

DOMA and *U.S. v. Windsor* – What Might it Mean to You?

The Supreme Court's decision in *United States v. Windsor*, 570 U.S. ____ (2013), which overturned Section 3 of the Defense of Marriage Act (DOMA) as a violation of the guarantee of equal protection, means that same-sex couples who are legally married are considered "spouses" for federal law purposes and may take advantage of a number of tax breaks and benefits previously afforded only to married heterosexual couples.

The Court did not go so far as to hold that same-sex couples have a fundamental right to marry. Currently, only 13 states and the District of Columbia recognize same-sex marriage. The Court's ruling also did not require the federal government to recognize the marriage of couples who reside in a state that does not recognize the marriage. We expect to see guidance from the IRS on this issue as the federal government continues to undertake the task of changing federal laws to comply with *Windsor*.

Federal tax advantages now available to same-sex couples include the ability to file joint federal income tax returns, spousal retirement plan contributions and rollovers, tax-free health care coverage, unlimited gift and estate tax deductions for transfers between spouses, the option to elect portability for an unused estate tax exemption and deductibility of alimony payments.

Among the benefits affected by *Windsor* are open enrollment periods for health plans, continuation of benefits under COBRA, eligibility for leave under the Family Medical Leave Act, eligibility for spousal retirement benefits and Social Security benefits for surviving spouses.

While the *Windsor* ruling seems simple, it raises more questions than it answers. Because the ruling deems Section 3 of DOMA unconstitutional, it is as if the law never existed. Therefore, it is possible that same-sex married couples are entitled to retroactive benefits. Should same-sex couples amend federal tax returns to take advantage of spousal tax benefits? Are employers required to retroactively recognize same-sex married couples for employer-sponsored health and benefit plans?

Windsor left intact Section 2 of DOMA, which provides that a state is not required to recognize same-sex marriages performed in any other state. For multistate employers, how do you handle state laws that treat same-sex marriage differently? Must federal benefits apply to same-sex couples who live in a state that does not recognize same-sex marriage? Because Section 3 of DOMA was struck down on the basis of equal protection, one would expect federal benefits to apply regardless of state law. Under Section 2 of DOMA, that may not be the case.

Windsor does not just apply to same-sex married couples – it also affects employers that employ an individual who is part of a same-sex married couple. While the federal government continues to revise federal laws regarding "spousal" benefits in light of *Windsor*, we expect to see a myriad of ancillary issues come to light regarding state law and the application of federal law to states that do not recognize same-sex marriage.

For more information on the tax and benefits implications of *Windsor*, please contact the following Roetzel attorneys:

Erika L. Haupt

614.723.2037 | ehaupt@ralaw.com

David C. Strosnider

312.582.1688 | dstrosnider@ralaw.com

Edward C. Hertenstein

614.723.2066 | ehertenstein@ralaw.com

Nathan Pangrace

216.615.4825 | npangrace@ralaw.com

Paul L. Jackson

330.849.6657 | pjackson@ralaw.com

Any federal tax advice contained herein or in any attachment hereto is not intended to be used, and cannot be used, to (1) avoid penalties imposed under the Internal Revenue Code or (2) support the promotion or marketing of any transaction or matter. This legend has been affixed to comply with U.S. Treasury Regulations governing tax practice.