

Same Sex Marriage in Pennsylvania

What is the Impact on Employers?

July 9, 2014



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Repeal of DOMA - The Windsor Decision

The Effect on Retirement Plans



July 2014

Today's Presenter

Josh Laychock, AIF®
Northeast Financial Group, Inc.
Principal-Partner
jlaychock@nefginc.com

Northeast Financial Group, Inc.
P.O. Box 531
2813 Route 611
Tannersville, PA 18372
570-688-9898

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Supreme Court Rules on DOMA

- On **June 26, 2013**, the Supreme Court ruled that DOMA was unconstitutional
- They also ruled the same day that Proposition 8, previously passed in California was unconstitutional
- DOMA affected over 1300 federal laws that now need to be reinterpreted



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DOMA vs. Post-DOMA

- On August 29, 2013 IRS issued:
 - Revenue Ruling 2013-17 (**effective 9/16/2013**)
 - FAQs – Same-sex married couples
 - FAQs – Registered Domestic Partners
- Additional Guidance issued with respect to QPs and 403bs on 4/4/2014 in Notice 2014-19
- On 4/4/2014 IRS also posted FAQs on their website
- Plan amendments – addressed qualified plans and 403(b) plans only
 - Safe Harbor 401(k) plans addressed
 - No guidance for IRAs and 457 plans



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DOMA vs. Post-DOMA

- Revenue Ruling 2013-17
- ***Marital Status is determined based on the laws of the state where marriage occurred not the state of residency for all federal purposes.***
- For federal tax purposes, the terms “spouse”, “husband and wife”, “husband”, “wife”, “marriage” include marriage and spouses of same-sex marriages.
- For federal tax purposes, the terms “spouse”, “husband and wife”, “husband”, “wife”, “marriage” DO NOT include marriage and spouses of registered domestic partnerships.



DOMA vs. Post-DOMA

FAQs Specifically Geared to Retirement Plans

- The Effect of Rev. Rul. 2013-17 on Retirement Plans
 1. Retirement Plans must treat a same-sex spouse as a “spouse” for all federal tax laws relating to retirement plans;
 2. Retirement Plans must recognize same-sex marriages that were validly entered into in a jurisdiction where the marriage is authorized, regardless of the state of residency of the participant and spouse
 3. A person who is a registered domestic partner (or a civil union) is not considered a spouse for purposes of applying any federal tax law. This applies to same-sex and opposite sex marriages.



DOMA vs. Post-DOMA

FAQs Specifically Geared to Retirement Plans

- When does Rev. Rul. 2013-17 apply to Retirement Plans
 1. Rev. Rul. 2013-17 is effective on **9/16/2013**.
 2. While for other tax reasons a participant can amend their tax return, this does **not apply** to retirement plans.
 3. This guidance does not cover effects on retirement plans with respect to periods before 9/16/2013
 4. IRS intends to issue future guidance on:
 - a. Plan amendments including timing
 - b. Any necessary corrections relating to plan operations before future guidance is issued.



DOMA vs. Post-DOMA

ERISA Qualified Plans/403(b) :

- QJSA/QPSA requirements
- Payment of account balances to beneficiaries
- Spousal Consent for distributions/loans
- Hardship where plan requires “spouse” to be named as primary beneficiary to use spouse’s hardship
- Rollovers – Same-sex spouses will be recognized for all of the spousal exceptions
- QDRO
- RMDs
- Plan Policies and Procedures



DOMA vs. Post-DOMA

ERISA Qualified Plans/403(b) : (cont'd)

- Prohibited Transaction applicability
- ERISA disclosure notifications to a spouse, former spouse, or alternate payee
- Family attribution applicability
- Controlled Group Rules
- Other testing considerations
 - Top-Heavy
 - Cross-Tested Plans
 - Highly Compensated Employees

Miscellaneous Legislative Updates



July 2014

Pre-Tax Status Of Deferrals

Tax incentives for retirement savings
are viewed by Congress as:

“lost revenue”

Tax Expenditures

JCT Jan. 2013 Estimates

JCT January 2013 estimates

(<https://www.jct.gov/publications.html?func=startdown&id=4503>)

