Employee Benefits Issues Affecting Employees in Same-Sex Marriages, Civil Unions, and Domestic Partnerships

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I. Introduction.

The twenty-first century has seen a rapid expansion of access to civil relationship recognition for same-sex couples, culminating in *Obergefell v. Hodges*, 135 S. Ct. 2584 (June 26, 2015), which eliminated state-law barriers to civil marriage. Coming two terms after *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down as unconstitutional Section 3 of the federal Defense of Marriage Act,[1] *Obergefell* completes the dismantling of the legal framework that previously supported discrimination against same-sex couples in employee benefit plans.

Windsor had a tremendous effect on federal employee benefits law, including that spousal protections under ERISA and the Internal Revenue Code became mandated for same-sex spouses, and welfare benefits provided to couples in same-sex marriages no longer carried the significant federal tax consequences that they did while DOMA Section 3 was in effect. *Obergefell* further simplifies plan administration by providing nationally uniform marriage access and recognition, facilitating ERISA's goal of promoting nationally uniform plan administration. In particular, *Obergefell* should eliminate discrepancies between federal and state tax requirements for same-sex married couples.

Nonetheless, difficult transitional issues still face employee benefit plans and participants, particularly where a participant in a same-sex marriage or equivalent relationship has had a life event – such as a retirement, death, or divorce – prior to *Windsor* (or possibly prior to *Obergefell*). Additional issues involve how employee benefit plans will deal with participants in marriage-equivalent relationships created by the states prior to *Obergefell*, such as registered domestic partnerships and civil unions, which are still available to same-sex couples as an alternative to civil marriage in certain states.

This paper will discuss post-*Windsor* guidance from the IRS and the Department of Labor on federal tax and employee benefits law – guidance that, after *Obergefell*, is likely to apply to most same-sex couples nationwide as to employee benefits matters that arise in the future. The paper will then highlight outstanding issues arising from life events occurring pre-*Windsor*, issues for welfare benefit plans that continue to exclude same-sex spouses, and issues pertaining to marriage-equivalent relationships. Finally, it will focus on specific employee benefits issues for same-sex couples and how *Windsor*, *Obergefell*, and federal agency guidance applying *Windsor* have changed the outcome of those issues under federal law and plan terms.

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[1] Section 3 had defined "marriage" and "spouse" wherever those terms appeared in federal statutes and regulations to mean only an opposite-sex marriage and opposite-sex spouse. *Former* 1 U.S.C. § 7.

II. Post-*Windsor* Guidance from the IRS and Department of Labor.

A. IRS Revenue Ruling 2013-17.

On August 29, 2013, the IRS issued Revenue Ruling 2013-17, answering three questions pertinent to employee benefit plans after the demise of DOMA § 3:

(1) Whether same-sex spouses lawfully married under state or foreign law are spouses for federal tax purposes: Yes. The terms "spouse," "husband and wife," "husband," and "wife" include individuals married to a person of the same sex, if the couple is validly married under state or foreign law.

(2) Whether the IRS recognizes such a marriage for federal tax purposes even if the state in which the couple is domiciled does not recognize the marriage: Yes. The IRS has adopted a "place-of-celebration" rule, recognizing the marriage if it was validly entered into in a state or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex, regardless of whether the marriage is recognized by the state of domicile. Pre-*Obergefell*, the place-of-celebration rule created federal uniformity of marriage recognition while uniformity was still lacking in the states.

(3) Whether registered domestic partners and civil union partners are spouses for federal tax purposes: No. The terms "spouse," "husband and wife," "husband," "wife," and "marriage" do not include relationships or persons in relationships not denominated as marriage under the law of the state in which they were entered.

See Rev. Ruling 2013-17.

Taxpayers may rely on the Revenue Ruling retroactively for open years for purposes of filing tax returns, amended returns, adjusted returns, or claims for credits or refunds. This means that individuals in same-sex marriages may amend federal tax returns to file jointly and may file claims to recover taxes paid on imputed income, among other issues, and employers may also file claims to recover taxes paid on imputed income. *See* § IV.B.3.b, below.

