment).

<sup>132</sup>For an up-to-date list of lawsuits pending by state, see State Same-Sex Marriage Ban Tracker (HR State Quick Reference Charts), available at [http://ezproxy.jmls.edu:2088/bprc/2216/split\\_display.adp?fedfid=48163141&vname=checklistc&wsn=500090000&searchid=23014638&doctypeid=11&type=score&mode=doc&split=0&scm=2216&pg=0](http://ezproxy.jmls.edu:2088/bprc/2216/split_display.adp?fedfid=48163141&vname=checklistc&wsn=500090000&searchid=23014638&doctypeid=11&type=score&mode=doc&split=0&scm=2216&pg=0). See also Status of Same-Sex Relationships Nationwide, available at <http://www.lambdalegal.org/publications/nationwide-status-same-sex-relationships>.

<sup>133</sup>*Obergefell v. Wymyslo*, 962 F. Supp.2d 968 (S.D. Ohio 2013).

<sup>134</sup>*Id.* at 972.

<sup>135</sup>*Id.* at 974-975.

<sup>136</sup>*Id.* at 978.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.* at 980-981.

<sup>139</sup>*Id.* at 983.

equal protection clause.<sup>140</sup> While the court noted the most recent Sixth Circuit decision rejecting the use of a heightened standard for evaluating classifications based on sexual orientation, it wrestled with decisions made by federal and state courts that called for a heightened standard.<sup>141</sup> However, in the end, the court concluded that even if a heightened standard of review did not apply, Ohio's marriage recognition ban failed under the rational basis standard, thereby rejecting the state's arguments to maintain its traditional definition of marriage and to have children raised by heterosexual couples.<sup>142</sup>

Ohio appealed the decision to the Sixth Circuit in January 2014, with oral arguments scheduled for August 6, 2014. Another lawsuit, *Henry v. Himes*, granted the plaintiff's motion for a declaratory judgment and permanent injunction for Ohio's non-recognition laws for same-sex marriages performed out of state, with the injunction partially stayed pending appeal to the Sixth Circuit.<sup>143</sup> Similar decisions in other district courts within the Sixth Circuit for the states of Michigan, Kentucky, and Tennessee include *DeBoer v. Snyder*; *Bourke v. Beshear*; and *Tanco v. Haslam*.<sup>144</sup>

### D. Tenth Circuit

In the 2013 case of *Kitchen v. Herbert*, the district court found that Utah's state ban on same-sex marriages violated the Constitution's guarantees of equal protection and due process.<sup>145</sup> Both Utah's law and state constitution recognize marriage within Utah as a legal union between a man and a woman.<sup>146</sup> Similarly, the state does not recognize any legal effect of a valid same-sex marriage performed in a state that does recognize those marriages.<sup>147</sup> The plaintiffs argued that since the *Windsor* decision prohibited the federal government

<sup>140</sup>*Id.*

<sup>141</sup>*Id.* at 987, citing the most recent Sixth Circuit decision on the issue at *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012).

<sup>142</sup>*Id.* at 994-995.

<sup>143</sup>*Henry v. Himes*, No. 1:14-cv-129 (S.D. Ohio, Apr. 14, 2014) and *Henry v. Himes*, No. 14-3464 (S.D. Ohio, Apr. 16, 2014).

<sup>144</sup>*DeBoer v. Snyder*, 2014 No. 12-cv-10285 (E.D. Mich., Mar. 21, 2014) (holding that Michigan's ban on same-sex marriages was unconstitutional); *Bourke v. Beshear*, No. 3:13-cv-750-14 (W.D. Ky., Feb. 12, 2014) (holding that Kentucky's anti-recognition law is unconstitutional); *Love v. Beshear*, No. 3:13-cv-750-H (W.D. Ky., July 1, 2014) (holding that Kentucky's ban on same-sex marriages violates the equal protection clause of the 14th Amendment and thus is void, but staying the opinion until further order of the Sixth Circuit); *Tanco v. Haslam*, No. 3:13-cv-01159 (M.D. Tenn., Mar. 14, 2014) (holding that Tennessee's anti-recognition law is unconstitutional).

<sup>145</sup>*Kitchen v. Herbert*, 961 F. Supp.2d 1181 (2013).

<sup>146</sup>*Id.* at 1191, referring to Utah Code Ann. section 30-1-4.1 and Utah Constitution as Article I, section 29.

