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DOMA Implications for Employee Benefit Plans
by Kathryn J. Kennedy

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Kathryn J. Kennedy highlights the effect *Windsor* will have on employee benefit plans and federal laws relying on Defense of Marriage Act section 3.

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The federal law known as the Defense of Marriage Act (DOMA) was passed in 1996 in the wake of Hawaii's consideration of same-sex marriage. Section 2 of DOMA permits states to disregard the validity of same-sex marriages that are otherwise legal in the state in which the ceremony was performed; whereas section 3 defined for federal law purposes a marriage as one between a man and a woman and a spouse as the person of the opposite sex. While there were no states that permitted same-sex marriage in 1996, there are now 13 states, as well as the District of Columbia, that permit it.

The U.S. Supreme Court recently held section 3 of DOMA to be unconstitutional in *United States v. Windsor*. However, in disposing of *Hollingsworth v. Perry* on procedural grounds, the Court left section 2 of DOMA intact. *Windsor* has significant rippling effects because there are 1,138 instances of the use of the terms "marriage" and "spouse" in federal laws relying on DOMA section 3. Employee benefit plans will be affected significantly because there are benefits and rights extended to a participant's spouse and dependents under ERISA and the Internal Revenue Code. This report highlights those changes and raises the outstanding issues.



Kathryn J. Kennedy

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I. Moan and Groan

As a law professor, it is difficult to recruit students into employee benefits law because they generally do not understand it or see its relevance to everyday practice. But the Supreme Court is changing that by providing employee benefits law professors some welcome bait in the form of decisions that affect employee benefits as they relate to employers and employees. In 2012 the Supreme Court affirmed the constitutionality of the Patient Protection Affordable Care Act (PPACA), which imposes an individual mandate on Americans to maintain minimum essential health insurance coverage or face a shared responsibility payment (that is, a tax penalty) to the federal government.¹ Similarly, the PPACA imposes new requirements on group health plans maintained by employers.² In 2013 the Supreme Court granted certiorari in two cases -- one which addressed the constitutional aspects of section 3 of the Defense of Marriage Act (DOMA)³ and another which addressed the constitutionality of a state ban against same-sex marriages.

Maybe, just maybe, employee benefits law will now appear relevant to law students. This report focuses on the Supreme Court's 2013 DOMA decisions and their effect on employee benefit plans regulated by ERISA and the code.⁴

II. Introduction

DOMA section 2 provides that no state shall be required to recognize for state purposes a same-sex marriage that is valid as a legal marriage in another state, nor does a state have to recognize a state right or claim arising under that relationship (which could exist if the other state had legalized civil unions or domestic partnerships). Hence, a state may disregard the validity of a same-sex marriage that was otherwise legal in the state in which the ceremony was performed (the "state of celebration"). Thus, if a same-sex couple marries in a state that permits same-sex marriages, that marriage does not have to be recognized by another state should the couple move to that state ("state of residence"). In contrast, DOMA section 3 looks to the Dictionary Act for the definition of marriage for any federal law, ruling, or regulation. According to the Act, marriage means only a legal union between one man and one woman and "spouse" refers only to a person of the opposite sex who is a husband or wife.⁵

The constitutionality of DOMA section 3 was at the heart of the June 26, 2013, Supreme Court 5-4 decision. In *United States v. Windsor*,⁶ the Supreme Court struck down the constitutionality of DOMA section 3, making it clear that for federal law purposes, the federal government must recognize same-sex marriages in states that recognize those marriages.

While DOMA section 2 was not at issue in the second Supreme Court decision issued on the same date, the constitutionality of a state's definition of marriage as a union between a man and woman was. Had the Supreme Court struck down the ability of a state to limit marriage to opposite-sex couples, that would have had ramifications for DOMA section 2. Instead, the *Hollingsworth v. Perry* Court was able to sidestep that question because it held that the petitioners did not have standing to appeal the lower court's decision.⁷ Hence, the issue of whether a state can prohibit marriages to same-sex couples within it, by defining marriage as a union between a man and a woman, must be resolved at a later date. Thus, DOMA section 2 remains intact and states are not required to recognize same-sex marriages rendered legal in another state.

In 2009 federal legislation known as the Respect for Marriage Act was proposed to repeal DOMA; it was reintroduced in the House and Senate in 2011.⁸ If that legislation is passed or if DOMA is held to be unconstitutional, the Full Faith and Credit Clause of the U.S. Constitution, or the lesser-known rule -- the rule of comity -- may compel states to recognize same-sex marriages valid in other states.

Windsor leaves unresolved many outstanding questions. The first is how the federal government will treat same-sex couples that had a valid marriage in the state of celebration, but then moved and reside or work in a state that does not recognize those marriages. In the past, the IRS has looked to the state of residence for tax purposes.⁹ Likewise, the Department of Labor (DOL) has looked to the state of residence for some labor law purposes.¹⁰ However, those regulatory interpretations preceded the enactment of DOMA. Also, the implications of the Supreme Court's decision will go beyond the interpretations previously made by the IRS and DOL agencies because DOMA affects more than 1,000 federal statutory provisions. A list of federal agencies, including the IRS, that have made announcements on their use of the state of celebration or state of residence approach will be discussed later in this report.

The second question is the retroactive effect of *Windsor* because its effective date is 25 days after its issuance or July 23, 2013.¹¹ When DOMA was passed in 1996, there were no states that recognized same-sex marriages.¹² While the federal regulatory agencies collaborate on the interpretation of *Windsor* and Congress debates whether DOMA should be repealed, employee benefits plan sponsors need immediate guidance on the decision's effect on plans and tax withholding questions. As ERISA, the code, the Family and Medical Leave Act (FMLA), COBRA, and Health Insurance Portability and Accountability Act of 1996 (HIPAA) all confer benefits or rights to married spouses and dependents, *Windsor* has important and immediate consequences under employer-provided employee benefits plans.

DOMA affects more than 1,000 federal laws ranging from estate and gift tax and Social Security benefits to retirement plans and income tax filings.¹³ Many federal agencies will be involved in the implementation of *Windsor*.

III. The Two Supreme Court Decisions

The Dictionary Act provides uniform definitions used by more than 1,000 federal laws and a host of federal regulations to provide uniformity in administration.¹⁴ When the Hawaii Supreme Court said in the early 1990s that there may be a state constitutional right to a same-sex marriage,¹⁵ Congress passed DOMA section 3. The section amended 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 partners. Further, the word "spouse" was to refer only to a person of the opposite sex who is a husband or wife. At that time, no state had made lawful a marriage between same-sex couples, so it was a theoretical point. Congress also passed section 2 of DOMA at that time, which provided that no state shall be required to recognize for state purposes a same-sex marriage that is valid as a legal marriage in another state, nor does it have to recognize a state right or claim arising from that relationship (which could exist if the state allowed for civil unions or domestic partnerships). The federal concern at the time was that some states would begin to permit same-sex marriage and other states would have to recognize those same-sex marriages under the Full Faith and Credit Clause of the Constitution or general comity principles.¹⁶ The Full Faith and Credit Clause grants Congress the power to ascertain whether each state must grant "full faith and credit" to other states' acts.¹⁷ Interestingly, DOMA was relatively short in length and the express reasons for its enactment which are usually set forth at the beginning of the statute were absent.¹⁸

After the passage of the DOMA, 35 states have adopted DOMA's section 3 definition of a marriage as between a man and a woman performed within the state and do not recognize same-sex marriages performed in other states.¹⁹ They have accomplished those two results either by legislation or changes made to their state constitutions. Two states -- New Jersey and New Mexico -- neither expressly prohibit nor permit same-sex marriages. New Jersey is silent as to whether same-sex marriages performed elsewhere will be recognized by the state; New Mexico has an attorney general's opinion issued in January 2011 validating same-sex marriages performed elsewhere under New Mexico law.²⁰

Of the 35 states with mini-DOMA laws or amendments to state constitutions, seven of them permit civil unions or domestic partnerships for same-sex couples, which may or may not confer the same rights and benefits to married couples.²¹ The state of Illinois limits marriage to opposite-sex couples (that is, mini-DOMA section 3), but recognize same-sex marriages performed in other jurisdictions as civil unions (but not as marriages).²² To date, 13 states (mostly in the northeast corridor of the United States), including California after the *Perry* decision and the District of Columbia, permit same-sex marriages within their states or districts, and recognize out-of-state same-sex marriages.²³

According to a recent GAO report, there are 1,138 instances of the terms "marriage" and "spouse" in federal laws that rely on the Dictionary Act.²⁴ Initially the Obama administration defended the legality of DOMA section 3 against constitutional challenges in federal courts. But in February 2011, Attorney General Eric Holder said that the president thought that DOMA section 3 was unconstitutional. Holder directed the Justice Department not to defend the statute in litigation but the administration would continue to enforce the law. In reaction to the administration's position, several House Republican leaders, as part of a House Bipartisan Legal Advisory Group (BLAG), decided to defend the constitutionality of DOMA.

The Supreme Court granted certiorari in *Windsor* on the constitutionality of DOMA section 3, and in *Perry* on the constitutionality of a state constitution limiting marriage to

opposite-sex couples. Those decisions were issued on the last day of the 2012-2013 Supreme Court term and left just as many questions unanswered as those they answered. Even though the Supreme Court struck down the constitutionality of DOMA section 3 in *Windsor*, the federal government must rely on state law to determine whether a same-sex couple is married for federal law purposes. However, DOMA section 2 remains a valid federal law and, thus, states are free to refuse to recognize same-sex marriages as valid in other states. The central outstanding question is whether a same-sex couple that is married in the state of celebration but moves to a state of residence that does not recognize same-sex marriages will be considered married for federal law purposes. For now, it will be up to the federal agencies to resolve.

