Individuals in same-sex marriages and their employers are significantly impacted by the Windsor DOMA decision

Jul 01, 2013

By: Mary C. Downie

The United States Supreme Court, in the case United States v. Windsor, found that Section 3 of the Defense of Marriage Act (“DOMA”) violated the 5th Amendment of the United States Constitution. DOMA is the federal act which defined a marriage for federal law purposes as that between one woman and one man. In Windsor, the court held that the denial of a federal estate tax marital deduction to the decedent’s estate of a same-sex legally married woman as required by DOMA was unconstitutional because it treated a same-sex marriage differently than a heterosexual marriage. The Windsor decision means that same-sex couples who are legally married under state law (and live in a jurisdiction that recognizes their marriage) are entitled to the same federal benefits extended to heterosexual married couples. While that sounds simple, the implications of the Windsor decision in the thicket of conflicting state and local laws, as well as the myriad of federal regulations is complex.

The decision in Windsor did not hold that states are required to allow same-sex couples to marry. Instead, it held that where states have recognized that as a right of their citizens, the federal government cannot treat a same-sex marriage differently than a heterosexual marriage. The Windsor decision impacts a wide range of federal benefits, including employer-sponsored health insurance benefits and retirement plans, federal civilian employees benefits and retirement plans, immigration, Family Medical Leave Act leave, federal financial aid for students, immigration, and the deductions, exemptions and filing status available for federal income, estate and gift taxes.

Thirteen states (Maine, Massachusetts, Rhode Island, Connecticut, New Hampshire, Vermont, New York, Delaware, Maryland, Iowa, Minnesota, Washington, and, as a result of the concurrently decided Hollingsworth v. Perry or Proposition 8 case, California) and the District of Columbia all permit same-sex marriages. Seven states (New Jersey, Illinois, Wisconsin, Colorado, Oregon, Nevada, and Hawaii) all allow civil unions or domestic partnerships for same-sex couples.

Same-sex married couples who live in a state which allows same-sex marriages are now entitled to all of the federal benefits of marriage as a result of the Windsor decision. The Windsor decision, decided on June 26, 2013, takes effect 25 days after its issuance (Monday, July 22, 2013, following the 25th day on Sunday, July 21, 2013). President Obama has already announced that he has directed all agencies within the federal government to review all existing regulations and make appropriate changes to ensure that the decision of the court is “implemented swiftly and smoothly.” The impact of Windsor is already being seen in immigration cases across the country.

For legally married same-sex couples living in one of the 37 states which do not expressly permit same-sex marriages, the impact of Windsor is unclear. Some states are silent on the topic of same-sex marriages, a significant number of those states expressly prohibit same-sex marriages by statute or state constitutional amendment, and some states as noted above have a domestic partnership or civil union regime. Those who have entered into civil unions or domestic partnerships will not be considered married under federal law because those relationships are not “marriages” under federal law. Availability of federal benefits may depend upon whether or not the state where the couple resides recognizes same-sex marriages. Some federal agencies look to whether the marriage was valid where it was performed, or the “state of celebration” test. Other federal agencies look to whether the marriage is recognized by the state where the individual resides, or the “state of domicile.”

As examples of agencies that utilize some form of the state of domicile test, Social Security looks at the state of domicile at the time of application. Likewise, eligibility for veterans’ benefits for surviving spouses are determined based on the law of the state where the couple lived either at the time of the marriage or when the right to the benefit accrued (although ironically, the Department of Defense uses a state of celebration test for active-duty military personnel). As a result, surviving spouses who were legally married and who live in a state that bans same-sex marriages may not qualify for survivor's benefits under Social Security and veterans' benefits.

Federal taxes are usually determined by the state of domicile. However, there are numerous same-sex couples who visit another state to be married and will end up filing tax returns from their home state which may not recognize their marriage. Without guidance from the IRS, it is unclear whether those couples will be treated as married by the IRS.

