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## Obergefell Simplifies Benefit Plan Administration

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For the second time in exactly two years, the United States Supreme Court has issued a landmark decision relating to same-sex marriages. Two years ago, in *United States v. Windsor*, the Court recognized same-sex marriages for federal law purposes. However, states were not required to recognize same-sex marriages entered into under the laws of another state. On June 26, 2015, in *Obergefell v. Hodges*, the Court went further, holding that all states must recognize a marriage as valid if it was valid in the jurisdiction in which it was performed, and also required that all states license same-sex marriages. State bans on same-sex marriages are now invalid.

### Is the Decision Retroactive for Tax Purposes?

As in *Windsor*, the Supreme Court did not address the extent to which the decision will apply retroactively for individuals who were validly married under the laws of any state prior to June 26, 2015. After the *Windsor* decision requiring same-sex marriages be recognized for federal purposes, the Internal Revenue Service (IRS) issued guidance permitting employers to apply the new rules prospectively for tax purposes. It is not yet known whether the affected states will recognize a same-sex marriage entered into in a different state retroactively, or only beginning on the date of the Court's decision. In essence, this is a state-by-state determination, but, if history is any guide, retroactive effect of the decision is unlikely.

### What are the Implications for Health and Welfare Plans?

Employers that currently exclude coverage for same-sex spouses under a self-insured plan (such as those in states that did not recognize same-sex marriages prior to June 26, 2015) will need to decide whether to continue that practice. ERISA does not require coverage of same-sex spouses or opposite-sex spouses for health and welfare plans. Nothing in this decision mandates such coverage, but an employer that excludes a same-sex spouse while providing coverage to opposite-sex spouses will likely face challenges based on federal discrimination laws (and potentially state discrimination laws depending on the applicable state).

Employers with fully-insured coverage, including health and life insurance coverage, will likely not be able to exclude benefits for same-sex spouses because of the application of state insurance laws to such plans. At this time, it is not known whether coverage for same sex spouses for those with insured plans must be provided starting on June 26, 2015, or whether there will be a delayed effective date. Employers with fully-insured plans that exclude coverage for same-sex spouses should contact their insurers.

State income tax imputation is no longer required for valid same-sex marriages in those states that previously did not allow same sex marriage and have a state income tax regime. However, it remains unclear how each affected state will implement the decision and how quickly. After *Windsor*, due to administrative issues, many employers were not able to immediately implement the imputation changes, and those same administrative challenges will likely present themselves with *Obergefell* as well.

Employers who provide benefits to domestic partners may now want to review their policies to determine whether to eliminate such benefits now that there is full marriage equality in all states. However, this decision

should not be made lightly and employees will need to be given adequate time to become married if the decision to eliminate domestic partner benefits is made. Federal and state income tax imputation is still required if the person is not the employee's spouse. Therefore, imputation will continue to apply to domestic partnerships and other unions that are not considered valid marriages under state law.

### **What are the Implications for Qualified Retirement Plans?**

Qualified retirement plans (for example, pension and 401(k) plans) are the least affected by the *Obergefell* decision. Unlike health plans, ERISA requires spouses to be provided certain rights and benefits in qualified retirement plans, and, since *Windsor*, qualified retirement plans have been required to recognize same-sex marriage.

### **What are the Implications for Nonqualified Retirement Plans?**

Nonqualified retirement plans are also minimally affected by the *Obergefell* decision. Supplemental nonqualified plans (typically those that make up for benefits denied under qualified plans because of IRS limits) usually link benefit rights to the underlying qualified plan terms. Under these plans, plan terms generally flow through from the qualified plan, so recognition of same-sex marriage already occurred after *Windsor*. Other nonqualified plans are independent contractual plans where the employer may have more latitude. In this context, amending the plan to expressly recognize same-sex spouses, particularly for employers that operate in states that had bans on same-sex marriages, may be helpful as part of a strategy of avoiding or limiting retroactivity.

### **What Should Plan Sponsors Do Now?**

Plan sponsors will need to review and update plan documents and summary plan descriptions to reflect the impact of *Obergefell*. Even for those plans that have little to no administrative changes due to *Obergefell*, plan sponsors will still need to update their plan documentation to remove the old *Windsor* language. As with *Windsor*, we expect the IRS to issue guidance and a deadline for making such amendments.

For more information about these issues, please contact the author(s) of this Legal Alert or your existing firm contact.

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