Undoubtedly, litigation will continue until the Supreme Court decides whether a state can refuse to recognize same-sex marriages that were legitimized in another state, or more broadly, whether a state can prohibit same-sex marriages from occurring within it. Those in attendance at the oral arguments of the two decisions reported that the Court was not yet ready to decide such a controversial question.

A. *Hollingsworth v. Perry*

Perry involved California law and its state constitution. California's family law defined marriage as one arising between a man and a woman.²⁵ In 2008 the California Supreme Court held that the state's official designation of marriage restricted to opposite-sex couples violated the equal protection clause of the state constitution.²⁶ Same-sex marriages were then made available in California from June through October 2008.²⁷ In reaction, California state voters passed an initiative, known as Proposition 8, which amended the California constitution to hold that "only marriage between a man and a woman is valid or recognized in California."²⁸

The California Supreme Court later held the initiative properly enacted.²⁹ According to the court, Proposition 8 granted a "narrow and limited exception" to the state constitutional rights guaranteed to same-sex couples, which recognized their unions as domestic partnerships with the same rights, protections, and benefits as marriages but without the official designation of the term.³⁰ The respondents (two same-sex couples wishing to marry) filed suit in federal court, alleging that Proposition 8 violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution.³¹ Thus, they were not challenging the constitutionality of section 2 of DOMA, because they did not question another state's refusal to recognize the validity of same-sex marriages recognized in another state; instead, they were challenging a state's ability to deny same-sex couples the opportunity to enter into a valid marriage within a state, a much broader issue. The named defendants were the California governor, the attorney general, and various state and local officials charged with enforcing the state's marriage laws. While the defendants refused to defend Proposition 8 in litigation, they continued to enforce it as the law of the state.³²

The district court allowed the original proponents of Proposition 8 to intervene to defend its constitutionality, but eventually held it unconstitutional.³³ The defendants were enjoined from enforcing the law.³⁴

The original advocates of Proposition 8 appealed, and the Ninth Circuit questioned their standing.³⁵ The Ninth Circuit asked the California Supreme Court whether those proponents had a "particularized interest" or "authority to assert" the state's interest.³⁶ The California Supreme Court responded in the affirmative.³⁷ That decision was then affirmed by the Ninth Circuit, which held that the state has the "prerogative, as independent sovereigns, to decide for themselves who may assert their interests."³⁸ According to the Ninth Circuit, if the state had endured a harm that would entitle it to standing at all, any party

it authorized to "represent its interest in remedying that harm" had standing too.³⁹ Then, looking to the merits of the case, the court held that Proposition 8 was unconstitutional because its designation of marriage for opposite-sex couples violated the Constitution's equal protection clause. That classification served no purpose "but to impose on gays and lesbians, through the public law, a majority's private disapproval of them and their relationships."⁴⁰

The Supreme Court granted certiorari to review the Ninth Circuit's opinion, requesting the parties brief and argue the question of standing under Article III of the Constitution. Article III limits the judicial power of the federal courts to "cases or controversies."⁴¹ In a 5-4 decision, the Court held that the petitioners lacked standing as they did not have a personal and direct stake in the outcome of the decision.⁴² According to the Court, "the presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Article III's requirements."⁴³ Because the petitioners had no "personal stake" in defending the enforcement of Proposition 8, their interest was no different from that of a "concerned bystander."⁴⁴ The Court rejected the argument that the petitioners had the right to appeal the district court's decision on behalf of the state, as they still "must have suffered an injury in fact, thus giving [them] a sufficiently concrete interest in the outcome of the issue in dispute."⁴⁵

For those present at the oral arguments, it was apparent that the Supreme Court justices were not in a hurry to decide the merits of the case. The question of standing afforded them the ability to sidestep the merits for the time being. Hence, the Court never decided whether a state that prohibits same-sex marriages by laws or through its constitution violates the equal protection clause of the 14th Amendment. Because the case rejected the petitioners' standing to bring the case, the Ninth Circuit decision was vacated and the case was remanded to the Ninth Circuit to dismiss the appeal.⁴⁶ Hence, the lower court's holding that Proposition 8 was unconstitutional became the law within the jurisdiction. Thus, after *Perry*, same-sex marriages resumed in California.⁴⁷ Also, because the constitutionality of DOMA section 2 was not in question, it remains valid federal law.

B. *United States v. Windsor*

Edith Windsor and Thea Spyer met in New York City in 1963 and became residents of New York. When New York gave same-sex couples the ability to register as domestic partners in 1993, Windsor and Spyer did.⁴⁸ Later, concerns over Spyer's health prompted the couple to travel to Ontario, Canada, in 2007, and have a lawful marriage ceremony. New York law recognized the Canadian marriage as valid.⁴⁹ Windsor and Spyer continued as New York residents after the marriage. Spyer died in 2009, leaving her estate to Windsor.⁵⁰ Because DOMA denied recognition of same-sex couples for federal law purposes, Windsor paid the federal estate tax without the benefit of the marital exemption.⁵¹ She then sued for a federal estate tax refund in the United States District Court for the Southern District of New York.⁵² Her claim was that DOMA section 3 was an unconstitutional violation of the equal protection guarantee of the Fifth Amendment of the U.S. Constitution.⁵³

While the case was pending, the U.S. attorney general informed the Speaker of the House that the Justice Department would not be defending the constitutionality of DOMA section 3.⁵⁴ In the *Windsor* majority opinion, the Supreme Court noted the Justice Department had previously defended DOMA's constitutionality, but failed to do so because the president had concluded that the law should be subject to a heightened standard of scrutiny.⁵⁵ The president had stated that DOMA section 3 would continue to be enforced, but that the "United States had an interest in providing Congress a full and fair opportunity to participate in the litigation of those cases."⁵⁶ That dual-track approach of enforcing the law but determining that it was unconstitutional would force the courts to be the final arbiters.⁵⁷

With *Windsor* and the Justice Department both not objecting to the lower court's decision, it was not clear who would have standing to pursue the litigation.

Around the same time the attorney general issued his notice, BLAG decided to intervene to defend the constitutionality of DOMA section 3.⁵⁸ In June 2012, the district court allowed BLAG standing as an interested party. The court then held against the United States on the merits of the federal estate tax refund on the theory that DOMA section 3 was unconstitutional. According to the court, BLAG failed to show a rational basis for treating opposite-sex and same-sex couples differently.⁵⁹ Thus, Treasury was ordered to refund part of the federal estate taxes with interest to *Windsor*.⁶⁰ In October 2012, the Second Circuit affirmed the decision, applying a heightened scrutiny to classifications based on sexual orientation.⁶¹ Because neither *Windsor* nor the U.S. government objected to the decisions, the issue of standing was going to be raised upon certiorari to the Supreme Court. In granting certiorari on the issue of the constitutionality of DOMA section 3, the Court requested arguments on the following:

- Because the United States agreed with *Windsor*'s legal position, was further review by the Supreme Court necessary regarding the constitutionality of section 3 of DOMA?
- Because BLAG intervened in the lawsuit as an interested party, did it have standing to appeal?
- Did the Supreme Court have jurisdiction to decide the case?⁶²

The Court held on each of the issues. It affirmed that it had jurisdiction to hear the case as there was a "concrete disagreement between opposing parties that was suitable for judicial resolution." The Second Circuit affirmed the district court's judgment against Treasury to pay *Windsor* the tax refund, but Treasury had not complied with the judgment. Hence, there was a "real and immediate economic injury" to justify a controversy for Article III jurisdiction purposes.

The Court struck down the constitutionality of DOMA section 3 because the Court said that it amounted to a deprivation of equal liberty of persons protected under the due process clause of the Fifth Amendment. While not illuminating a particular standard in applying the due process clause (reasonable versus strict scrutiny), the Court said that section 3 interfered with an area that had been traditionally controlled by the states. Because states had the power to define and regulate the status of marriage, DOMA's far reach to more than 1,000 federal statutes and regulations to effectuate federal policy imposed "restrictions and disabilities" on New York residents that rose to the level of an injury and indignity protected as liberty under the Fifth Amendment. DOMA's effect was that it injured a class of New York residents that New York chose to protect, thereby violating the due process clause, and equal protection principles, of the Fifth Amendment.⁶³ Thus, in those states that have made same-sex marriages lawful, as well as states that recognize same-sex marriages rendered valid in other jurisdictions (as New York held the Canadian marriage of *Windsor* and *Spyer* valid), that marriage is regarded as a liberty under the Fifth Amendment. Through DOMA the federal government was differentiating between opposite-sex marriages and same-sex marriages which amounted to a deprivation of that liberty without due process. According to Justice Anthony Kennedy, writing for the majority, DOMA section 3 "frustrates New York's objective of eliminating inequality by writing inequality into the entire United States Code." The Court ended the decision by saying that "this opinion and its holding are confined to those lawful marriages." Thus, future appellate courts and federal agencies may limit *Windsor* to those situations in which the state recognizes same-sex marriages, but not civil unions or domestic partnerships, for federal law purposes.

IV. Implementation by Federal Agencies

Windsor means that federal law defers to state law definitions of marriage. Joseph Adams,

Todd Solomon, and Brian Tiemann of McDermott Will & Emery have coined the phrase "federally recognized same-sex spouse" to define a same-sex couple that must be recognized for federal law purposes.⁶⁴ The phrase refers to a same-sex spouse who was legally married in a state that permits and recognizes same-sex marriages. That includes same-sex spouses who marry in one of the 13 states or the District of Columbia and continue to reside in any of those states or district. The phrase also includes spouses married in New Jersey or New Mexico because they have no legal prohibition against recognizing out-of-state same-sex marriages.