<sup>147</sup>*Id.*, referring to Utah Code Ann. section 30-1-4.0(b).

from differentiating between same-sex and opposite-sex couples, the 14th Amendment prohibits the states from making a similar distinction.<sup>148</sup>

The court in *Kitchen* had four distinct holdings. First, it rejected Utah's argument that the court should summarily dismiss the case "for want of a substantial federal question,"<sup>149</sup> because the *Perry* decision held that the petitioners lacked standing to maintain the appeal, but the Supreme Court had not dismissed the case outright for lack of a substantial federal question. Second, on the issue of whether Utah's ban on same-sex marriages violated the 14th Amendment, the court held that the right to marry a person of the same sex was a fundamental right protected by the guarantee of liberty under the due process clause<sup>150</sup> and, thus, protected against the "State's unwarranted usurpation, disregard, or disrespect."<sup>151</sup> It found that Utah's arguments that other legitimate state bans on marriages (for example, forbidding marriages of children, those who are mentally incapable, and life prisoners) did not demonstrate a rational reason why same-sex couples could not marry.<sup>152</sup>

Third, it held that the state ban on same-sex marriages violated the equal protection clause.<sup>153</sup> While the application of that clause is usually dependent on the class of citizens who have been affected, the court held that the state ban failed a rational basis review, and thus, it did not have to consider applying higher standards of scrutiny.<sup>154</sup> Lastly, the court held that Utah's refusal to recognize same-sex marriages validly performed in another state was a moot question because of the disposition of the other issues in the case.<sup>155</sup> In its decision, the court held that Utah must remove its

ban against same-sex marriages immediately (that is, on December 20, 2013, the date of the decision). On January 6, 2014, the U.S. Supreme Court granted a stay of the district court's ruling pending the appeal.<sup>156</sup>

The Tenth Circuit's decision affects the states of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming — five of which prohibit same-sex marriage. While New Mexico's laws are silent on the issue, its state supreme court has ruled that New Mexico authorizes and recognizes same-sex marriages.<sup>157</sup> There is another federal district court case within the Tenth Circuit, *Bishop v. United States*, in which the Oklahoma ban on same-sex marriage was held to be unconstitutional, and that decision was upheld by the Tenth Circuit, but it stayed the ruling pending appeal to either an *en banc* hearing of the Tenth Circuit or to the U.S. Supreme Court.<sup>158</sup>

In a three-judge panel decision, the Tenth Circuit affirmed the district court's holding in *Kitchen* on June 25, 2014, becoming the first circuit to do so and edging the issue closer to the Supreme Court. In a 2-1 decision, Circuit Judge Carlos F. Lucero, writing for the two-judge majority, stated that a "state may not deny the issuance of a marriage license to two persons, or refuse to recognize their marriage, based solely upon the sex of the persons in the marriage union."<sup>159</sup> Although it was not raised by the parties, the court first considered the issue of standing, as the Salt Lake County Clerk (the original defendant) did not appeal the district court's order, but the governor and attorney general did.<sup>160</sup> Because of the governor's and attorney general's

<sup>148</sup>*Id.* at 1193, noting that the 14th Amendment holds, "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the Laws." U.S. Const. amend. XIV, section 1.

<sup>149</sup>*Id.* at 1194, citing *Baker*.

<sup>150</sup>*Kitchen v. Herbert*, 961 F. Supp.2d at 1204.

<sup>151</sup>*Id.* at 1197, citing the Supreme Court's decision in *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S. Ct. 555 (1996).

<sup>152</sup>*Id.* at 1205.

<sup>153</sup>*Id.* at 1206-1207.

<sup>154</sup>*Id.* Generally, classifications based on race and national origin are considered highly suspect and therefore subject to a higher standard of scrutiny, whereas classifications based on sex are quasi-suspect and subject to a lesser level of review. The court declined to rule on the plaintiffs' assertion that the Utah laws discriminated on the basis of sex, as it is bound by the Tenth Circuit's decision in *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1105 (2008), finding that sexual orientation is not protected and subject to heightened scrutiny. *Id.* at 1113.

<sup>155</sup>*Kitchen v. Herbert*, 961 F. Supp.2d at 1215.

<sup>156</sup>*Herbert v. Kitchen*, 134 S. Ct. 893 (2014).