For all other federal tax purposes, Revenue Ruling 2013-17 applies prospectively as of September 16, 2013. However, this prospective application for federal tax purposes does not control potential participant claims under ERISA Title I, as discussed more fully below in § III.C.

For the period roughly between *Windsor* and *Obergefell*, Revenue Ruling 2013-17 provided uniformity with respect to federal law where state-law uniformity was lacking.[2] Prior to *Obergefell*, whether a same-sex married couple who lived in a state that did not recognize their marriage could file joint *state* tax returns depended on state tax law, however. Post-*Obergefell*, it remains to be seen what retroactive state tax issues may arise.[3]

B. DOL Technical Release No. 2013-04.

On September 18, 2013, the Department of Labor issued Technical Release No. 2013-04, which provided additional guidance for employee benefit plans on the definition of "spouse" and "marriage" under ERISA following *Windsor*. *See* DOL Technical Release No. 2013-04. Consistent with Revenue Ruling 2013-17, the DOL's guidance provides that in Title I of ERISA, the Internal Revenue Code, and accompanying regulations:

- The term "spouse" will be read to refer to any individuals who are lawfully married under any state law, including individuals married to persons of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriage.

- The term "marriage" will be read to include a same-sex marriage that is legally recognized as a marriage under any state law.

Id.

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[2] After *Windsor* and Revenue Ruling 2013-17, same-sex spouses can no longer be tax dependents under federal tax law. *See* IRS, Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law. However, as discussed below, the status of a same-sex domestic partner as a tax dependent will continue to affect a variety of issues under pension and welfare plans because domestic partners are not recognized as spouses under federal law. *See* Rev. Rul. 2013-17.

[3] Before *Obergefell*, states that did not recognize same-sex marriage took varying approaches as to whether same-sex married couples could or were required to file joint state returns. For example, in Missouri, which had a state constitutional amendment banning same-sex marriage, the governor issued an executive order providing that same-sex married couples who filed a joint federal return were required to file joint Missouri returns, because under state tax law, the state must accept jointly filed state returns from couples who file federal joint returns. *See* Executive Order 13-14 (Nov. 14, 2013). Other states that did not recognize same-sex marriages required taxpayers in same-sex marriages to file state returns as single. *See, e.g.*, La. Dep't of Rev., Revenue Information Bulletin No. 13-024 (Sept. 13, 2013).

Again reflecting the pre-*Obergefell* regime of conflicting state laws, the Technical Release notes that adopting a contrary rule for employee benefit plans based on state of domicile would raise "significant challenges" for employers that operated or had employees in more than one state or whose employees moved between states while entitled to benefits. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee or former employee moved to a state with different marriage recognition rules. *See id.* By recognizing marriages that were valid in the state where they were celebrated, the DOL's rule "provide[d] a uniform rule of recognition that can be applied with certainty by stakeholders, including employers, plan administrators, participants, and beneficiaries" in the pre-*Obergefell* world, and, as with the IRS rule, may continue to affect participants who had life events before the advent of national uniformity of marriage laws for same-sex couples. *Id.*

In addition, consistent with the Revenue Ruling 2013-17, the DOL's Technical Release further notes that the terms "marriage" and "spouse" as used in Title I of ERISA, the Internal Revenue Code, and related regulations do not include relationships and persons in relationships that are not called "marriage" under state law, such as domestic partnerships and civil unions.[4] *See id.*

The DOL's guidance means that for ERISA-governed employee benefit plans, spousal benefit requirements under ERISA and/or the IRC *must* be applied to same-sex spouses even before *Obergefell*, regardless of where the couple resided.[5] *See* § IV.C.3, below.

C. IRS Notice 2014-19.

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[4] On October 23, 2015, the Treasury Department issued a Notice of Proposed rulemaking amending the current regulations under section 7701 of the Internal Revenue Code to provide that, for federal tax purposes, the terms "spouse," "husband," and "wife" mean "an individual lawfully married to another individual," the term "husband and wife" means "two individuals lawfully married to each other," and that "[t]hese definitions apply regardless of sex." 80 Fed. Reg. 64378-81, available at http://www.gpo.gov/fdsys/pkg/FR-2015-10-23/html/2015-26890.htm.