Because DOMA section 2 is valid law, states are not required to recognize out-of-state same-sex marriages or any rights or claims arising from those relationships. The majority of states have mini-DOMA laws in effect and so that will continue to be the case. The outstanding question is whether the federal agencies will adopt a state of celebration approach so that a couple with a valid same-sex marriage in the state of celebration continues to be married for federal law purposes, regardless of their state of residence. Alternatively, if federal agencies adopt the state of residence approach, a couple with a valid same-sex marriage in the state of celebration would not be married for federal law purposes, if the spouses move to a state that does not recognize same-sex marriages.

Generally, judicial law from the Supreme Court is effective 25 days after the decision. In the case of *Windsor*, that date would be July 23, 2013.⁶⁵ The decision will affect employee benefit plans, including retirement and welfare plans. There is no statute of limitations within which the qualified retirement plan must comply with the code. That will cause retroactivity issues for mandated spousal benefits under covered retirement plans. However, the IRS has authority under section 7805(b) to provide transitional relief which may be coming. That relief, however, would not extend to any ERISA Title I claims. Perhaps the IRS will adopt the approach it took in reaction to the 2004 Supreme Court's decision in *Central Laborers' Pension Fund v. T.E. Heinz* where it limited the retroactive effect of that decision.⁶⁶

Immediately after the decision, the administration issued a directive to the attorney general and the Cabinet that federal agencies should work together to address related questions left unresolved.⁶⁷ However, the agencies have taken inconsistent positions:

- The Office of Personnel Management (OPM) (effectively the human resources department of the federal government) announced that it would extend federal benefits to same-sex spouses of federal employees and retirees, including pension, health and welfare, and flexible spending accounts.⁶⁸ Notably, the OPM indicated that it would be using the standard of state of celebration, not state of residence, for purposes of determining the validity of a same-sex marriage.
- The Pentagon issued a statement saying that it would extend equal employee benefits to same-sex couples who present a valid marriage license.⁶⁹
- The DOL announced on a fact sheet that for purposes of FMLA, a spouse means a husband or wife as defined or recognized under state law where the employee resides (state of residence), including common law marriages and same-sex marriages.⁷⁰
- The Social Security Administration posted "*Windsor* instructions" applicable to all claims filed on or after June 26, 2013, or that were pending final determination at that time. The instructions say that payment of claims to the Number Holder (NH) are subject to the NH being married in a state that permits same-sex marriages and being domiciled, at the time of application or while the claim is pending, in a state that recognizes same-sex marriages.⁷¹
- Janet Napolitano, secretary of Homeland Security, released a statement and two questions and answers stating that the U.S. Citizenship and Immigration Services would adopt the state of celebration approach in determining an immigrant visa petition for a same-sex spouse.⁷²
- The Department of Health and Human Services issued a memo invalidating its prior

rule that a Medicare beneficiary in a same-sex marriage enrolled in a Medicare Advantage plan did not have equal access to skilled nursing facilities. Under the state of celebration approach, a Medicare beneficiary in a legally recognized same-sex marriage would have equal access to those facilities, regardless of where the couple lived.⁷³

V. Treasury, IRS, and DOL Guidance

The most sweeping announcement was made by Treasury and the IRS on August 29, 2013, when they officially adopted a state of celebration approach for federal tax purposes.⁷⁴ In the revenue ruling, Treasury and the IRS began with a discussion of Rev. Rul. 58-66, which says that individuals entering into a common law marriage in a state that recognizes common law marriages will be treated as married for purposes of federal income tax filing status and personal exemptions.⁷⁵ According to the new revenue ruling, the prior revenue ruling concluded that the couple would continue to be treated as married for federal income tax filing status and personal exemptions even if the spouses were domiciled in a state that required a ceremony to establish a marriage. Because of that precedent and the requirement for uniform nationwide rules that promote fair tax administration, the IRS is adopting a similar approach in its application of *Windsor* for tax purposes. With more than 200 code provisions and Treasury regulations using the terms spouse, marriage, husband and wife, husband, and wife, the IRS will interpret the terms to include same-sex spouses and same-sex marriages that were legally performed, regardless of the married couple's place of domicile. Thus, even if the same-sex couple's state of domicile does not recognize the validity of the marriage, the IRS will recognize it for federal tax purposes.

Treasury and the IRS went on to say that a state of residence approach would pose significant challenges for employers that operate in more than one state or that have employees or former employees who reside in more than one state. By acknowledging the financial and administrative burdens imposed on employers and administrators of employee benefit plans, the IRS adopted the state of celebration approach for benefit purposes as well.

However, Treasury and the IRS will not interpret the "marriage," "spouse," "husband and wife," "husband," and "wife" as including registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law, not denominated as a marriage under that state's law. That rule applies regardless of whether the individuals who entered into those relationships are of the opposite sex or same sex.

The revenue ruling is to be applied prospectively as of September 16, 2013. However, for open tax years, affected taxpayers may rely on it for purposes of filing original returns, amended returns, adjusted returns or claims for credit or refund for any overpayment of tax resulting from it, provided all items required to be reported are consistent with the marital status reported on the return or claim.⁷⁶ Because of the prospective application of the revenue ruling, affected taxpayers are not required to file amended returns for open tax years. For employee benefit plan purposes, taxpayers are entitled to rely on the revenue ruling retroactively for open tax years regarding filing original returns, amended returns, adjusted returns or claims for credit or refund of an overpayment of both employment and income taxes. That includes employment and income taxes applicable to employer-provided health coverage or fringe benefits excludable from income under section 106, 117(d), 119, 129, or 132 that are based on an individual's marital status. It also includes employment and income taxes applicable to a taxpayer who made a pretax salary-reduction election under a cafeteria plan and who elected health coverage for a same-sex spouse on an after-tax basis. Now the amounts paid for employer-provided group health coverage for the same-sex spouse may be treated as pretax salary deferrals. The IRS intends to issue further guidance on the retroactive application of the *Windsor* decision on employee benefit plans.

On September 18, 2013, the DOL released Technical Release 2013-14 stating that it would use the state of celebration approach in administering the applicable provisions of ERISA

and the code for employee benefit purposes.⁷⁷ Thus the two agencies -- the IRS and DOL -- will take comparable approaches in their definitions of "marriage" and "spouse" for purposes of employee benefit plans. However, the DOL was silent as to the retroactive effect of its interpretation, but noted that it would issuing further guidance.

VI. Outstanding Questions

There are several outstanding questions in the wake of *Perry* and *Windsor*:

- While DOMA was passed in 1996 when there were no same-sex marriages valid under any state law and the first state to do so was in 2004, what is the retroactive effect of the *Windsor* decision? For some federal tax purposes, we have clarity as to the retroactive effect of the decision for individual taxpayer purposes for income and FICA taxes but not in all employee benefit contexts.
- While *Windsor* affirms that federal law must recognize same-sex marriages valid under state law, it is silent as to federal recognition of same-sex couples together as a result of state civil unions or domestic partnerships laws.
- *Perry* did not decide whether states have the constitutional right to prohibit same-sex marriages and to refuse to recognize same-sex marriages legitimized in other states; thus, states may continue to rely on mini-DOMAs or laws that amend state constitutions laws passed by them to limit marriages to opposite-sex unions. That will be the case until the Supreme Court decides that question or Congress repeals DOMA.
- Will same-sex marriages, valid in the state of celebration, be recognized in a state of residence that does not recognize same-sex marriages for federal law purposes? Other federal agencies making announcements will provide more clarity as to which approach applies.
- If a state law later changes either as a result of litigation or legislation, what is the retroactive effect of that on the enforcement of federal law?

VII. Implications for Employee Benefits

Windsor will affect employee benefit plans, but most plan sponsors are awaiting federal guidance before making changes to their plan documents and plan communications. The outstanding questions will be of concern for plan sponsors and plan administrators. Further, there will be uncertainty regarding drafting plans prospectively in light of *Windsor* and what discretion to grant to the plan administrator in making determinations about who is the participant's spouse, beneficiary, or dependent.⁷⁸

For ERISA purposes, federal law governs because ERISA's preemption clause generally preempts state laws as they relate to employee benefit plans with a savings exception for state insurance laws.⁷⁹ Thus, pre-*Windsor*, employee benefit plans could follow DOMA section 3 definitions of "marriage" and "spouse," except in situations of insured welfare plans where a state insurance law could require any spousal coverage to be extended to same-sex spouses. As ERISA amended federal labor laws as well as the federal tax code, both DOL and the IRS now regulate it.

Now that guidance has been issued by both Treasury/IRS and DOL, adopting the state of celebration approach for employee benefit purposes, that issue has been quickly resolved. Both sets of guidance affirmed that "marriage" and "spouse" would not include individuals in a domestic partnership or civil union, regardless of whether those individuals had the same rights and responsibilities as those individuals who are married under state law. The interpretation applied to individuals in such relationship with an individual of the opposite sex or same sex.

Teresa Renaker describes the effect of *Windsor* as creating a "unique ERISA moment."⁸⁰ Generally when a couple gets married, they are aware of their actions and the consequences of their decision. According to a report from the Williams Institute issued in November 2011, there are more than 140,000 same-sex couples that have formalized their

relationships under state law and close to 50,000 that have actually married under state law.⁸¹ As a result of *Windsor*, same-sex couples may now be married for federal law purposes without knowing it, especially if they no longer reside in the state of celebration of their marriage. That may raise questions of notice by the plan administrator to those couples so as to make them aware of any new employee benefits or rights under existing employee benefit plans.

The effect on employee benefit plans will be discussed separately from retirement plans and welfare benefit plans. For qualified retirement plan purposes, according to recent guidance, federally recognized same-sex spouses include individuals who entered into a valid same-sex marriage in the state of celebration, regardless of whether their state of domicile recognizes the marriage. The minimum distribution rules and the rollover rules which affect both qualified retirement plans and IRAs will use the same definition of federally recognized same-sex spouse.