Tax Expenditure	Billions			
	2013	2014	2015	2016
Employer-provided health exclusion	\$131.7	\$143.0	\$153.0	\$161.5
Home mortgage deduction	69.7	71.7	75.0	79.2
Defined contribution plans	57.0	61.4	65.9	72.5
Defined benefit plans	32.9	35.1	41.2	48.9
Self-employed pension plans	11.3	12.0	12.7	13.6
Total ER-Provided retirement plans	101.2	108.5	119.8	135.0
Traditional IRAs	11.1	13.3	14.5	15.9
Roth IRAs	3.8	4.3	4.9	5.5

Automatic Enrollment & Work Place IRAs

*Workers will save for retirement
without a workplace plan...*

The Middle Class is 15 Times More Likely To Save At Work



Participation Rates by Moderate
Income (\$30,000–\$50,000) Workers
IRA only vs Employer Plan

Employer Plan

71.5%



No Employer Plan

4.6%

Employment Law Consequences of Pennsylvania's Same Sex Marriage Ruling

Berks County SHRM Chapter
July 9, 2014

Jill S. Welch. Esq.

717.399.1521

jwelch@barley.com

Defense of Marriage Act

- In 1996, Congress enacted the federal Defense of Marriage Act (DOMA), federal law deferral to state law changed fundamentally
- Two operative provisions of DOMA
 - Section 2 – allows states to refuse to recognize same-sex marriages performed under the laws of other jurisdictions
 - Section 3 – provided a comprehensive federal law definition of “marriage” and “spouse”

DOMA Provisions

- “Marriage”, under DOMA, means only a legal union between one man and one woman as husband and wife
- “Spouse”, under DOMA, refers only to a person of the opposite sex who is a husband or a wife
- DOMA definitions applied to all federal statutes, regulations and directives where marital or spousal status is addressed or relevant—over 1000 such laws

U.S. Supreme Court *Windsor* Decision

- Section 3 of DOMA, defining marriage and spouse, is “unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution”
- The Constitution does not permit the Federal government to limit citizens’ personal freedom to marry
- But *Windsor* left intact Section 2 of DOMA, which allows states to refuse to recognize same sex marriages performed elsewhere

What is the current status of states' same sex marriage recognition?

- Currently 19 states -- along with D.C. -- permit same sex marriage: CA, CT, DE, HI, IL, IA, ME, MD, MA, MN, NH, NJ, NM, NY, OR, PA, RI, VT, and WA
- The population of the above jurisdictions is roughly 44% of the total U.S. population
- On appeal to federal Appeals Courts: AR, IN, MI, OH, UT, WI, ID, KY and TN

Pennsylvania's *Whitewood* Decision

- **PA's Statute re: same sex marriage:**

It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth

Pennsylvania's *Whitewood* Decision

- Judge Jones, federal trial court in Harrisburg, declared PA's statutory ban on both in-state and out-of-state marriages unconstitutional
- Governor Corbett will not appeal
- County Clerk's appeal based on "vagueness" likely will be denied

Other Pennsylvania cases?

- Montgomery County Clerk: PA Supreme Court lifted the trial court's order prohibiting the clerk from issuing marriage licenses
- *Palladino*: similar to *Whitewood*, looks like heading for dismissal by federal court in Philadelphia

Same Sex Marriage and FMLA

- DOL Fact Sheet 28F
 - **Spouse** means a husband or wife as defined or recognized under state law for purposes of marriage *in the state where the employee resides (place of residence)*
 - DOL proposing to change this to place of celebration
 - Includes **common law** and **same-sex** marriage

Common Law Marriage in PA?

- Not after Jan. 1, 2005 when legislature abolished common law marriage
- Common law marriages valid only up to Sept. 17, 2003, when PA appeals court abolished common law marriages
- But unclear for common law marriages between Sept. 17, 2003 and Dec. 31, 2004 – conflicting PA appellate decisions

Other FMLA Considerations

- Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a child
- *In loco parentis* – those with day to day responsibilities to care for or financially support a child, even those with no legal or biological relationship with the child

Same Sex Marriage and Military Leave

- Qualifying Exigency Leave
 - Arises from the military deployment of an employee's **spouse**, son, daughter or parent to a foreign country
- Military Caregiver Leave
 - To care for a covered service member with a serious injury or illness if the employee is the **spouse**, son, daughter, parent, or next of kin of the service member

Same Sex Marriage and State Leave Law

- In states that recognize same-sex marriage and have state leave laws applicable to **spouses**, spousal leave available under state law will run concurrently with leave taken under the federal FMLA (if FMLA qualifying)