[5] Following the Supreme Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which concerned a corporation's challenge under the Religious Freedom and Restoration Act to certain provisions of the Affordable Care Act regarding contraceptives, it is possible that some employers might assert that their religious exercise prevents them from complying with the guidance from federal agencies implementing *Windsor*. The guidance from the IRS and DOL, however, does not contain any exemption for religious organizations. Furthermore, to the best of the authors' knowledge, since *Windsor*, no employer has challenged the obligation to provide federally mandated spousal benefits to same-sex spouses.

On April 4, 2014, the IRS issued Notice 2014-19, providing guidance on application of the *Windsor* decision and Revenue Ruling 2013-17 to qualified retirement plans. Under this Notice, any retirement plan qualification rule that applies because a participant is married must be applied equally to same-sex spouses. Qualified plans must reflect the outcome of *Windsor* as of June 26, 2013 or risk losing tax qualification. Through September 16, 2013, a plan will not lose its tax qualification for recognizing only same-sex spouses of participants domiciled in states that recognize same-sex marriage. After that date, plan must recognize the marriage regardless of whether the state of domicile recognizes it.

Under Notice 2014-19, plans may recognize same-sex marriage for some or all purposes prior to June 26 or September 16, 2013. The Notice does not provide relief from any claim that an individual participant or same-sex spouse may bring asserting rights to spousal benefits based on events that happened before June 2013. Retroactivity issues are discussed in more detail below.

If amendments are required for compliance with the Notice, they must have been made by year-end 2014 in most circumstances (although Notice 2015-86, discussed below, permits later amendments to recognize same-sex marriages on a retroactive basis on a date earlier than June 26, 2013). Notice 2014-19 also provides a rule of interpretation: if a plan does not define "spouse" or "marriage" in a manner inconsistent with *Windsor*, an amendment is not required but the plan must be operated in accordance with the Notice.

D. IRS Notice 2015-86.

On December 9, 2015, the IRS issued Notice 2015-86, which provides guidance on the application of *Obergefell* to qualified retirement plans and health and welfare plans. The Notice explains that while certain marriages will be recognized for the first time for state law purposes, because those marriages were already recognized by federal tax law purposes due to *Windsor*, the Treasury Department and the IRS "do not anticipate any significant impact from *Obergefell* on the application of federal tax law to employee benefit plans." Although plans are not required to make changes as a result of *Obergefell*, the Notice states that a plan will not lose its tax-qualified status if it applies *Windsor* prior to June 26, 2013. *See id.* at Q-3 and A-3.

III. Issues After *Windsor*, *Obergefell*, and Related Guidance from the IRS and DOL.

After *Windsor*, *Obergefell*, and related guidance from the IRS and DOL, several categories of employee benefits issues remain for same-sex couples: (1) the status of spousal-equivalent relationships, such as domestic partnerships and civil unions; (2) the interpretation of plan terms; (3) legacy issues arising from pre-

Windsor or *Obergefell* events; and (4) the application of federal anti-discrimination laws, particularly Title VII of the Civil Rights Act of 1964 and Section 1557 of the Affordable Care Act.

A. Treatment of Domestic Partnerships and Civil Unions.

One set of issues continuing after *Windsor* and *Obergefell* relates to employees in spousal-equivalent statuses under state law, which continue to be available after *Obergefell*. California, Hawai'i, Illinois, New Jersey, Colorado, Nevada, and Oregon so far also continue to make available either civil unions or registered domestic partnerships. These statuses, referred to in this paper as "domestic partnerships," carry the same rights and obligations as marriages under state law. In these states, state law specifically provides that domestic partners will be treated as spouses for all purposes under state law, including for purposes of marital property, taxation, intestacy, and parentage. *See, e.g.*, Cal. Fam. Code § 297.5; Colo. Rev. Stat. 14-15-107. Legislative history is often clear that the intent of these state laws is to treat domestic partners as married spouses. *See, e.g.*, Colo. Rev. Stat. 14-15-102 (stating that purpose of Colorado Civil Union Act is "to provide eligible couples the opportunities to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses").