A. Retirement Plans

1. Spousal benefits and rights. ERISA mandates specific rights and benefits for the spouse of a plan participant. For qualified pension plans (defined benefit and money purchase or target benefit defined contribution plans), ERISA and the code mandate that the normal form of benefits to married participants be the qualified joint and survivor annuity (QJSA) that provides a survivor annuity of not less than 50 percent and not more than 100 percent for the life of the participant's spouse.⁸² Further, for a vested participant who dies before commencing distributions, ERISA and the code prescribe that qualified pension plans offer a spousal death benefit no less than a qualified pre-retirement survivor annuity (QPSA).⁸³ That amount is equivalent to the survivor portion of the participant's normal form of payment had the participant lived until retirement and then immediately died. Both of those benefits can be waived by the spouse provided the waiver is in writing, notarized, or witnessed by a plan representative, and an alternate form of payment or alternate beneficiary is named.⁸⁴ Thus, there are some formalities that preface those waivers. Spousal waivers are also required for pension plans that provide for plan loans.⁸⁵ As a result of *Windsor*, federally recognized same-sex spouses must be afforded those rights and benefits.

If the plan fails to obtain the required spousal consent for alternate distributions and makes an improper distribution, there is guidance under the IRS's current correction program (referred to as the Employee Plans Compliance Resolution System) as to how to correct to avoid plan disqualification.⁸⁶ Spousal consent may be obtained retroactively; but if that is unavailable, the plan is required to provide the survivor portion to the surviving spouse after the participant's death.⁸⁷ The plan may commence payment of the survivor's benefits (offset by payments already made to the participant) or offer the spouse a lump sum equivalent of the actuarial value of the survivor benefits.⁸⁸ That guidance will be relevant from now on if a federally recognized same-sex spouse is not provided the necessary surviving spouse benefits. Treasury and the IRS have yet to provide guidance for qualified retirement plans relating to periods before September 16, 2013.⁸⁹ Thus, they expect future guidance to address plan amendment requirements and any necessary operational corrections for periods before future guidance is issued.⁹⁰

The availability of QJSA and QPSA distribution options for federally recognized same-sex spouses may affect the minimum funding for the plan, especially if those options are subsidized by the employer. The grant of the QPSA benefit for federally recognized same-sex spouses may increase costs depending on the employer's workforce and whether the plan currently doesn't offer a non-spousal death benefit. To the extent a pension plan must provide QJSA and QPSA benefits to federally recognized same-sex spouses, that may affect the actuarial assumption used for funding purposes as the actuary generally makes assumptions as to what percentage of participants are married and the age

difference between spouses.⁹¹ The funding ratio of the plan is relevant for the benefit restrictions under ERISA section 206(g) and section 436.

Defined benefit plans may offer Social Security offset distribution options that are calculated based on the Social Security benefit payable to the participant before and after his Social Security eligibility age. As federally recognized same-sex couples will now be eligible for spousal Social Security benefits, that may affect the presumed Social Security benefit used to determine the offset depending on whether the plan uses the participant's own Social Security benefits or those that he might receive as a spousal benefit.

For individual account plans (for example, profit-sharing plans such as 401(k) plans), the above rules do not apply provided the participant's account balance is payable to the participant's surviving spouse, unless waived by the spouse, or if there is no spouse, to a designated beneficiary.⁹² Again, all federally recognized same-sex spouses will be affected by those requirements.

2. QDROs. ERISA and the code generally prohibit retirement benefits from being assigned or alienated.⁹³ However, there is a well-known exception for qualified domestic relations orders that are state-issued domestic relations orders relating to child support, alimony, or marital property.⁹⁴ Benefits from the plan may be paid under a QDRO to an alternate payee, which includes the participant's spouse, former spouse, child, or dependent.⁹⁵ Under those rules, a domestic relations order that is qualified (that is, meets the requirements in ERISA and the code) may recognize a former spouse as the current spouse for purposes of mandated plan benefits and rights.⁹⁶ Given that some states allow same-sex couples to divorce, the former federally recognized same-sex spouse is now entitled to secure a QDRO that could recognize that person as a spouse or former spouse for plan purposes.

Under the federal income taxation rules, if the alternate payee is the participant's spouse or former spouse, the alternate payee is taxed on whatever distributions they receive under the QDRO.⁹⁷ However, if the alternate payee is someone other than the spouse or former spouse (for example, dependent), the participant is taxed on the distribution.⁹⁸ Clearly *Windsor* will have federal tax implications for QDRO distributions paid to a federally recognized same-sex spouse or federally recognized former same-sex spouse.

3. Notices. ERISA mandates that sometimes notices be given to beneficiaries receiving benefits, covered spouses, and alternate payees of QDROs.⁹⁹ Thus, to the extent the plan provides notices to opposite-sex spouses as required by ERISA, the plan must extend those notices to federally recognized same-sex spouses. DOL guidance will be relevant in determining who is entitled to those notices.

4. Required minimum distributions. Qualified pension and profit-sharing plans, as well as IRAs, are required to follow the code's minimum distribution rules. Those rules ensure that benefits are taxed to participants and beneficiaries and are not deferred to subsequent generations. They define the required beginning date (RBD) for distribution purposes as the April 1 after the calendar year that the plan participant or IRA owner attains age 70 1/2 (or terminates employment, if later).¹⁰⁰ The required distributions then diverge depending on whether (1) the participant or IRA owner dies before or after his RBD and (2) he designates a spousal beneficiary. If he dies before his RBD and designates a spousal beneficiary, the surviving spouse is permitted to defer receipt of benefits until December 31 of the calendar year of the participant's RBD. A non-surviving spouse beneficiary must begin benefits within one year of the participant's death over his life expectancy, or alternatively, receive all benefits within five years of death of the participant or IRA owner.¹⁰¹ Thus, the surviving spouse beneficiary has greater rights under the federal income tax rules to defer receipt of benefits than the non-surviving spouse beneficiary. Further, distributions to the spouse beneficiary may be made over the spouse's life expectancy, which, depending on the age of the spouse, could be considerable. After *Windsor*, those rights must be extended to

federally recognized same-sex spouses.

If the participant dies *after* the RBD, the regulations set forth a Uniform Table for determining the applicable divisor in determining the amount of each calendar year's distribution.¹⁰² The table assumes that the participant is married to a spouse that is 10 years younger, regardless of whether the participant or IRA owner is married and regardless of whether the spouse is actually 10 years younger. However, the regulations go on to say that if the age difference between the participant and the designated spouse beneficiary is greater than 10 years, the actual joint life expectancy of the couple may be used.¹⁰³ The result is that a larger divisor may be used each year, resulting in a smaller required distribution and less benefits subject to taxation. Qualified plans will need to be administered in accordance with *Windsor* so that federally recognized same-sex spouses are given the same rights and benefits as opposite-sex spouses, which could result in greater deferrals for them.

5. Rollovers. The code's rollover sections provide an exception from the normal federal income tax rule that a qualified plan or IRA distribution is taxed in the year of receipt. Under the rollover rules, the recipient may defer taxation by rolling the money into another qualified plan or IRA.¹⁰⁴ However, a spouse beneficiary of an eligible rollover distribution has more choices under the tax rules and a greater ability to defer receipt of taxation when receiving benefits upon the participant's death. That is because the code treats the spouse in the same manner as if he were the participant.¹⁰⁵ Thus, a spouse beneficiary can accomplish a rollover of eligible amounts either by rolling the money directly into another qualified plan or into another IRA.¹⁰⁶ In contrast, a non-spouse beneficiary can only accomplish a rollover through a direct trustee-to-trustee transfer and, if transferred to an IRA, that IRA must be treated as an inherited IRA.¹⁰⁷ Under the minimum distribution rules discussed above, distributions to a non-spouse beneficiary from an inherited IRA are less favorable than those available to a spouse-beneficiary from his own IRA. Post-*Windsor*, federally recognized same-sex spouses must be treated the same as opposite-sex spouses for these rollover rules.

6. Hardship distributions. The popular 401(k) profit-sharing plan may offer hardship distributions that provide an exception from the rule that participants under age 59 1/2 may not withdraw any funds before death, disability, or severance of employment.¹⁰⁸ Treasury regulations provide a safe harbor for when a hardship distribution may include (1) payments for tuition, related educational fees, and room and board expenses for postsecondary education for the employee, the employee's spouse, children, and dependents; (2) burial or funeral expenses for the employee's deceased parent, spouse, children, or dependents; and (3) deductible health costs for the employee, the employee's spouse, or dependents.¹⁰⁹ Thus, post-*Windsor*, federally recognized same-sex spouses' expenses would qualify for the safe harbor treatment. On the flip side, the assets of the employee and spouse must be considered in determining that there is no alternative means to satisfying the hardship exception.¹¹⁰ Thus, the assets of a federally recognized same-sex spouse must be considered in determining whether the safe harbor exception can be used if offered.

7. Miscellaneous issues. For purposes of various qualification rules, pension and profit-sharing plans of related employers are aggregated under the rules of section 414(b), (c), (m), (n), and (o). Those rules generally look to the ownership rights that entities have over other entities or that individuals have over those entities.¹¹¹ For purposes of the latter, there are attribution rights when the ownership rights of an individual's spouse (unless otherwise divorced or separated) are attributed to the individual.¹¹² Hence, after *Windsor*, for federal law purposes, a federally recognized same-sex spouse's ownership rights may be attributable to the other spouse which could cause the aggregation of qualified plans for certain qualification rules. That may cause aggregated plans to become top heavy, to discriminate as to benefits, or to exceed the maximum limitations of section 415(b) and (c).

That will generally be a concern for small plans, sponsored by entities owned by family members.