On the other hand, immigration decisions turn on whether the marriage was valid in the state or country where the marriage was celebrated. Thus, a couple who legally married in one of the states authorizing same-sex marriage but currently living in a state where same-sex marriages are banned could pursue a permanent resident visa (“green card”) if one of the spouses is foreign-born.

Changing to a state of celebration test with some federal agencies may be a matter of simply changing the specific agency’s practice (e.g., the IRS), but in others it may require legislation passed by Congress (e.g., Social Security and Veteran’s Affairs). Where it is a practice or the agency has no explicit rule, the Obama administration may be able to make the necessary revisions through an executive order. Where the rule is part of federal law or federal regulations, a lengthier process of either adopting new regulations or passing new legislation will be involved. Senator Dianne Feinstein (D-CA) has already introduced legislation that would ensure same-sex couples are not excluded from federal benefits even if they live in states where their marriages are not recognized. Commentators have noted that it is uncertain whether the House of Representatives would support such legislation.
A summary of how the benefits available to same-sex couples vary based upon residency is as follows:

**If you...**

- Live in and got married in a state that allows marriage
- Lived in and got married in a state that allows marriage, but later moved to a state that does not allow marriage
- Live in a state that bans marriage, but visited and married in a state that allows marriage
- Live in a state that bans marriage but allows a civil union or domestic partnership and have entered into a civil union or domestic partnership
- Foreigner married to a US citizen

**Then the impact of Windsor decision is...**

- Full federal benefits immediately available
- Federal benefits vary by agency
- Federal benefits vary by agency
- Not considered married for federal purposes
- The US spouse can apply for a permanent resident visa ("green card") for the foreign spouse

It seems inevitable that in some situations, a couple will be considered married in the eyes of the federal government, but not in the eyes of the state in which the couple resides. Disparate treatment will almost certainly lead to additional litigation on whether there is a right to marry.

Retroactivity is another issue to consider. It seems likely that in most cases, the federal government will adopt a forward-looking approach to benefits. Many benefits accrue only when an application is filed, so retroactive benefits would not be permissible in those situations. However, if benefits are not barred by a deadline in the law and do not accrue as of the date of application, it may be possible to file an application and seek back benefits.

In cases where the statute of limitations has not yet run and, importantly, where the IRS will recognize the marriage, couples may consider filing amended joint federal income tax returns, and surviving spouses may consider filing amended gift and estate tax returns to claim the federal marital deduction. Protective refund claims may also be appropriate for FICA refunds if the individual's employer does not plan to file such a claim on behalf of same-sex married employees. There is also concern that the retroactive application of the decision in certain gift tax situations could harm those in same-sex marriages who engaged in certain estate planning techniques in reliance on their marriage specifically not being recognized for federal tax purposes, such as where one spouse created a grantor retained interest trust for the other. This technique is prohibited between spouses under federal law. Thus, there are significant issues involving retroactivity that must be addressed by the federal government, and we advise that you discuss with your attorney whether action can or should be taken retroactively in light of the **Windsor** case and federal guidance on its implementation. We anticipate that the IRS will issue guidance on how it will determine whether a same-sex couple is married for tax purposes.

Employers will also face significant change and complexity in implementing **Windsor**, particularly in the area of eligibility for employment benefits, FMLA leave, and retirement benefits. The same residency issues that individual couples must navigate are also issues that employers will need to address to ensure that their benefits programs are compliant with **Windsor**.

The decision in **Windsor** and the overturn of Section 3 of DOMA have significant impact on same-sex couples and employers. The rights and obligations of marriage for federal law purposes are significant, and have both positive and negative tax implications. This is an area that will evolve as federal agencies issue rules and legislation is introduced and voted upon, and we advise that you consult with counsel before taking any action to determine the current status of the law and its impact upon you. If you, a member of your family, or your company may be impacted by the **Windsor** decision, whether it be in the area of estate planning, family law (including dissolution of marriage), federal estate, gift or income taxation, employment benefits including FMLA, immigration, retirement benefits, please contact your Clark Hill attorney for additional guidance.