Plan Design After *United States v. Windsor:* What Happens When Employers Ask and Employees Tell

On June 26, 2013 the Supreme Court issued its decision in *United States v. Windsor,* striking down Section 3 of the Defense of Marriage Act. Under the *Windsor* decision, the federal government can no longer treat same-sex marriages differently than opposite-sex marriages. This article discusses some of the issues employers will need to address in response to the *Windsor* decision regarding their defined benefit, defined contribution, health and other welfare plans. The authors recognize that, over the next few months, additional guidance will be issued to help employers implement the decision. However, even when such guidance is issued, one can anticipate gaps for employers to navigate.

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On June 26, 2013 the Supreme Court issued its decision in *United States v. Windsor,* striking down Section 3 of the Defense of Marriage Act. Under the *Windsor* decision, the federal government can no longer treat same-sex marriages (now permitted in 18 states[1] and the District of Columbia, as of December 20, 2013) differently than opposite-sex marriages. The *Windsor* decision represents a turning point in the legal treatment of same-sex spouses[2] and affects a broad range of employee benefit programs. As with so many other significant changes in social policy (e.g., the Affordable Care Act), employers are left with the responsibility of understanding and implementing the day-to-day implications of these changes.

This article will discuss some of the issues employers will need to address in meeting the responsibilities imposed on them as a result of the *Windsor* decision. We recognize that, over the next few months, additional guidance will be issued to help employers implement the decision. However, even when such guidance is issued, one can anticipate gaps for employers to navigate.

Framework

The *Windsor* decision has, generally, been viewed as a compliance matter. And, it is true that many of the knottier issues raised by *Windsor* are compliance-related. But *Windsor* also includes a range of design issues.

In responding to the *Windsor* decision, employers might want to start with the following framework:

- *Which programs are potentially affected?*
  Search for the word *spouse* in your plan documents, summary plan descriptions and employee handbooks. Each place that the word appears represents a potential policy change or decision point under *Windsor*.
  This is not to say that each use of the word spouse will automatically require a change. However, each use should merit review and assessment.
  In considering which plans will require more extensive review and potential mandatory changes, as a general rule, programs that are subject to more federal involvement are more likely to require a change in the post-*Windsor* environment. Such programs include qualified retirement plans subject to extensive regulation under the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA), as well as health plans subject to ERISA and the Consolidated Omnibus Budget Reconciliation Act (COBRA).
  On the other hand, programs subject to fewer federal obligations (such as life and disability plans and nonqualified deferred compensation plans) are less likely to be affected by any mandatory compliance changes as a result of *Windsor*. However, the impact of *Windsor* on these plans should also be considered.
- *What changes are required by* Windsor*—and what changes are more optional in nature?*
  Ultimately, employers will be required to recognize same-sex spouses for compliance-related purposes. For example, same-sex spouses will be treated as spouses for purposes of applying the qualified joint and survivor annuity rules applicable to qualified retirement plans (both defined benefit [DB] and defined contribution [DC] plans), for purposes of COBRA coverage, and for purposes of administering leaves under the Family and Medical Leave Act (FMLA). As we receive guidance on each of these required changes, employers will have the task of implementing whatever changes are mandated by the federal government.
  However, many plans affected by the *Windsor* decision will also have to consider a series of potential changes that are more discretionary in nature.

How Will This Framework Apply to Specific Programs?

Defined Benefit Plans

Windsor precludes the federal government from differentiating between same-sex and opposite-sex spouses. Accordingly, federal requirements that apply to "spouses" will now apply equally to same-sex and opposite-sex spouses. We anticipate that most DB plan sponsors will apply *Windsor* expansively and treat same-sex and opposite-sex spouses the same for all plan purposes.

However, *Windsor* leaves open the possibility that employers that object to same-sex marriage may seek to treat same-sex spouses less favorably than opposite-sex spouses. Please note, we are not seeking to encourage differential treatment of same-sex spouses. Rather, we simply seek to highlight the difference between changes required in a post-*Windsor* environment and the plan design decisions facing employers. The most notable opportunity for such differentiation is the potential for an employer to provide that opposite-sex spouses receive subsidized joint and survivor annuities, while same-sex spouses receive unsubsidized joint and survivor benefits (that still comply with the minimum joint and survivor requirements). Of course, such differential treatment would be subject to the general restrictions on impermissible discrimination under the Code, primarily under Section 401(a)(4). However, the nondiscrimination rules in the Code focus on prohibiting discrimination in favor of highly compensated employees and officers, and different treatment of same-sex and opposite-sex couples is not likely to trigger the Code or ERISA rules.

