

Legislative Alert

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The Supreme Court's DOMA and Proposition 8 decisions and their impact on employer health and welfare plans



The Supreme Court (the "Court") ruled this week on two significant cases regarding same-sex marriage. In *U.S. v. Windsor*, the Court struck down Section 3 of the Defense of Marriage Act (DOMA), which defined marriage, for purposes of over a thousand federal laws and programs, as a union between one man and one woman as husband and wife. The Court held that DOMA was unconstitutional, explaining that the states have long had the responsibility of regulating and defining marriage, and some states have opted to allow same-sex couples to marry. The Court held that by denying recognition to same-sex couples who are legally married, DOMA violates the basic due process and equal protection principles in the Constitution. This decision means generally that same-sex couples who are legally married under the laws of a state that permits same-sex marriage must be treated the same under federal law as married opposite-sex couples.

In *Hollingsworth v. Perry*, the Court dismissed the appeal regarding California's Proposition 8, which banned same-sex marriage in California, and was previously struck down by a federal district court. Supporters of Proposition 8 appealed the federal district court decision, but the Court ruled that they did not have standing, or the legal right, to appeal the case. As a result, the district court's ruling will stand, clearing the way for same-sex marriage in California. Note, however, that the Court's decision did not address the merits of the *Hollingsworth* case, specifically whether it is unconstitutional for a state to prohibit same-sex marriage.

Impact on employee benefit plans

The Court's rulings in these cases mean that the federal government must now recognize state sanctioned same-sex marriages. Prior to the Court's decisions, the District of Columbia and twelve states recognized same-sex marriage:

- Connecticut
- Delaware (not yet effective)
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota (not yet effective)
- New Hampshire
- New York
- Rhode Island (not yet effective)
- Vermont
- Washington

The *Hollingsworth* decision paves the way for California to become the 13th state to recognize same-sex marriage. The federal recognition of same-sex marriage will have a significant impact on employer health and welfare benefit plan administration, including but not limited to the following:

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- **Cafeteria plans and other tax-favored health plan coverage.** Federal agencies are expected to require tax-favored status for employee health and welfare plans covering same-sex spouses, including pre-tax treatment of coverage purchased through an employer's cafeteria plan and exclusion of employer contributions towards the cost of coverage. This should end an employer's obligation to impute income to employees with same-sex spouses for federal income tax purposes. Employees are also expected to have the right to seek reimbursement for the medical care expenses of a same-sex spouse from a Health Savings Account (HSA), a Health Reimbursement Arrangement (HRA), and a Health Flexible Spending Account (HFSA).
- **HSA contributions.** The annual contributions to HSAs for same-sex married couples are expected to reflect the annual limits currently in effect for opposite-sex married couples (\$6,450 for 2013 and \$6,550 for 2014).
- **Family Medical and Leave Act (FMLA).** Rights under the FMLA, previously limited to opposite spouses under DOMA, are expected to extend to same-sex spouses.
- **Consolidated Omnibus Budget Reconciliation Act (COBRA).** The right to continued coverage under COBRA is expected to extend to same-sex spouses.
- **Health Insurance Portability and Accountability Act (HIPAA).** Entitlement to a special enrollment right under HIPAA as a result of marriage is expected to extend to same-sex spouses.
- **Eligibility for Medicaid and federal subsidies under an Exchange.** Eligibility determinations for Medicaid and for federal subsidies under an Exchange are based on household income, which is expected to take into account the income of the individual and the same-sex spouse.
- **Dependent Care Spending Accounts.** The annual \$5,000 dependent care election limit for married couples is expected to extend to same-sex married couples, if filing joint tax returns.

Although the impact of the DOMA decision on self-funded plans is not yet entirely clear, self-funded plans operating in states that recognize same-sex marriage may be prohibited from limiting plan eligibility to opposite-sex spouses.

Notwithstanding the Court's decisions, questions remain on a number of important and practical issues, including the current status of state recognized same-sex civil unions or domestic partnerships. A number of states recognize some version of same-sex civil unions or domestic partnerships, including:

- California
- Colorado
- Hawaii
- Illinois
- Nevada
- New Jersey
- Oregon
- Wisconsin

Plan sponsors that offer same-sex domestic partner coverage will have to decide whether to continue to offer such coverage in the light of the Court's decisions. In addition, a number of states do not recognize any form of same-sex unions, and certain states affirmatively prohibit same-sex marriage or civil unions. Complex issues could arise when a same-sex couple lawfully married in a given state moves to a state that does not recognize same-sex marriage or a state that affirmatively prohibits same-sex marriage. Given the lack of uniformity across the states, plan sponsors with multi-state operations could face significant challenges in administering the eligibility provisions of their plan.

Questions also remain as to how quickly plans must comply with the Court's decision and the best manner in which to implement compliance. Specifically, we anticipate guidance from the Internal Revenue Service (IRS) on how and when employers should implement the tax consequences of the Court's decision, and how employers should handle past treatment of same-sex spouses as non-tax dependents.

At a minimum, employers should review their plans and policies with respect to same-sex spouses to determine what changes will be necessary, and initiate discussions with the plans' service providers on how and when to implement those changes. Sponsors of self-insured plans who are considering limiting eligibility provisions to opposite-sex married spouses in states that currently recognize same-sex marriage should consult with outside legal counsel about the implications of such a decision.

Wells Fargo Insurance will continue to monitor developments and provide guidance on this issue.

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