



August 2013

COMPLIANCE ADVISORY



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DOMA decision answers one question but raises many more

On June 26, 2013, the U.S. Supreme Court handed down two decisions relating to same-sex marriages.

In *U.S. v. Windsor*, the Court ruled that Section 3 of the federal Defense of Marriage Act (DOMA), which denied federal benefits and recognition to same-sex marriages, was unconstitutional ("the DOMA Decision").

In *Hollingsworth v. Perry*, the Court upheld the earlier federal district court decision that California's Proposition 8, which amended the California Constitution to provide that only marriages between opposite sex individuals were valid, was unconstitutional ("the Prop 8 Decision").

The Prop 8 Decision has relatively narrow impact because it simply allows same-sex marriages to resume in California. It does not have any bearing on other states' laws banning same-sex marriages.

The DOMA Decision is much wider-reaching because it extends federal spousal benefits and benefits offered to married couples to same-sex spouses and couples. This includes special tax treatment under the Internal Revenue Code and special benefit requirements under ERISA.

Normally, such a ruling would make the lives of plan administrators [somewhat easier](#). However, the DOMA Decision did not address the status of Section 2 of DOMA, which provides an exception to the "full faith and credit" provision of the U.S. Constitution. In accordance with the full faith and credit provision, states recognize the legality of marriages entered into under the laws of another state, even if such a marriage is not permissible under its own laws (for example, common law marriages). Section 2 of DOMA specifically provides that states are not required to recognize same-sex marriages entered into in other states or countries. Many states do not provide this recognition.

Plan sponsors are now left to deal with whole new complexities, even if they only have employees in a single state, since employees often move from state to state or even live in a state that neighbors their work state. For example:

- Federal tax and employee benefits law now treats same-sex spouses in the same manner as opposite-sex spouses. What is not yet clear is how these laws will determine marital status. They could look at the couple's state of residence, or at the state of celebration (i.e., where the couple was married).
- Some states now allow same-sex marriages and recognize same-sex marriages that were celebrated in other states.
- Other states do not allow same-sex marriages but provide civil unions or domestic partnerships that provide all the same rights and responsibilities as marriage, and recognize out-of-state same-sex marriages as such unions or partnerships.
- Still other states that allow civil unions or domestic partnerships but not same-sex marriages do recognize out-of-state same-sex marriages as marriages.
- Some states do not allow civil unions, domestic partnerships or same-sex marriages and do not recognize out of state same-sex marriages.
- Some Native American governments recognize same-sex marriages even though the states in which they are located do not.

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As a result of the DOMA Decision, plan sponsors will likely want to:

- Review plan documents, including SPDs and other participant communication materials to determine if changes will be needed to re-define "spouse" or "marriage".
- Determine how they will identify same-sex spouses, being careful not to impose more burdensome documentation requirements on same-sex couples than on opposite-sex couples, except as may be required by the guidance that is ultimately issued.
- Consider how they may need to extend benefits such as Qualified Preretirement Survivor Annuities (QPSAs), Qualified Joint and Survivor Annuities (QJSAs), and Qualified Optional Survivor Annuities (QOSAs) to same-sex spouses. An open question is whether benefits currently in pay status under a non-QJSA form of payment to someone with a same-sex spouse will need to be re-elected or will need retroactive spousal consent.
- Determine how and when to obtain new beneficiary designations if someone other than the participant's same-sex spouse has been named primary beneficiary.
- Modify procedures for granting certain hardship withdrawals from 401(k) plans.
- Revise tax notices and related tax-withholding procedures to provide that distributions to same-sex spouses are eligible rollover distributions and to apply spousal Required Minimum Distribution (RMD) rules to same-sex spouses.

In addition sponsors of plans that currently extend spousal benefits to domestic partners or civil union partners will need to consider how to integrate the same-sex spouse coverage into their plan designs without violating anticutback rules.

Just as Prudential Retirement has begun the process of identifying affected policies, procedures and paperwork, plan sponsors will need to do the same, including identification of their affected populations. However, plan sponsors may want to **postpone actual changes to documents until the IRS and other regulatory agencies provide guidance**. In addition to identifying which state's (state of celebration, residence, or work) law determines marital status, there is also the big question of the effective date of this change, as it could be retroactive to the enactment of DOMA in 1996, which preceded all of the state laws allowing or recognizing same-sex marriages. The first state to legalize same-sex marriages was Massachusetts in 2004.

Since the effects of the DOMA decision reach beyond the confines of the qualified plan world, plan sponsors will likely need to coordinate these efforts with similar efforts relating to health and welfare plans and general payroll procedures, and work closely with their legal counsel in deciding how and when to implement these changes.

A notice on the IRS website says: *"We are reviewing the important June 26 Supreme Court decision on the Defense of Marriage Act. We will be working with the Department of Treasury and Department of Justice, and we will move swiftly to provide revised guidance in the near future."* Hopefully, we will have some form of DOMA guidance before the end of 2013.

Once the affected agencies have provided guidance, Prudential will identify the acceptable courses of action for defined benefit, defined contribution, 403(b), 457(b) and nonqualified plans, including plans that are subject to ERISA and those that are not (e.g., governmental and church plans), as well as IRAs, and will publish additional communications discussing specific actions that must be taken.

Compliance Advisory by Prudential Retirement

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