<sup>157</sup>*Griego v. Oliver*, 2014-NMSC-003 (2013).

<sup>158</sup>*Bishop v. United States*, 962 F. Supp.2d 1252 (N.D. Okla., Jan. 14, 2014), *aff'd sub nom. Bishop v. Smith*, Nos. 14-5003, 14-5006 (10th Cir., July 18, 2014). In that case, a federal district court in northern Oklahoma held that Oklahoma's constitutional amendment limiting marriage to opposite-sex couples violated the equal protection clause because it was an arbitrary and irrational exclusion of one class of Oklahoma citizens from a fundamental right. It invoked the rationality standard for the non-suspect class — same-sex individuals. *Id.* at 1287. The court rejected that there was a rational basis to the exclusion on the grounds that it sought to promote morality, to encourage responsible procreation and child-rearing, to result in more stable marital unions, to promote optimal child-rearing environments, and to have a positive impact on marriage. *Id.* at 1295. In declaring the Oklahoma constitutional amendment as being federally unconstitutional, the court permanently enjoined its enforcement. While the case was originally filed as *Bishop v. United States*, it has been renamed *Bishop v. Smith* in its appeal to the Tenth Circuit, which held oral arguments in April 2014.

<sup>159</sup>*Kitchen v. Herbert*, No. 13-4178 at \*4 (10th Cir., June 25, 2014). Circuit Judge Paul J. Kelly Jr. dissented on the grounds that the Supreme Court settled that issue back in 1972. *Id.* at \*121.

<sup>160</sup>*Id.* at \*10-\*13.

actual exercise of supervisory power over the county clerks and other officials who could issue marriage licenses, the court held that they had standing to appeal.

The court also agreed with the lower court that there was a substantial federal question at issue, as the *Windsor* decision did not rely on federalism principles. It instead posed the question whether DOMA section 3 interfered with a liberty protected by the Fifth Amendment, and it held that it did because Utah's treatment of the plaintiffs, particularly the plaintiffs who had a valid marriage under another state's law, seeks to degrade and demean them by treating them differently than opposite-sex couples.<sup>161</sup> Hence, the question at issue was not "wholly insubstantial."<sup>162</sup>

The court turned to the merits of the appeal and held that the fundamental right of marriage as protected by the U.S. Constitution included the freedom to choose one's spouse and the right to remain married (if a couple had a valid marriage under another state's law).<sup>163</sup> Therefore, it rejected the argument that the fundamental right of marriage was limited to the right to marry a person of the opposite sex. The court also held that the Supreme Court's sexual orientation jurisprudence did not justify that limitation.<sup>164</sup> The defendants, the governor and attorney general, would have to show that Utah's laws could survive a strict scrutiny analysis to prevail over the plaintiffs' due process and equal protection claims.<sup>165</sup> While the defendants argued, with four justifications in favor of the laws, the court held that the first three failed on the means prong of the strict scrutiny test, as they relied on the link between marriage and procreation.<sup>166</sup> As to the fourth justification — "accommodating religious freedom and reducing the potential for civic strife" — the court dismissed that argument because public opposition cannot prevail over a violation of a fundamental right.<sup>167</sup> Also, it found that a state's concern over religious freedom

could not justify denying fundamental rights protected by the Constitution.<sup>168</sup> The Tenth Circuit affirmed the decision of the district court but stayed its mandate pending any subsequent petition for writ of certiorari to the U.S. Supreme Court.<sup>169</sup> Within hours of that decision, Boulder County Clerk Hillary Hall began to issue marriage licenses to same-sex couples in Colorado and has refused an ultimatum from the state attorney general to stop issuing them unless the U.S. Supreme Court resolves the issue.<sup>170</sup>

#### E. Fifth Circuit

In the 2014 federal district court case of *DeLeon v. Perry*, a same-sex couple challenged the constitutionality of Texas's constitution and state law that banned same-sex marriages and refused to recognize legal out-of-state same-sex marriages.<sup>171</sup> The court applied the rational basis standard and held that the laws violated the due process and equal protection clauses.<sup>172</sup> The court passed on the plaintiff's argument that the heightened standard should apply, and rejected the state's arguments that its law withstands a rational basis review because of the state's interest in child-rearing, procreation, and tradition.<sup>173</sup>

A federal complaint has been raised in Louisiana<sup>174</sup> but not yet in Mississippi, both of which are part of the Fifth Circuit.