Surrounding States With Leave Laws

- New Jersey Family Leave Act
- Maryland's Flexible Leave Act
- New York Family Leave

Same Sex Marriage and Documentation

- An employer is permitted to request documentation to confirm a family relationship, including spousal relationship
 - **Be consistent**
- An employer is also permitted to inquire whether the employee lives in a state that recognizes same sex marriage, if not known

Same Sex Marriage and Immigration

- Immigrant visa petitions
 - Same sex couples are legally married for purposes of the immigration law if the marriage took place in a U.S. state or foreign country that recognizes same-sex marriage, regardless of the couple's current place of residence
 - Place of celebration rule

Title VII and ENDA

- Title VII
 - Prohibits discrimination based upon sex, but not sexual orientation
- ENDA
 - Prohibits employers from firing, refusing to hire, or discriminating against employees or applicants on the basis of their perceived or actual sexual orientation or gender identity
 - Passed Senate last fall; awaiting House vote

State Anti-Discrimination Laws

- **Pennsylvania** – Senate and House bills introduced to eliminate discrimination based on sexual orientation, gender identity & expression; Governor Corbett support, but no timeline
- **New York** – sexual orientation
- **New Jersey** – civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression
- **Delaware** – sexual orientation, gender identity
- **Maryland** – sexual orientation

Local Anti-Discrimination Laws

- Lancaster City – prohibits sexual orientation discrimination
- City of York – sexual orientation, gender identity
- City of Reading – sexual orientation, gender identity or expression

Employee Handbooks & Spouses

- Bereavement Leave
- EAP
- FMLA Leave
- Qualified Exigency Leave
- Covered Service Member Caregiver Leave
- Beneficiaries Update



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Impact on Health Insurance

Presented by Jessica Dean
Employee Benefits Consultant
(610) 685-1790
jdean@pkbenefits.com

Same-Sex Marriage Legal in PA

What this means...

- Same-sex couples married outside of PA are now recognized as spouses in PA
- Same-sex couples can legally wed in PA
- PA state law now permits same-sex couples to add their spouse to their health insurance plan
- Health plans should be reviewed for how “spouses” are defined
- Employers should not impute additional income to an employee who covers a same-sex spouse



CMS Final Regulations

- Centers for Medicare & Medicaid Services (CMS) new regulation guidance
- Insurance issuers must offer coverage to same-sex spouses that is offered to opposite sex spouses
- Prior, already applied in states that recognized same-sex marriage
- Now, all insurance companies in all states are required to make coverage available
- Health insurance coverage will always be available to employers that wish to offer coverage to same-sex spouses
- Health insurance issuers are encouraged to offer coverage to same-sex spouses in 2014; all issuers must fully comply in 2015



Fully Insured Health Plans

- State insurance law generally requires fully insured plans to offer equal coverage to opposite-sex and same-sex spouses.
- Employers with fully insured plans in states that do not currently recognize same-sex marriage must be offered the opportunity by the insurance company



DOMA and the *Windsor* Decision

Fully Insured

State Recognizes Same-Sex Marriage:
SSS Coverage Required

State Does Not Recognize Same-Sex Marriage:
SSS Coverage Not Required

Self-Insured Health Plans

- Most self insured plans are not subject to state insurance law
- Not subject to the new CMS guidance
- Employers with self insured plans are generally not required to provide equal coverage to same-sex spouses
- Employers that do not offer benefits to same-sex spouses may be at risk for discrimination lawsuits



DOMA and the *Windsor* Decision

Self Insured

State Recognizes Same-Sex Marriage:
SSS Coverage May Be Required

State Does Not Recognize Same-Sex Marriage:
SSS Coverage Not Required

Cafeteria Plans

- An employee's same-sex spouse may receive benefits through an employer's cafeteria plan
- A cafeteria plan may permit a participant's FSA to reimburse covered expenses of the participants same-sex spouse
 - To be eligible the expenses must have be incurred during a period beginning on a date that is no earlier than:
 - The beginning of the cafeteria plan year
 - The date of marriage, if later





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Checklist for Employers

To Do List for Employers

- ✓ **“Take Stock”**
- ✓ **Decision Making**
- ✓ **Documentation**
- ✓ **Communications**
- ✓ **Other Administrative Issues**
- ✓ **Additional Issues to Consider**