B. Health and Welfare Plans

Health and welfare plans will have different considerations than the rules applicable to retirement plans because ERISA does not require spousal coverage under group health and welfare employee benefit plans. However, some state insurance law require same-sex spousal coverage be offered if opposite-sex spousal coverage is offered under an insured group health plan. Because of ERISA's clause that preserves state insurance laws from preemption, the effect of *Windsor* will depend on whether the employee benefit plan is insured or self-insured (and if insured, the state where the policy is written).

1. Group health plans. If the group health plan was insured, the state insurance law may have required any spousal benefit coverage for medical, dental, and vision plans offered under an employer health plan be extended to same-sex spouses, assuming the state recognized same-sex marriages performed in the state or rendered valid by the state although performed elsewhere.¹¹³ That was true before *Windsor* because of ERISA's saving clause as part of the preemption provisions.

For self-insured plans, the question is whether spousal coverage is offered under the employer's plan because there is no ERISA mandate that it does. If the employer plan extends coverage to an opposite-sex spouse, failure to extend spousal coverage to federally recognized same-sex spouses could raise federal discrimination questions under Title VII of the Civil Rights Act of 1964 or other anti-discrimination laws or policies. While sexual orientation is not a protected class, sex discrimination is prohibited under federal law. Any state or local claims of sexual orientation discrimination may be preempted under ERISA.

Windsor may have no effect under a group health plan's special enrollment rights because those rights may be based on who the plan defines as a dependent. A dependent could be defined as any individual who was or could be eligible for coverage under the terms of the plan because of his relationship to the participant. For example, the plan could be written to extend special enrollment rights to same-sex spouses, civil union partners, or domestic partners within 30 days of losing coverage under another group health plan. If the plan offers special enrollment rights to a participant's spouse, it must extend special enrollment rights to federally recognized same-sex spouses within 30 days of losing coverage under another group health plan or within 30 days of their marriage with the participant.

Group health plans typically contain coordination of benefit clauses providing which plan is primary or secondary if the participant and spouse both have health coverage through their employers. Those provisions will need to be examined because federally recognized same-sex spouses will now be recognized as the spouse for that purpose.

2. Federal income taxation of health coverage. The real effect of *Windsor* for health plans will be the federal income tax treatment of employer-provided health coverage. Under the code, employer-provided health coverage and reimbursement for medical costs are not taxable to an employee.¹¹⁴ That tax exclusion includes employer contributions for group health coverage, and reimbursement for medical costs, covering the employee's spouse and children through age 26.¹¹⁵ Thus, given the IRS's recent guidance, employer contributions for health coverage and plan reimbursements covering a federally recognized same-sex spouse will now be excluded from the employee's income for federal tax purposes, including federal income and FICA taxes. That exclusion for medical coverage for a same-sex spouse now relies on the state of celebration approach in defining who is a federally recognized same-sex spouse.¹¹⁶

For group health coverage of a same-sex spouse's dependent child, the result may not be contingent on whether the spouse is a federally recognized same-sex spouse. Under the federal income tax laws, section 152(a) defines a dependent as either a qualifying child or

qualifying relative. A qualifying child includes a child of the taxpayer or a stepchild of the taxpayer. Hence, if the couple meets the definition of a federally recognized same-sex couple, and if the same-sex spouse's child is the stepchild of the employee, it could qualify as a child of the employee. Likewise, the same-sex spouse's child could qualify as a qualifying relative if he has the "same principal place of abode" as the employee and is a member of the employee's household.¹¹⁷ Under the recent Treasury and IRS guidance, same-sex couples with a valid marriage in a state of celebration will file, for the 2013 tax year and forward, returns using a married filing separately or married filing jointly status.¹¹⁸ If a child is a qualifying child under section 152(c) of both parents who are spouses but file using the married filing separate status, only one parent, not both, may claim a dependency deduction for it.¹¹⁹

3. Tax refunds. Because the IRS has previously treated employer-provided health coverage extended to same-sex spouses as imputed income to the employee and thus subject to federal income and FICA taxes, employees may now file for refunds for those taxes. That will require amending prior years' tax returns with a revised marital status. Under the usual rules, an employee can go back to three open tax years unless the employee filed a protective refund claim.¹²⁰ Likewise, the employers have been reporting FICA taxes on that imputed income and may wish to file for refunds from the IRS.¹²¹ Undoubtedly the employees will be requesting amended Form W-2 statements from their employers for open tax years so that they properly reflect income for federal tax purposes.

C. Cafeteria Plans

Normally a participant election that allows a choice between taxable and nontaxable benefits would result in imputed income under the code. An exception exists for elections made under a valid cafeteria plan when the employee makes the election in advance of the tax year.¹²² The regulations permit a cafeteria plan to offer special enrollment rights so that the prior year's election is revoked and replaced with another election.¹²³ In the context of the participant's spouse, that change in election is permitted if there is a change in the employee'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.¹²⁴ After *Windsor*, cafeteria plans that allow those special enrollment rights must do so for federally recognized same-sex spouses. Because of recent guidance, that would include same-sex spouses with a valid marriage in the state of celebration. The open question is whether a change in status occurs at or after the effective date of the *Windsor* decision or whether the change in status can be reflected during an open enrollment period that existed when the same-sex spouse met the definition of a federally recognized same-sex spouse. Regarding the federal tax implications of making a change in status and electing to pay premiums for family coverage on a pretax basis, the guidance is clear that employees who elected to pay for employer-provided health coverage on a pretax basis through a cafeteria plan and purchased the coverage on an after-tax basis for the employee's same-sex spouse, the employee may claim a refund of taxes paid on those premiums for open tax years.¹²⁵

D. Dependent Care Assistance

Employers may reimburse an employee for dependent care assistance or may offer a dependent care assistance account as part of a cafeteria plan allowing an employee to defer on a pretax basis amounts used to reimburse for eligible child care expenses.¹²⁶ That exclusion from income did not extend to payments made to the employee's spouse, which for federal tax purposes, pre-*Windsor*, did not include same-sex spouses.¹²⁷ An exception does exist for dependent care flexible spending accounts where the payments are for the care of an employee's disabled spouse or a disabled child of the spouse (provided that individual has lived with the employee for more than half a year) and for the care of a child of the spouse who is under the age of 13. Thus, after *Windsor*, payments made to federally

recognized same-sex spouses under Treasury's and the IRS's interpretation 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.

E. Health Savings Accounts

Under DOMA rules pre-*Windsor*, the participant could not contribute the maximum dollar amount to his health savings account if he or the opposite-sex spouse had family health coverage.¹²⁸ Likewise, the participant could not be reimbursed for medical expenses from the HSA used for the benefit of a same-sex spouse. With *Windsor*, a federally recognized same-sex spouse must be considered in determining whether the participant can contribute the maximum dollar amount to his HSA. The default rule is that each spouse is limited to 50 percent of the maximum limit unless one or both elect an alternate percentage.¹²⁹ However, medical expenses of the same-sex spouse may now be reimbursed from the HSA.

F. COBRA

COBRA mandates the continuation of medical coverage for the employee and his qualified beneficiaries in the event that coverage is lost due to the occurrence of a qualifying event.¹³⁰ Of course, the employee and beneficiaries must pay the cost of the coverage, but it 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.¹³¹ If the employee marries during the COBRA continuation period, the employee is permitted to enroll the spouse within 30 days of the marriage. Similarly, a qualified beneficiary includes any dependents who were covered under the plan on the day before the qualifying event or born (or adopted) during the COBRA continuation period.¹³² 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. What if the employee had elected COBRA coverage but COBRA-type benefits were unavailable to the federally recognized same-sex spouse and his children? Must that coverage now be made available to the same-sex spouse and children and, if so, would retroactive COBRA premiums be required? Once the retroactive date is known, plan sponsors will need to provide the initial COBRA notices to the federally recognized same-sex spouses and their children who were eligible for coverage. Because COBRA is administered by several agencies, their approach to defining federally recognized same-sex spouses is unknown. The DOL and Treasury have jurisdiction over private sector group health plans, whereas HHS has jurisdiction over public sector health plans.

G. HIPAA

HIPAA was passed to curtail the preexisting condition exclusions used by group health plans that limited coverage to employees and their dependents.¹³³ HIPAA is enforced through ERISA and the code. HIPAA requires special enrollment periods to be made available to specified employees and their dependents that were otherwise eligible for coverage but failed to enroll during open enrollment (for example, a spouse that was covered under another group health plan). In the case of group health plans that offered coverage to dependent beneficiaries, special enrollment periods must be made available for an individual who becomes a dependent of the participant through marriage, birth, adoption, or placement for adoption.¹³⁴ Likewise, a spouse has special enrollment rights upon marriage to the employee, as well as upon the birth or adoption of a child. As a result of *Windsor*, the federally recognized same-sex spouse and the dependent of the participant (which may include the child of the federally recognized same-sex spouse) must be afforded these special enrollment periods. An open question exists as to whether same-sex couples that were previously married must be offered a special enrollment right post-*Windsor* because they were newly married for federal law purposes. In the DOL's

Technical Release, it mentioned that it had coordinated with HHS and Treasury/IRS in adopting a state of celebration approach for purposes of the HIPAA rules.

VIII. Other Outstanding Issues

A. Benefit Claims for Past Benefits

An employee seeking a claim for past benefits will file a cause of action under ERISA section 502(a)(1)(B), which will depend on the terms of the plan as written at the time. As a result of the *Firestone* line of opinions, plan administrators are entitled to a very deferential standard of review in interpreting the terms of the plan, provided the appropriate grant of deference is afforded to the plan administrator in the plan document.¹³⁵ Given that most plans extend deference to a plan administrator's interpretation, claims for benefit relief are unlikely. But it is possible for an employee or beneficiary to seek relief under ERISA section 502(a)(3) for "appropriate equitable relief." However, given the case law precedent, retroactive relief may not be appropriate or equitable in the case when the plan administrator followed the terms of a federal statute before a Supreme Court ruling.¹³⁶ The IRS has authority under section 7805(b) to limit the retroactive effect of judicial holdings which would be relevant in the taxability of group health coverage imputed to an employee with federally recognized same-sex spousal coverage. Thus future guidance will be important.