#### F. Fourth Circuit

In the state of Virginia, both the governor, Democrat Terry McAuliffe, and the attorney general, Democrat Mark Herring, refused to defend the state's ban on same-sex marriages in court. That led to the landmark case in the Fourth Circuit of *Bostic*

<sup>161</sup>*Id.* at \*27-\*30.

<sup>162</sup>*Id.* at \*31.

<sup>163</sup>*Id.* at \*47-\*48.

<sup>164</sup>*Id.* at \*59.

<sup>165</sup>*Id.* at \*63.

<sup>166</sup>*Id.* at \*65-\*82 (listing the four justifications for the same-sex ban furthering the state's interest: (1) "fostering a child-centric marriage culture that encourages parents to subordinate their interests to the needs of their children"; (2) "children being raised by their biological mothers and fathers — or at least by a married mother and father — in a stable home"; (3) "ensuring adequate reproduction"; and (4) "accommodating religious freedom and reducing the potential for civil strife").

<sup>167</sup>*Id.* at \*87, citing to the Supreme Court cases in *Palmer v. Thompson*, 403 U.S. 216, 226 (1971) and *Watson v. City of Memphis*, 373 U.S. 526 (1963).

<sup>168</sup>*Id.* at \*90.

<sup>169</sup>*Id.* at \*97. But the court noted that if no petition for certiorari is filed, its decision would govern when the deadline for filing the petition lapsed.

<sup>170</sup>See Keith Coffman and Daniel Wallis, "Emboldened by Utah Ruling, Colorado Clerk Issues Gay Marriage License," Reuters (June 26, 2014), available at <http://www.reuters.com/article/2014/06/26/us-usa-gaymarriage-colorado-idUSKBN0F129520140626>. Hall stated, "Given the 10th Circuit's recent decision and the numerous other cases on this issue, I would be surprised if a judge in Colorado were willing to invalidate a marriage license simply because the parties to the marriage were the same sex." See *Brinkman v. Colorado*, No. 2014SA212 (July 18, 2014) (staying Denver and Adams County clerks from issuing marriage licenses to same-sex couples pending resolution of the appeal).

<sup>171</sup>*DeLeon v. Perry*, 975 F. Supp.2d 632 (W.D. Tex., Feb. 26, 2014).

<sup>172</sup>*Id.* at 652.

<sup>173</sup>*Id.* at 652-655.

<sup>174</sup>See *Robicheaux v. Caldwell*, 2:13-cv-5090 (E.D. La. 2013) (granting the defendants' motion to dismiss for lack of jurisdiction but denying the motion to dismiss or transfer for improper venue).

*v. Rainey*, in which a 2014 federal district court held that Virginia's ban on same-sex marriages was unconstitutional.<sup>175</sup> Both Virginia's laws and constitution banned same-sex marriages and voided same-sex marriages performed elsewhere. The plaintiffs were two men seeking to obtain a marriage license and two women, with a valid California marriage license, seeking to obtain a Virginia marriage license and birth certificate for their daughter listing them both as parents.<sup>176</sup> The plaintiffs challenged the state's ban on same-sex marriages and its prohibition against recognizing otherwise lawful same-sex marriages from other jurisdictions.<sup>177</sup>

The court rejected the argument that the plaintiffs lacked standing, finding that their injuries were sufficient and that an injunction would redress those injuries by allowing them to marry or have their marriage recognized in Virginia.<sup>178</sup> It also rejected the argument that the case should be dismissed "for want of a substantial federal question," citing the Second Circuit's decision in *Windsor v. United States* and the Tenth Circuit's in *Kitchen v. Herbert*.<sup>179</sup> The court found that Virginia's marriage laws interfered with the plaintiff's fundamental right to marry, including someone of the same sex, which was protected by both the due process and equal protection clauses.<sup>180</sup> In applying a strict scrutiny standard to the Virginia marriage laws, the court examined the three justifications to support the laws — tradition, federalism, and "responsible procreation and optimal child rearing."<sup>181</sup> Citing the Supreme Court's decision in *Loving v. Virginia* (finding a state's prohibition on interracial marriage unconstitutional), the court rejected the argument