1. Status of Domestic Partnerships in the States.

After *Obergefell*, civil marriage is available in all of the states that provide or previously provided same-sex couples with domestic partnerships. These states have taken varying approaches as to whether to continue to provide domestic partnerships. For example, as noted above, in California, New Jersey, Hawai'i, Illinois, Colorado, Nevada, and Oregon, same-sex couples may marry or enter into domestic partnerships, which will continue to be recognized as such.[6] Other states that formerly provided domestic partnerships no longer do so now that civil marriage is available to same-sex couples, however.[7]

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[6] *See* Cal. Sec'y of State, California Domestic Partnership Registry; New Jersey Dep't of Health, Frequently Asked Questions; Hawai'i Act 001; Illinois Religious Freedom and Marriage Fairness Act, Ill. Public Act 98-0597; Colo. Rev. Stat. Ann. § 14-15-112 (2013); Nevada Sec'y of State, "Domestic Partnerships"; Oregon Health Authority, FAQs: Same-Sex Marriages (noting that Oregon Registered Domestic Partnerships are "established in separate law and will continue to be an option for same sex couples until the law is changed").

[7] *See, e.g.*, State of Delaware, Delaware Marriage (noting that no new civil unions will be created); Rhode Island Dep't of Health, Rhode Island's Marriage Equality Law (noting that civil unions are not available after August 1, 2013.

In addition, some states also provide for the conversion of domestic partnerships to marriages, either by operation of law or by action of the couple. In Delaware, for example, same-sex couples in civil unions were permitted to convert their civil unions to marriages, and for those who did not act, on July 1, 2014, all civil unions were automatically converted to marriages. *See* 13 Del. C. § 218. The effective date of each marriage for Delaware state law purposes was deemed to be the date of the original civil union, raising issues for employee benefit plans that treated these couples as non-married. *See id.* By contrast, in Washington, domestic partnerships for same-sex couples under age 62 were dissolved and converted to marriages, either by action of the parties or by operation of law, effective on the date of the conversion or June 30, 2014, not the date of the original domestic partnership. *See* Rev. Code of Wash. Ann. § 26.60.100.

2. Federal Law Employee Benefits Issues for Domestic Partners.

Under DOMA § 3, domestic partners could not be treated as spouses under federal law even where they were treated as spouses for purposes of state law. As noted above, now that Section 3 has been struck down, the IRS and DOL have made clear that for purposes of federal employee benefits law and federal tax law, the terms "spouse" and "marriage" do not include domestic partners and domestic partnerships.[8] *See also* IRS, Answers to Frequently Asked Questions for Registered Domestic Partners and Civil Union Partners.

Employee benefit plans will likely face questions regarding the status of domestic partners under their terms, however. For example, if a plan does not define "spouse" but incorporates California law, California registered domestic partners may argue that they are entitled to be treated as spouses under the plan terms even if the plan terms do not explicitly provide benefits for domestic partners. Other issues may also arise under plan terms, particularly for claims that arise pre-*Windsor*. In addition, for same-sex couples who were in a domestic partnership and later married each other, issues may arise as to the duration of the marriage for

[8] Guidance issued on June 20, 2014 from the Social Security Administration, however, provides that these relationships will be treated as marriages for purposes of Social Security benefits. *See* § VI.B. In addition, in November 2013, a bankruptcy court in the Central District of California determined that a California Registered Domestic Partnership satisfied the definition of "spouse" for the purpose of federal bankruptcy law. *In re Cusimano*, No. 8:10-bk-23646-ES (C.D. Cal. Nov. 12, 2013) (Dkt. 56) (holding that California RDPs are spouses for purposes of federal bankruptcy law, and therefore non-support obligations to an RDP are nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(15)).

purposes of employee benefits, such as pension plans that have a marriage duration requirement for survivor benefits.[9]

B. Plan Interpretation Questions.

Plan language establishing spousal benefits has been subject to interpretation, but the DOL's Technical Release 2013-04 and IRS Notice 2014-19 resolve some previous questions. Plan language generally falls into the following categories:

- Plan does not define "spouse" with reference to sex or with reference to any state's law. This language includes all legally married spouses, although plans might dispute this interpretation where events occurred pre-*Windsor*.