B. Fiduciary Obligations

The retroactive effect of *Windsor* will be relevant as the plan administrator exercises his fiduciary duty to act solely in the interests of the plan participants and beneficiaries and for the exclusive purpose of providing benefits to them.¹³⁷ To the extent *Windsor* creates retroactive rights and benefits for plan participants and beneficiaries, the plan administrator is likely to have a fiduciary duty to notify them of those rights and benefits as they clearly were not on notice. That will affect amendments to plan documents and beneficiary designation forms, as well as notices of changes to the plan's terms.

C. Recent Federal Litigation

Two federal cases have been issued since *Windsor*. In the case of *Obergefell v. Kasich*, a federal district court in Ohio held that a same-sex marriage that is valid in a state of celebration must be recognized as valid under Ohio law.¹³⁸ The plaintiffs, James Obergefell and John Arthur, were legally married under Maryland's same-sex marriage law but moved to Ohio which has a mini-DOMA. As Arthur was gravely ill and expected to die, he and Obergefell petitioned the court for a temporary restraining order so that the Ohio registrar of death certificates could not accept a death certificate that did not reflect Arthur's status as married and did not reflect Obergefell as his surviving spouse. According to the court, Ohio law had always recognized the validity of opposite-sex marriages performed in other jurisdictions. Ohio had also always recognized out-of-state marriages of minors and out-of-state marriages of cousins even though Ohio law does not permit those marriages to occur within the state. Relying on language from *Windsor* and a prior Supreme Court decision of *Romer v. Evans*, the court held that Ohio law which refused to recognize same-sex marriages celebrated elsewhere violated the equal protection clause of the 14th amendment of the U.S. Constitution and thus was unconstitutional.

Less than a week later, a federal district court in Pennsylvania held that spousal retirement benefits under a qualified profit-sharing plan were payable to a deceased same-sex spouse instead of the participant's parents.¹³⁹ The couple, Sarah Farley and Jean Tobits, were married under Canadian law in 2006 but moved to Illinois which does not issue marriage licenses to same-sex couples. As a result, the couple entered into a civil union as permitted under Illinois law. Farley died in 2010 while residing in Illinois and both Tobits and Farley's parents filed for death benefits under the ERISA plan. Given that the Supreme Court would

hold on the constitutionality of DOMA section 3, the court placed the issue on the suspense docket pending the outcome of that case. Although the qualified plan has a choice of law provision relying on Pennsylvania law, the court ignored Pennsylvania law because it was held to be preempted by ERISA. The court cited *Windsor* in holding that Illinois recognizes same-sex marriages performed in other jurisdictions by treating them as civil unions in Illinois. Hence, the court held, Farley was the surviving spouse under Illinois law. Whether that holding would be affirmed on appeal is questionable because *Windsor* was limited to lawful marriages under state law, not lawful civil unions or lawful domestic partnerships. Also from now on, guidance from Treasury and the IRS applicable to a qualified profit-sharing plan would not require that spousal death benefit protection be extended to civil union spouses.

Obergefell and *Tobits* illustrate that there will continue to be litigation after *Windsor* until federal agencies issue more concrete guidance.

IX. Conclusion

Windsor and *Perry* are just as significant for what they say as for what they don't. There are many outstanding questions, some of which have been answered by the federal agencies affected by *Windsor*. As noted earlier, the Obama administration expressed its desire to have the affected federal agencies act not only in unison but in an expeditious fashion to provide clarity for employers. Regardless of the fact that same-sex marriages make up a small percentage of employees covered under ERISA plans, employers face the same questions for plan amendments and related computer systems' adjustments as they would face for any changes affecting either all or a very small segment of the plan participant and/or beneficiary community. In the meantime, they will act cautiously until guidance is forthcoming.

The guidance from Treasury, IRS, and the DOL relating to the treatment of federally recognized same-sex spouses for tax purposes was swift. Those agencies have expressed willingness to promulgate additional guidance for qualified retirement plans and welfare benefit plans, and regarding the retroactive effect of those rulings.

Because of *Perry*, the question regarding the legality of DOMA section 2 will wait until another day as the political climate in the predominant majority of states wishes to limit marriages to opposite-sex couples. That may limit the mobility of same-sex couples to move to new states of residence that do not recognize their marriages, except for the corridor of the New England states that have embraced same-sex marriages and unions. But at least for federal law purposes, the same-sex marriage question has been resolved prospectively by honoring the decisions of state law or state constitutions that affirmatively allow same-sex marriages within their state or within other jurisdictions. However, litigation will continue, costing plan sponsors in the resolution of the present unknown.

FOOTNOTES

¹ *NFIB v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012) (upholding the constitutionality of section 5000A(b)(1) of the PPACA, P.L. 111-148).

² Subtitles A and C of Title I of PPACA impose new requirements on group health plans.

³ P.L. 104-199, passed 85-14 in the Senate and 342-67 in the House. While President Clinton endorsed the legislation at the time of its passage, he later stated his regret about its passage. Despite his own personal reservations, he signed the legislation into law probably due to wide margins of passage and the prevailing political climate.

⁴ ERISA, P.L. 93-406 (codified and amended in various sections of titles 26 and 29 of the U.S.C.). ERISA is a federal labor law which, along with section 401, regulates the adoption

and continued maintenance of voluntary employer-sponsored retirement and welfare plans.

⁵ P.L. 104-199, section 2 says:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

In contrast, section 3 of that act amends Title 1 of the United States Code by saying:

In determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

⁶ 570 U.S. ___, 133 S. Ct. 2675, 2680 (2013) (PDF). Vicki Jackson was the court-appointed amicus curiae on the issue of standing. Sri Srinivasan, Deputy Solicitor General, argued for the petitioner in support of affirmance. Paul Clement argue on behalf of BLAG, as the respondent. Roberta Kaplan argued on behalf of the respondent Windsor.

⁷ 570 U.S. ___, 133 S. Ct. 2652 (2013).

⁸ Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, Nat'l Conf. of State Leg. [NCSL: Defining Marriage], available at <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

⁹ Rev. Rul. 58-66, 1958-1 C.B. 60 (holding that state of domicile governs in determining whether two persons are married at the time of death for estate tax purposes).

¹⁰ 29 CFR 825.101, stating that "spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriages in States where it recognized."

¹¹ Rule 44 of the Rules of the Supreme Court of the United States (2010) (requiring any petition for a rehearing of the merits of a decision be made within 25 days after entry of the date of the decision). *Windsor* was decided June 26, 2013.

¹² The House Judiciary Committee states in its report that Congress passed DOMA to "reflect and honor a collective moral judgment and to express moral disapproval of homosexuality." See Liz Goodwin, "Lawmakers' 'moral disapproval' of gay people in 1996 could doom DOMA law in Supreme Court," available at <http://news.yahoo.com/blogs/ticket/lawmerks-moral-disapproval-gay-people-1996-could-doom-224933451--politics.html> (Mar. 27, 2013).

¹³ Initially, the Government Accountability Office identified 1,049 federal statutes in the U.S. Code in which benefits, rights, and privileges are contingent upon marital status. See GAO, "Defense of Marriage Act," GAO/OGC-97-16 (Jan. 31, 1997). By 2004 that number rose to 1,138. See GAO, "Defense of Marriage Act: Update to Prior Report," GAO-04-353R (Jan. 23, 2004) (PDF).

¹⁴ U.S. Code Title 1.

¹⁵ In the 1991 case of *Baehr v. Miike* (originally *Baehr v. Lewin*), a same-sex couple sued

the Hawaii Director of Health John C. Lewin to require him to issue a marriage license. The trial court dismissed the case but it was appealed to the state supreme court. In 1993 the state supreme court held that the right of privacy in the Hawaiian state constitution did not include a fundamental right to a same-sex marriage, but the denial of marriage to the couple resulted in sex discrimination, violating the constitutional right to equal protection. The court then remanded the case to the trial court, with the instructions that "in accordance with the 'strict scrutiny' standard, the burden will rest on Lewin to overcome the presumption that HRS section 572-1 [the state's marriage statute] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights." *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 he enjoined the state from refusing to issue marriage licenses to same-sex couples. *Baehr v. Miike*, Circuit Court for the First Circuit, Hawaii No. 91-139. The next day, Judge 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.

¹⁶ According to the Judicial Committee report, it noted that "if Hawaii or some other State eventually recognizes homosexual 'marriage,' Section 3 [of DOMA] will mean simply that that 'marriage' will not be recognized as a 'marriage' for purposes of federal law. Other than this narrow federal requirement, the federal government will continue to determine marital status in the same manner it does under current law." H.R. Rep. No. 104-664 (1996).

¹⁷ The full faith and credit clause provides "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. Art. IV, section 1.

¹⁸ The House Committee report stated, "The Committee briefly discusses four of the governmental interests advanced by this legislation: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources." H.R. Rep. No. 104-664, at 12 (1996).

¹⁹ NCSL: Defining Marriage, *supra* note 8. The 35 states with "mini-DOMA" statutory or constitutional provisions include Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), Colorado (2008), Florida (2008), Georgia (2004), Hawaii (1998), Idaho (2006), Illinois (1996), 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 (2004), Virginia (2006), West Virginia (2012), Wisconsin (2006), and Wyoming (1977). Puerto Rico also does not recognize same-sex marriages performed in other jurisdictions.