that tradition alone could justify denying same-sex couples the right to marry.<sup>182</sup> Likewise, it said the courts have a constitutional duty to decide whether state laws regarding domestic relations conflict with federal law.<sup>183</sup> Finally, the court stated that the "for-the-children" rationale failed under both the strict scrutiny and rational basis reviews since limiting marriage to opposite-sex couples does not further the state's interest in the welfare of its children.<sup>184</sup> The court referenced research that supported the conclusion that children raised by gay or lesbian parents were just as likely to be "healthy, successful and well-adjusted" as children raised by heterosexual parents.<sup>185</sup> Therefore, it concluded that under the due process clause, the Virginia laws improperly compromised the plaintiffs' fundamental rights.<sup>186</sup>

Turning to the equal protection clause, the court concluded, for the reasons discussed above, that the Virginia laws interfered with a fundamental right and were "inadequately tailored to effectuate only those interests."<sup>187</sup> Therefore, they were unconstitutional under that clause as well. In applying rational scrutiny to Virginia's discriminatory laws, the court found no rational relationship to a legitimate purpose, and, therefore, it did not have to address the plaintiffs' argument that the laws should be subject to heightened scrutiny.<sup>188</sup> In striking down the Virginia law and constitutional clause prohibiting same-sex marriages and recognition of same-sex marriages performed in other states, the court enjoined the commonwealth from enforcing those mandates.<sup>189</sup>

The case, retitled *Bostic v. Schaefer*, was appealed to the Fourth Circuit on February 24, 2014, and the earlier *Bostic* decision was stayed pending appeal.<sup>190</sup> A three-judge panel heard oral arguments on May 13, 2014, and rendered a decision on July 28, 2014. The Fourth Circuit granted permission for the American Civil Liberties Union and Lambda Legal to intervene. In a 2-1 *en banc* decision, the Fourth Circuit affirmed the lower court's ruling.<sup>191</sup> The court rejected the application of *Baker* because subsequent "doctrinal developments" show that the Supreme Court no longer views the question as

<sup>175</sup>*Bostic v. Rainey*, 970 F. Supp.2d 456 (E.D. Va., Feb. 13, 2014).

Two gay men filed the initial lawsuit as *Bostic v. McDonnell*, naming as defendant then-Gov. Bob McDonnell. After he left office in January 2014, the case was renamed *Bostic v. Rainey*, with Janet Rainey, the state registrar of vital records, as lead defendant. A lesbian couple, who were married in California and were the parents of a teenager, joined the case as plaintiffs. It was on January 23, 2014, that Herring stated that his office would not defend the state in the *Bostic* decision, but would argue for the plaintiffs instead. It was the attorneys for the clerk of the Circuit Court for the City of Norfolk who defended the state's ban in the lawsuit before the federal district court. The American Foundation for Equal Rights' team led by Ted Olson and David Boies argued on behalf of the plaintiffs.

<sup>176</sup>*Id.* at 461. Thus, the plaintiffs filed suit against the governor, the former attorney general, and George E. Schaefer III in his capacity as the clerk of Court for the Norfolk Circuit Court.

<sup>177</sup>*Id.* at 464.

<sup>178</sup>*Id.* at 467-468.

<sup>179</sup>See *Windsor v. United States*, 699 F.3d 169, 178 (2d Cir. 2012), *aff'd*, 133 S.Ct. 2675 (2013); and *Kitchen v. Herbert*, 961 F. Supp.2d at 1204.

<sup>180</sup>*Bostic v. Rainey*, *supra* note 175, 970 F. Supp.2d at 470-472.

<sup>181</sup>*Id.* at 473.

<sup>182</sup>*Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>183</sup>*Bostic v. Rainey*, 970 F. Supp.2d at 477.

<sup>184</sup>*Id.* at 478.

<sup>185</sup>*Id.*, noting the research discussed in the decision of *Perry v. Schwarzenegger*, 704 F. Supp.2d 921, 980 (N.D. Cal. 2012).

<sup>186</sup>*Id.* at 480.

<sup>187</sup>*Id.*

<sup>188</sup>*Id.* at 482.

<sup>189</sup>*Id.* at 484.

<sup>190</sup>The *Bostic v. Schaefer* case is also referred to as the *Harris Class Action* case.

