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TCRS 2013-02: Supreme Court’s Decision on the Defense of Marriage Act (“DOMA”).

Snapshot Summary: The Supreme Court’s ruling that Section 3 of DOMA is unconstitutional may require certain rights and benefits under qualified retirement plans to be provided to married, same-sex spouses. This complicated situation is made more complex as a result of differences in states’ laws regarding same-sex marriage. For some employers, it may be unclear whether such rights and benefits must be extended to same-sex spouses.

It is likely that the Internal Revenue Service (“IRS”) will issue guidance in the near future, however, due to a number of “unknowns” which may or may not require action before any IRS guidance is issued, consulting with ERISA counsel now is suggested for those who are concerned about how to comply.

Background: On June 26, 2013, the Supreme Court ruled that Section 3 of DOMA is unconstitutional. Section 3 of DOMA had defined “marriage” as the legal union between one man and one woman as husband and wife, and “spouse” as a person of the opposite sex who is a husband or wife.

One of the effects of Section 3 of DOMA on same-sex spouses has been the exclusion from multiple federal rights and benefits, including rights and benefits under qualified retirement plans. Following are examples of rights and benefits under qualified retirement plans that are generally affected, as well as a snapshot of the potential “before” and “after” effects of the Supreme Court’s ruling:

Right/Benefit – Qualified Retirement Plan	Before Supreme Court’s Ruling – Same-sex spouse’s right	After Supreme Court’s Ruling – Same-sex spouse’s potential right
Qualified Joint and Survivor Annuity (“QJSA”)	Treated as a non-spouse beneficiary.	Must receive at least 50% survivor annuity unless otherwise consents.
Qualified Pre-Retirement Survivor Annuity	Same as above.	Same as above.
Qualified Domestic Relations Order (“QDRO”)	Treated as a non-spouse. Not an “alternate payee” unless qualifies as a “dependent.”	Alternate payee, entitled to a portion of the former spouse’s retirement benefits.
Loans	Treated as a non-spouse. No consent needed.	Consent needed for plans subject to QJSA rules.
Hardship withdrawal	If plan allows, may be designated as primary beneficiary or dependent for purposes of own medical, tuition, and medical expenses to be paid by hardship withdrawal.	Must be recognized as primary beneficiary for own medical, tuition, and medical expenses for hardship withdrawal purposes.
Death benefits and Required Minimum Distributions (“RMDs”)	Treated as a non-spouse beneficiary with a more rapid distribution period than a surviving spouse beneficiary.	Generally, has an extended distribution period than a non-spouse beneficiary.
Rollover as a beneficiary	Rollover only to an inherited IRA.	Rollover to own IRA or to own employer’s qualified retirement plan.
Beneficiary status	Treated as a non-spouse beneficiary. Not required to be named as a beneficiary.	Entitled to 100% of death benefits unless consents to another beneficiary.

Because the Supreme Court ruled that Section 3 of DOMA is unconstitutional, qualified retirement plans may now need to make certain changes to plan administration.

What makes a complicated situation even more complex is that some states’ laws have also excluded, and may continue to effectively exclude, federal rights and benefits to married, same-sex spouses – including qualified plan rights and benefits – notwithstanding the Supreme Court’s ruling. Specifically:

- The Supreme Court’s ruling about Section 3 of DOMA provides that the definition of “marriage” and “spouse” is generally defined at the state level.
- A state may not provide for same-sex marriage (either at all, or may provide a different, but similar state legal union, such as a domestic partnership or civil union).
- A state is not required to recognize a same-sex marriage that was recognized in another state. Section 2 of DOMA contains this provision and is still in effect, as this section (Section 2) was not affected by the Supreme Court’s ruling on Section 3 of DOMA.

Because of the above, it may not be readily apparent whether certain married, same-sex spouses are entitled to rights and benefits under a qualified retirement plan.

Questions that require clarification and/or guidance for qualified retirement plan purposes:

Does the participant have a spouse or not?