²⁰ *Id.*

²¹ NCSL: Defining Marriage, *supra* note 8. Colorado (civil unions), Hawaii (civil unions), Illinois (civil unions), Nevada (domestic partnerships), New Jersey (civil unions), Oregon (domestic partnerships), and Wisconsin (domestic partnerships). Only Illinois and New Jersey confers same-sex civil union couples with all or almost all of the same rights and benefits under state law as conferred to opposite-sex couples.

²² *Id.*

²³ *Id.* The 13 states that permit same-sex couples to marry include California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York,

Rhode Island, Vermont, and Washington. The District of Columbia also permits them. California recognized same-sex marriages performed elsewhere between June 17 and November 4, 2008. That was the time when a California Supreme Court's decision struck down a ban against same-sex marriages as a violation of the state constitution's equal protection clause. See *In re Marriage Cases*, 43 Cal. 4th 757, 183 P.3d 384 (2008). Thereafter, California voters amended the state constitution to ban same-sex marriages.

²⁴ See *supra* note 13.

²⁵ Cal. Fam. Code section 300 ("Marriage is a personal relation arising out of a civil contract between a man and a woman").

²⁶ *In re Marriage Cases*, 183 P.3d 384 (2008).

²⁷ See *Strauss v. Horton*, 46 Cal. 4th 364 (2009).

²⁸ Cal. Const., Art. I, section 7.5.

²⁹ *Strauss v. Horton*, 46 Cal. 4th 364, 474-475, 207 P.3d 48, 122 (2009).

³⁰ *Id.* at 388, 207 P.3d at 61. See California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified as amended at Cal. Fam. Code sections 297-299) (West 2008) (providing that same-sex couples had the "same rights, protections, and benefits, and . . . the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses").

³¹ *Perry v. Schwarzenegger*, 704 F. Supp.2d 921 (N.D. Cal. 2010).

³² *Id.*

³³ *Id.* at 1004.

³⁴ *Id.*

³⁵ *Perry v. Schwarzenegger*, Civ. No. 10-166696 (C.A. 9, Aug. 16, 2010), at 2.

³⁶ *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011).

³⁷ *Perry v. Brown*, 52 Cal. 4th 1116, 1127, 265 P.3d 1002, 1007 (2011).

³⁸ *Perry v. Brown*, 671 F.3d 1052, 1070-1071 (9th Cir. 2012).

³⁹ *Id.* at 1072.

⁴⁰ *Id.* at 1095 (relying on *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996) as "the Equal Protection Clause requires the state to have a legitimate reason for withdrawing a right or benefit from one group but not others, whether or not it was required to confer that right or benefit in the first place," 671 F.3d at 1083-1084).

⁴¹ *Hollingsworth v. Perry*, 568 U.S. ___, 133 S. Ct. 786 (2012).

⁴² *Hollingsworth v. Perry*, 570 U.S. ___, 133 S. Ct. 2652, 2656 (2013).

⁴³ 570 U.S. ___, 133 S. Ct. at 2661 (quoting from its decision in *Diamond v. Charles*, 476 U.S. 54, 62 (1986)).

⁴⁴ 570 U.S. ___, 133 S. Ct. at 2663.

⁴⁵ *Id.* (quoting from *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370 (1991)).

⁴⁶ *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2658 (2013).

⁴⁷ California state law had permitted same-sex marriages in 2008 and some 18,000 couples took advantage of that law between June and November 2008, before the lawsuits.

⁴⁸ *Windsor v. United States*, 699 F.3d 169, 177-178 (2d Cir. 2012), acknowledging that the state of New York recognized their Ontario marriage as a valid marriage.

⁴⁹ As an aside, New York made same-sex marriages legal in 2011, but it was New York's recognition of the Canadian marriage that was central to the holding of the case as Spyer died in 2009 and Windsor and Spyer could not have taken advantage of the same-sex marriage rule in New York.

⁵⁰ *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. at 2689.

⁵¹ *Id.*, 570 U.S. ___, 133 S. Ct. at 2683.

⁵² *Windsor v. United States*, 833 F. Supp.2d 394 (S.D.N.Y. 2012).

⁵³ *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. at 2683.

⁵⁴ *Id.* See Letter from Eric Holder to John A. Boehner, R-Ohio, at 5 (Feb. 23, 2011). The Justice Department's concern was that DOMA section 3 was unconstitutional as its "classifications based on sexual orientation should be subject to a . . . heightened standard of scrutiny" and "Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard." It was silent on the constitutionality of DOMA section two, even though due process and equal protection concerns of the Fifth Amendment should be relevant. More particularly, the Fourteenth Amendment may apply which prohibits states "to deny to any person within its jurisdiction the equal protection of the laws." Note the department had defended its constitutionality in the case of *Smelt v. United States*, 447 F.3d 673 (9th Cir. 2006).

⁵⁵ *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. at 2683-2684.

⁵⁶ *Windsor v. United States*, 699 F.3d 169, 191-93 (2d Cir. 2012).

⁵⁷ *Id.* at 192.

⁵⁸ Boehner made an announcement on March 4, 2011, that he would convene the BLAG to vote on the issue of whether the House should defend DOMA section 3 and on March 9, the committee voted to do so. See Felicia Sonmez and Ben Pershing, "Boehner Launches Effort to Defend Gay-Marriage Ban," *The Washington Post*, Mar. 5, 2011, available at <http://www.webcitation.org/5x0nIUf57>.

⁵⁹ *Windsor v. United States*, 833 F. Supp. 394, 402 (S.D.N.Y. 2012).

⁶⁰ *Id.* at 406.

⁶¹ *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012).

⁶² *Windsor v. United States* 570 U.S. ___, 133 S. Ct. at 2684.

⁶³ *Id.* at 2695-2696. That federalism argument may have been the majority's attempt to distinguish the federal law of DOMA from the states' mini-DOMA laws. The latter also would be subject to scrutiny under the equal protection clause of the 14th Amendment.

⁶⁴ See McDermott Will & Emery webinar "DOMA and Proposition 8: Immediate Implications for Employee Benefit Plan Sponsors" (July 2, 2013).

⁶⁵ Rule 44 of the Rules of the Supreme Court of the United States (2010) (requiring any petition for a rehearing of the merits of a decision be made within 25 days after entry of the date of decision).

⁶⁶ Rev. Proc. 2005-23, 2005-18 IRB 91 .

⁶⁷ See Ben Goad and Julian Hatten, "Supreme Court Decision Triggers Massive Overhaul of Regulations," Reg Watch (June 26, 2013), *available at* <http://thehill.com/blogs/regwatch/administration/307931-obama-orders-sweeping-review-of-federal-marriage-regulations>.

⁶⁸ OPM, Benefits Administration Letter, No. 13-203 (July 3, 2013), *available at* <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>.

⁶⁹ Defense Secretary's Hagel Messages, U.S. Department of Defense, "Extending Benefits to the Same-Sex Spouses of Military Members." *available at* http://www.defense.gov/home/features/messages/secdef_hagel.aspx.

⁷⁰ Department of Labor, Fact Sheet No. 28F: Qualifying Reasons for Leave Under the Family Medical Leave Act, *available at* <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm>.

⁷¹ Social Security Administration, Program Operations Manual System (requiring payment of all claims filed on or after June 26, 2013, or that were pending final determination at the time of the decision to be determined based on the NH being married and domiciled in a state that permits same-sex marriages at the time of the application or while the claim is pending in a state that recognizes same-sex marriages (that would include the 13 states with same-sex marriages and the District of Columbia), *available at* <https://secure.ssa.gov/apps10/public/reference.nsf/links/08092013111040AM>).

⁷² U.S. Citizenship and Immigration Services, "Same-Sex Marriages, Statement From Secretary of Homeland Security Janet Napolitano on July 1, 2013, Q3&A3 and Q9&A9." *available at* <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD>.

⁷³ Department of Health and Human Services, "HHS Announces First Guidance Implementing Supreme Court's Decision on the Defense of Marriage Act, *available at* <http://www.hhs.gov/news/press/2013pres/08/20130829a.html>."

⁷⁴ Rev. Rul. 2013-17, 2013-38 IRB. See also "Answers to Frequently Asked Questions of Individuals of the Same Sex Who Are Married Under State Law" *available at* <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples> [hereinafter referred to as FAQs Same Sex Married Spouses] and "Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions" *available at* <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions> [hereinafter referred to as FAQs for Registered Domestic Partners and Individuals in Civil Unions].

⁷⁵ 1958-1 CB 60.

⁷⁶ Generally, the statute of limitations for filing a refund claim is three years from the date the return was filed or two years from the date the tax was paid, whichever is later. See "IRS New Release, Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized for federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples." *available at* <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>.

⁷⁷ 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), *available at* <http://www.dol.gov/opa/media/press/ebsa/EBSA20131720.htm>. Note that under the Reorganization Plan No. 4 of 1978, the Secretary of Labor has authority to interpret certain provisions that have parallel provisions in both ERISA and the code.

⁷⁸ Under the Supreme Court's *Firestone v. Bruch* standard, if an ERISA plan has the necessary grant of discretionary powers to the plan administrator to interpret the terms of the plan, the courts will defer to the plan administrator's interpretation. See *Firestone v. Bruch*, 489 U.S. 101 (1989).

⁷⁹ ERISA section 514.

⁸⁰ See American Bar Association Joint Committee on Employee Benefits webinar, "Supreme Court Round-Up" (July 16, 2013).

⁸¹ See Badgett and Herman, "Patterns of Relationship Recognition by Same-Sex Couples in the United States," *available at* <http://www.williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/patterns-of-relationship-by-same-sex-couples-in-the-United-States>. Similar data exist from the 2010 U.S. census data. See American Community Survey Data on Same-Sex Couples, 2010 Census Data." *available at* <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>.