<sup>191</sup>*Bostic v. Schaefer*, No. 14-1167 (July 28, 2014).

insubstantial.<sup>192</sup> Because it determined that the fundamental right to marry included the right to a same-sex marriage and encompassed an individual's "freedom of choice," it applied a strict scrutiny standard.<sup>193</sup> Of the five compelling interests advocated by the laws' proponents — federalism, the history and tradition of marriage, the protection of the institution of marriage, procreation and optimal child-rearing — the court held that none justified the state's encroaching on the fundamental right to marry.<sup>194</sup> Therefore, it concluded that Virginia's marriage laws — preventing same-sex marriages and not recognizing other states' same-sex marriages — violated the due process and equal protection clauses.<sup>195</sup>

There are similar challenges before other federal district courts within the Fourth Circuit, as the other states within its jurisdiction (with the exception of Maryland) — South Carolina, North Carolina, and West Virginia — ban same-sex marriages or fail to recognize same-sex marriages validly performed elsewhere.<sup>196</sup>

### G. Remaining Circuits

In the First Circuit, a complaint was filed alleging that Puerto Rico's refusal to recognize same-sex marriages performed elsewhere violates the U.S. Constitution.<sup>197</sup> In the Third Circuit, there is a state ruling that authorizes New Jersey to allow and

recognize same-sex marriages<sup>198</sup> and a federal district ruling that authorizes Pennsylvania to allow and recognize same-sex marriages, discussed above.<sup>199</sup> In the Seventh Circuit, there are three federal district court rulings. In Indiana, one directed the commissioner of the Indiana Department of Health to recognize same-sex marriages performed outside the state on state death certificates,<sup>200</sup> and a second recognized the marriage of a lesbian couple, one of whom was terminally ill, on an emergency basis.<sup>201</sup> In Wisconsin, a ruling declared the laws banning same-sex marriages unconstitutional under federal law.<sup>202</sup> In the Eighth Circuit, there is a federal complaint challenging South Dakota's bans on same-sex marriages,<sup>203</sup> as well as three state complaints challenging state bans on same-sex marriages in Missouri, Nebraska, and Arkansas.<sup>204</sup> In the Eleventh Circuit, there are three federal complaints challenging state bans on same-sex marriages in Alabama, Georgia, and Florida.<sup>205</sup>

In summary, the federal courts post-*Windsor* appear to be analyzing state bans on same-sex marriages on three levels:

**1. Should the case be dismissed for want of a substantial federal question?** If subsequent "doctrinal developments" illustrate that the Supreme

<sup>198</sup>*Garden State Equal. v. Dow*, 434 N.J. Super. 163 (Sept. 27, 2013) (holding that the New Jersey ban on same-sex marriages violates the state's equal protection guarantee).

<sup>199</sup>*Whitewood v. Wolf*, No. 1:13-cv-1861 (M.D. Pa., May 20, 2014). See Dismissal of the Notice of Civil Appeal, *Whitewood v. Secretary Pennsylvania Department of Health*, No. 14-3048 (July 3, 2014).

<sup>200</sup>*Baskin v. Bogan*, No. 1:14-cv-00355-RLY (S.D. Ind., May 8, 2014).

<sup>201</sup>*Baskin v. Bogan*, No. 14-2386 (7th Cir., July 1, 2014) (lifting the stay of an earlier Indiana district court ruling finding that Indiana's ban on same-sex marriages was unconstitutional and recognizing the marriage of a lesbian couple, one of whom was terminally ill).

<sup>202</sup>*Wolf v. Walker*, 986 F. Supp.2d 982 (W.D. Wis., June 6, 2014).

<sup>203</sup>Complaint, *Rosenbrahn v. Daugaard*, No. 4:14-cv-04081 (D.S.D., May 22, 2014).

<sup>204</sup>Complaint, *Barrier v. Vasterling*, No. 1416-cv-03892 (Jackson County Cir. Ct., Feb. 11, 2014); *Nichols v. Nichols*, 13-COA-040 (S.C. Neb., June 13, 2014) (dismissing an appeal as there was no final judgment from a state court's dismissal of a divorce petition of a same-sex couple married in Iowa); Complaint, *Wright v. Arkansas*, No. 60-cv-13-2662 (Pulaski Co. Cir. Ct., May 9, 2014) (state court ruling that Arkansas's ban on same-sex marriage violated the U.S. Constitution).