As mentioned above, one of the complexities of the situation rests in the differences in various states' laws: some states recognize a same-sex marriage that may have originated in a different state (or even a foreign country); other states do not recognize same-sex marriages, regardless of origin. The "unknown" is what happens where a same-sex couple marries in, say, California, and thereafter, lives in Texas (which doesn't currently recognize same-sex marriages, regardless of origin).

Obviously, this "unknown" could easily apply to a large employer with multi-state employees. Perhaps less obvious, this situation could also apply to an employer whose employees live in one state but some may have married in a different state (and the employer may or may not be aware of such marriage).

Possibly further adding to the complexity are states that may not offer same-sex marriage, but may offer a similar legal union for same-sex couples, such as a civil union or domestic partnership, or where a participant entered into a same-sex marriage in a foreign country.

Following is a chart listing some of the possibilities that an employer may have to consider in determining whether or not spousal benefits/rights apply for purposes of its qualified retirement plan:

Employee's Legal Status	Origin of Legal Status	Employee's current domicile state allows/recognizes same-sex marriage	Employee's current domicile state does not allow, but does recognize same-sex marriage	Employee's current domicile state does not allow, and does not recognize same-sex marriage
Same-sex marriage	State	Treat spouse as same-sex spouse.	Treat spouse as same-sex spouse.	Appears not treated as same-sex spouse, unless employer chooses to recognize the legal status.
Same-sex marriage	Foreign country	Possibly treat spouse as same-sex spouse. Possibly dependent upon state law and any federal treaty.	Possibly treat spouse as same-sex spouse.	Same as above.
Civil union	State	Possibly treat spouse as same-sex spouse. Possibly depends upon whether state of origin provides the same status as spouse under a civil union as under a marriage (e.g. Illinois and New Jersey).	Possibly treat spouse as same-sex spouse.	Same as above.
Domestic partnership	State	Possibly treat spouse as same-sex spouse. Possibly depends upon whether state of origin provides the same status as spouse under a domestic partnership as under a marriage.	Possibly treat spouse as same-sex spouse.	Same as above.

When do changes need to be made to the plan?

The effective date for applying qualified plan rights and benefits to same-sex spouses is not yet known – including whether the effective date will be retroactive. If retroactive, it would seem the IRS would provide a window period (e.g. remedial amendment period) during which any required changes could be made, but during which the plan might have to be administered in accordance with the changes.

What changes will need to be made?

Anticipated changes to the plan may include:

- Amending the definition of spouse. Depending upon the guidance for determining a spouse for retirement plan purposes, an employer is advised to carefully define spouse to encompass the possibilities illustrated in the chart, above. For example, if a participant is married in California and has a same-sex marriage, the participant's spouse is a spouse for purposes of the qualified retirement plan. However, if that same participant moves to Texas, what then? Is the participant's spouse no longer a spouse for the retirement plan? The plan's definition of spouse should consider these possibilities. Hopefully, guidance from the IRS or other governmental agencies will simplify this issue.
- Amending death benefit, hardship withdrawal, loan, QDRO, and QJSA provisions and/or procedures to fully include the expanded definition of spouse, if amending the plan's definition of spouse isn't sufficient (see the chart above reflecting the "before" and "after" effects of the Supreme Court's ruling on these provisions).

Anticipated changes to plan administration and/or operation may include:

- Updating the Summary Plan Description ("SPD"), providing a clear definition of spouse and procedures the participant may need to take, such as for beneficiary designation purposes.
- Changes to forms, such as for beneficiary designation, distribution/loan requests, and QJSA/QPSA. In addition, changes to forms to update one's marital status (including dissolution of same-sex marriage, civil union, or domestic partnership) might be advisable.
- Possible changes to the process of gathering marital or related status information (such as for a participant to indicate whether in a same-sex marriage, civil union, or domestic partnership), including origin of the legal status (e.g. state or foreign country). Seemingly, this information could be gathered in much the same manner as it is currently being gathered, with perhaps a few additional "check boxes" included.

Suggested "next steps":

- Consult ERISA counsel.
- Review plan documents and forms and note where changes might be necessary.
- Review plan administrative and operational processes to identify areas where changes might be necessary (e.g. adding "check boxes" to a form to gather marital/related legal status information).
- Wait for IRS or related guidance.

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