⁸² ERISA section 205(a)(1) and section 417(b). An exception exists for lump sum payments that do not exceed \$5,000. The Pension Protection Act of 2006 (P.L. 110-458) amended ERISA and the code to require, after 2007, that qualified pension plans offer a "qualified optional survivor annuity" that provides a survivor annuity equal to 75 percent for the life of the participant's spouse under specified circumstances. ERISA section 205(g)(1) and section 417(e). ERISA section 205(d)(2) and section 417(a)(1)(A)(ii), as amended by the Act (20100, section 1004(a)(1)).

⁸³ ERISA section 205(e) and section 401(a)(11)(A)(ii).

⁸⁴ ERISA section 205(c)(2) and section 417(a)(2).

⁸⁵ ERISA section 205(c)(4) and section 417(a)(4)(A).

⁸⁶ Rev. Proc. 2013-12, 2013-4 IRB 313 , *modifying and superseding* Rev. Proc. 2008-50 .

⁸⁷ *Id.* at App. A. section 07.

⁸⁸ *Id.* at section 6.04(2)(c).

⁸⁹ See *supra* note 74, FAQs Same Sex Married Spouses, at Q&A18.

⁹⁰ *Id.* at Q&A 19.

⁹¹ See ERISA section 303 and section 430 for the code's funding requirements for single-employer pension plans.

⁹² ERISA section 205(b)(1)(C) and section 401(a)(11)(B)(iii)(I). In the FAQs Same Sex Married Spouses, *supra* note 74, a qualified defined contribution is not required to provide the death benefit to a surviving registered domestic partner of a deceased participant; however, the participant's registered domestic partner may be the default beneficiary unless the participant designates a specific beneficiary. *Id.* at Q&A 17.

⁹³ ERISA section 206(d)(1) and section 401(a)(13).

⁹⁴ ERISA section 206(d)(3) and section 414(p).

⁹⁵ ERISA section 206(d)(3)(K) and section 414(p)(8).

⁹⁶ ERISA section 206(d)(3)(F) and section 414(p)(5). Thus, ERISA and the code define eligible payees of QDROs as alternate payees that include "any spouse, former spouse, child or other dependent of the participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." ERISA section 206(d)(3)(K) and section 414(p)(8).

⁹⁷ Section 402(a) and (e)(1)(A).

⁹⁸ Notice 89-25, 1989-1 C.B. 662, Q&A-3.

⁹⁹ For example, ERISA section 102 requires summary plan descriptions to be given to plan participants and beneficiaries receiving benefits; ERISA section 205(c) requires notices of the QJSA, QPSA, and qualified optional survivor annuity benefits to be given to participants explaining the rights of the participant's spouse under such benefits; ERISA section 206(d)(3) requires the plan administrator to notify participants and alternate payees when in receipt of a QDRO; ERISA section 606(a) requires covered employees, covered spouses, and qualified dependents to be given a COBRA notice upon a qualifying event.

¹⁰⁰ Section 401(a)(9). An exception exists for a qualified plan if the participant is a non-5 percent owner and has yet to retire under the plan. See section 401(a)(9)(C)(ii).

¹⁰¹ Section 401(a)(9)(B)(iii) and reg. section 1.041(a)(9)-3; FAQs Same-Sex Married Spouses, *supra* note 74, Q&A-1(a).

¹⁰² Reg. section 1.401(a)(9)-9.

¹⁰³ Reg. section 1.401(a)(9)-1, E-1.

¹⁰⁴ Section 402(c)(1), (5).

¹⁰⁵ Section 402(c)(9).

¹⁰⁶ Section 402(c)(1).

¹⁰⁷ Section 402(c)(11).

¹⁰⁸ Section 401(k)(2)(B). The Pension Protection Act of 2008 permits hardship withdrawal rights to be extended to domestic partners and same-sex spouses named as beneficiaries under the plan. The hardship withdrawal option only exists if the employer chooses to adopt

it. P.L. 109-280, section 826.

¹⁰⁹ Reg. section 1.401(k)-1(d)(3)(iii)(B). Note there are six circumstances that qualify under the safe harbor rules for a hardship distribution but the three noted in the text are the ones that relate to expenses for the employee's spouse, dependent, or children.

¹¹⁰ Reg. section 1.401(k)-1(d)(3)(iv)(B).

¹¹¹ Note section 414(b) and (c) have both parent-subsidiary and brother-sister tests for aggregating related employers. Under the parent-subsidiary rules, the entities must be owned through a common parent, the parent must own at least 80 percent of one or more entities in the chain, and at least 80 percent of the other entities in the chain must be owned by one or more of the other entities in the chain (except for the parent). In contrast, the brother-sister test requires five or fewer persons (not entities) to have at least 80 percent actual control in the related entities, as well as 50 percent effective control.

¹¹² Section 1563(c) attribution rules are used in determining ownership rights for the parent-subsidiary and the brother-sister controlled tests.

¹¹³ See, e.g., the California Insurance Equality Act, Cal. Ins. Code section 10121.7 (2010).

¹¹⁴ Sections 106(a) and 105(c).

¹¹⁵ Section 105(c) extended the federal exclusion from the employee's income for coverage of the taxpayer's spouse or dependents (as generally defined in section 152).

¹¹⁶ See *supra* note 74. Note there is an exception -- often limited, in practice -- for the situation in which the same-sex spouse qualified as a dependent of the employee; in that case the employer contributions for health coverage would be excluded from the employee's federal income.

¹¹⁷ Section 152(d)(2)(H).

¹¹⁸ See FAQ Same Sex Married Spouses, *supra* note 74, at Q&A2. Under the FAQs, a taxpayer who is married cannot file using head of household filing status.

¹¹⁹ See FAQ Same Sex Married Spouses, *supra* note 74, at Q&A6. If both parents claim a dependency deduction, the IRS will treat the child as the qualifying child of the parent with whom the child resides for a longer time period during the tax year.

¹²⁰ See IRS Topic 308, Amended Returns, available at <http://www.irs.gov/taxtopics/tc308.html>.

¹²¹ See FAQ Same Sex Married Spouses, *supra* note 74, at Q&A 12, noting that a special administrative procedure for employers to file claims or refunds or to make adjustment for excess FICA taxes paid on same-sex spouse will be issued soon. However, claims for overwithheld income taxes for prior years cannot be made by employers. Employers may adjust for income tax withholding in the current year provided it has repaid or reimbursed the employee for the overwithheld income tax before the end of the calendar year. *Id.* at Q&A 13. As a follow-up to those Q&As, on September 23, Treasury and the IRS issued Notice 2013-61 for employers to follow in filing refund claims for overpaid income and FICA taxes paid on employer-provided benefits for federally recognized same-sex spouses. The notice offers employers two alternative administrative procedures for claiming refunds or adjustments.

¹²² Section 125(a).

¹²³ Reg. section 1.125-4.

¹²⁴ Reg. section 1.125-4(c).

¹²⁵ See FAQ Same Sex Married Spouses, *supra* note 74, at Q&A 11.

¹²⁶ Section 129 provides for a federal tax exclusion for payments made for eligible dependent care services (up to a dollar maximum).

¹²⁷ Section 129(c)(1).

¹²⁸ Section 223(b)(5). For 2013 the maximum limit for family coverage was \$6,450 and for individual coverage was \$3,250. Section 223(b)(2).

¹²⁹ Section 223(b)(5)(B)(ii).

¹³⁰ P.L. 99-272, 100 Stat. 222 (1985).

¹³¹ Section 4980B(g)(1)(A)(i).

¹³² Section 4980B(g)(1)(A).

¹³³ Section 9801 et seq. (Chapter 100), added by the HIPAA, P.L. 104-191, 110 Stat. 1936 (1996). The rules limit the time that an employer's group health plan can deny coverage for preexisting conditions for new enrollees in the plan.

¹³⁴ Section 9801(f)(2).

¹³⁵ For a review of the Supreme Court's decisions on the topic, see Kennedy, "Conkright: A Conundrum for Future Courts, An Opportunity for Congress," 2010 *NYU Rev. of Employee Benefits and Executive Compensation* 16-1 (2010).

¹³⁶ In *Manhart*, the Supreme Court held that the employer's use of gender-based actuarial tables for determining the amount of employee contributions to a pension plan violated Title VII of the Civil Rights Act of 1964. See *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). The Court, however, refused to award retroactive relief of excess contributions to the female employees, as the defendant had relief on the interpretation of the Wage and Hour Administrator of the Equal Pay Act. See *Manhart*, 435 U.S. at 719-720. The threat of the relief was not warranted because the Court believed administrators would change their practices to conform to the decision. Further, that retroactive relief would be significant and unanticipated by the pension fund. The courts relying on the *Manhart* line of cases would likely limit the retroactive impact of the *Windsor* decision. See *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1102-1107 (1983), *on remand*, 796 F.2d 1119 (9th Cir. 1986) and *Florida v. Long*, 487 U.S. 223, 230-238 (1988).

¹³⁷ ERISA section 404(a)(1)(A).

¹³⁸ *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262 (S.D. Ohio 2013).

¹³⁹ *O'Connor v. Tobits*, No. 2:11-cv-00045-CDJ, 2013 WL 3878688 (E.D. Penn. 2013).

END OF FOOTNOTES

Code Sections: Section 401 -- Pension Plans
Section 401(k) -- Cash or Deferred Arrangements
Section 402 -- Trust Beneficiary's Tax
Section 414 -- Pension Definitions
Section 417 -- Survivor Annuity
Section 436 -- Single-Employer Plans - Funding-Based Limits
Section 7805 -- Authority to Prescribe Rules

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