<sup>205</sup>See Complaint, *Searcy v. Bentley*, No. 1:14-cv-00208 (S.D. Ala., May 6, 2014), and *Brush v. Bentley*, No. 2:14-cv-01091 (N.D. Ala. June 10, 2014); Complaint, *Inmiss v. Aderhold*, No. 1:14-cv-01180 (N.D. Ga., Apr. 22, 2014); and Complaint, *Brenner v. Scott*, No. 4:14-cv-00107 (N.D. Fla., Feb. 28, 2014). See also *Huntsman v. Heavilin*, No. 2014-CA-305-K (Monroe County Cir. Ct., July 17, 2014) (striking down Florida's constitutional ban on same-sex marriages but only for Monroe County, which includes the Florida Keys).

<sup>192</sup>*Id.* at \*6.

<sup>193</sup>*Id.* at \*8-9. The dissent criticizes the majority's statement that the traditional right to marry includes the right to marry anyone, as it avoids the constitutional analysis required by *Washington v. Glucksberg*, 521 U.S. 702 (1997), for new fundamental rights being created. As such, the dissent says that broad right to marry could include the right of a parent to marry a child or the right to marry multiple people. *Id.* at \*18.

<sup>194</sup>*Id.* at \*11-16.

<sup>195</sup>*Id.* at \*17.

<sup>196</sup>See Complaint, *Bradacs v. Haley*, No. 3:13-cv-02351-JFA (Col. D. S.C. 2013), plaintiffs seeking to have their out-of-state same-sex marriage recognized in South Carolina, with the decision stayed pending the outcome of the Fourth Circuit's appeal; Complaint, *General Synod of the United Church of Christ v. Cooper*, No. 3:14-cv-00213-RJC-DCK (W.D.N.C., June 3, 2014), challenging the constitutionality of North Carolina's ban on same-sex marriages and seeking religious freedom to perform same-sex marriages; Complaint, *Gerber and Berlin v. Cooper*, (M.D.N.C. 2014); and *McGee v. Cole*, No. 3:13-24068 (S.D.W.V., Jan. 29, 2014), granting the state's motion to dismiss the plaintiff's claims pertaining to West Virginia's nonrecognition provisions relating to same-sex marriages, but allowing plaintiff's other claim relating to West Virginia's ban on same-sex marriages to proceed. The Fourth Circuit's ruling goes into effect seven days after issuance; however, the parties have two weeks from the issuance of the judgment to file for a rehearing *en banc* and a stay.

<sup>197</sup>*Vidal v. Armendariz*, No. 3-14-cv-01253 (D.P.R., Mar. 25, 2014).

Court no longer regards the question in *Baker* as insubstantial, a federal court need not view it as binding precedent and may therefore rule on the merits of a subsequent case.

**2. Does the U.S. constitutional right to marry include the right to choose who to marry, including someone of the same sex?** The courts have concluded that it does.

**3. What standard should be used in determining whether a state's ban on same-sex marriage violates the due process and equal protection clauses — the rational basis, strict scrutiny, or heightened scrutiny standard?** Some courts have explicitly determined the standard to be used, whereas others state that it simply does not matter because the state ban violates even the rational basis standard. Arguments used in the past to justify a state's interest in defining marriage as a union between a man and a woman — tradition, procreation, optimal child-rearing environments, and federalism — have been unanimously rejected by the federal courts post-*Windsor*.

Once a state ban on same-sex marriages is held to be invalid, there is little justification to uphold the state's right to refuse to recognize same-sex marriages performed in other jurisdictions.

## V. Conclusion

The *Windsor* decision has created the perfect storm for plan administrators of employee benefit plans. First, they may have to be aware of litigation in every federal circuit and state supreme court that invalidates same-sex marriage bans (and their effective dates) to process requests for spousal benefits. Second, they may not be in possession of information regarding the same-sex marriages for purposes of mandated or voluntary spousal benefits.

Another practical issue for plan administrators will be the unwillingness — for privacy reasons — of a same-sex employee to inform the administrators about a valid same-sex marriage, leaving them in the dark regarding who may be entitled to survivor benefits. That problem may have to be solved with educational outreach to inform same-sex employees of their new rights.

As mentioned in the previous article, the potential for future litigation in this area may encourage law students to consider employee benefit law as a career — a subject near and dear to my heart as a law school professor.

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