Accordingly, the legal obstacles to such discrimination

currently appear to be minimal. ERISA, the Code and current federal employment law simply do not protect same-sex spouses from this type of discrimination. And ERISA preemption may serve to shield such discrimination from (otherwise) applicable state law.

Defined Contribution Plans

Benefit values under DC plans, generally, do not vary by marital status.[3] Accordingly, the kinds of design-based decisions discussed elsewhere in this article do not seem to arise under DC plans. This does not mean that *Windsor* will not create issues for DC plan sponsors. Sponsors must still address a number of issues created by *Windsor,* such as:

- Application of the spousal required minimum distributions rules under 401(a)(9)
- The requirement to obtain spousal consent required for a nonspouse preretirement death benefit under a DC plan
- The challenges associated with the dissolution of a same-sex marriage in a state where such marriage was never recognized.

However, these challenges seem better categorized as compliance challenges and do not seem to raise plan design issues.

Health Plans

As is the case in retirement plans, one can anticipate that employers will treat same-sex spouses and opposite-sex spouses the same for all plan purposes (including both compliance-based rules and plan design decisions). However, it should be noted that under the Affordable Care Act (ACA) rules defining the employer mandate, large employers are required to offer coverage to employees and dependents. However, proposed regulation Section 54.4980H-1(a)(11) specifically defines *dependent* to exclude spouses. In effect, neither pre-ACA law nor ACA requires that employers offer coverage to spouses or that employers subsidize coverage offered to spouses.

In states that recognize same-sex marriage, there may be other legal reasons to treat same-sex marriage and opposite-sex marriage the same. But if an employer is located in a state that does not recognize same-sex marriage, and if that employer seeks to demonstrate its opposition to same-sex marriage, health care may provide a way to manifest such opposition.

Again, we anticipate that most employers will apply spousal coverage and subsidies uniformly to same- and opposite-sex marriages. However, such uniformity is not required.

Other Welfare Benefit Plans

Other ancillary health and welfare plans (such as life insurance) represent yet another area that illustrates the difference between federal adherence to *Windsor* and permitted employer discretion over plan design. Even after the *Windsor* decision, plan sponsors may have flexibility in defining spouse with respect to a wide range of insurance benefits

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(such as group life insurance or accidental death and dismemberment coverage).

Again, this does not mean employers should seek to treat same-sex couples differently than opposite-sex couples—However (subject to state law), it simply means that they can.

Retiree Medical Benefits: A Special Case

In considering welfare benefit plans, retiree medical benefits may represent a special case. Retiree medical plans have always had to grapple with the issue of the *after-acquired spouse*—the spouse of a marriage that occurs after retirement. Employers are, generally, disinclined to extend retiree medical coverage to these spouses. After all, these spouses were not part of the retiree medical "deal" as the benefit was earned by the employee. However, same-sex spouses may represent a special challenge: Same-sex partners may have been together for an employee's entire career, and the inability to include the same-sex partner was not a choice made by the employee, but was a product of the legal environment.

In light of the overall movement to cap and eliminate retiree medical benefits, we do not anticipate that many employers will seek to open these plans any more than is absolutely required. However, employers need to make these decisions after thoughtful consideration.

Potential New Legislation: ENDA

Enactment of the Employment Non-Discrimination Act (ENDA) could change many of the observations set out above regarding the potential for employers to treat same-sex marriages differently than opposite-sex marriages. ENDA would prohibit discrimination in hiring and employment on the basis of sexual orientation. ENDA has already passed the Senate. However, passage of ENDA by the House of Representatives does not seem likely for the foreseeable future.

ENDA, or some form of it, has been under consideration for many years. If and when some version of ENDA is ultimately enacted, employers will have many issues to consider far beyond the scope of this article.

Conclusion

The *Windsor* decision generally has been viewed as a compliance matter. And the most pressing (short-term) issues raised by *Windsor* are compliance-oriented. But this does not mean that *Windsor* is devoid of design questions for plan sponsors. BQ

Endnotes

1. California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Utah, Vermont and Washington.
2. *Spouse* does not include individuals who have entered into registered domestic partnerships, civil unions or other similar formal relationships recognized under state law that are not denominated as a marriage under that state's law.
3. Unless, for example, the QJSA rules apply to the plan because it offers annuity distribution forms.

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