- Plan does not define "spouse," but incorporates the law of a state that recognized same-sex marriages prior to *Obergefell*, or made available a marriage-equivalent status: same-sex spouses and domestic partners can claim benefits available to legally married spouses.

- Plan defines "spouse" by specific reference to DOMA: there is an argument that invalidity of DOMA means that the plan provides benefits to all legally married spouses.

- Plan defines "spouse" as "opposite-sex spouse": the plan term is clear, but plans are required to treat same-sex spouses as spouses for federal tax purposes due to Revenue Ruling 2013-17, and qualified pension plans must provide certain mandatory benefits to same-sex spouses pursuant to Technical Release 2013-04. *See* § IV.C.3, below. In addition, plans defining "spouse" as "opposite-sex spouse" may be subject to sex discrimination claims. *See* § III.D, below.

To the extent plans have discretion to define eligibility for spousal benefits not mandated by ERISA or the Code, for the reasons cited in Technical Release 2013-04, a rule providing the broadest marriage recognition has been and will continue to be the most efficient for plan administrators. It also avoids confusion arising from a discrepancy between nationally uniform marriage law with respect to same-sex couples, and contrary plan terms for some purposes. However, inefficiency and confusion can continue to arise from the federal refusal to recognize states' marriage-equivalent relationships – for example, where state law requires that domestic partners be treated as spouses for purposes of an insured welfare benefit plan, but federal law requires differential taxation.

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[9] *See Kapple v. Office of Pers. Mgmt.*, discussed below.

C. Legacy Issues Arising from Pre-*Windsor* and *Obergefell* Events.

Legacy issues remaining concerning DOMA's unconstitutionality and the application of *Windsor*, and from changing state laws on same-sex marriage, up to and including the impact of *Obergefell*.

1. Invalidity of DOMA § 3; Rev. Rul. 2013-17, Technical Release 2013-04, Notice 2014-19, and Notice 2015-86.

The invalidity of DOMA § 3 raises the question whether same-sex spouses are entitled to be treated as married under federal law retroactive to the dates of their marriages. Revenue Ruling 2013-17 and Notice 2014-19 make clear that for federal tax purposes, employee benefit plans must recognize many same-sex marriages beginning June 26, 2013, and all same-sex marriages beginning September 16, 2013. Thus, a plan does not fail to comply with tax-qualification requirements of the Code because it fails to recognize a same-sex marriage prior to that date.

However, federal tax law does not control claims by participants and beneficiaries under ERISA's civil enforcement provision. *See* ERISA § 502(a), 29 U.S.C. § 1132(a). *See Crawford v. Roane*, 53 F.3d 750, 756-57 (6th Cir. 1995) (holding that court has no power to resolve tax qualification issues in an action under ERISA § 502, but "[e]ven if this Court would determine that the Plan is disqualified for tax-deferred treatment, the written terms of the Plan would continue to be effective as a written contract between the participant, his beneficiaries, and the Plan sponsor"). In addition, federal tax law does not control claims by participants under Title VII or Section 1557 of the Affordable Care Act. *See* § III.D, below.

In particular, if a participant or beneficiary has a claim for benefits under the terms of a plan, and the plan can be read to provide spousal benefits to same-sex spouses, that claim can still be brought even if it is based on events that happened before *Windsor*. *See, e.g., Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D. Pa. July 29, 2013) (holding that surviving same-sex spouse was entitled to spousal benefit where plan did not exclude same-sex spouses from definition of spouse).

In sum, although a plan can comply with federal tax law prior to June 26 or September 16, 2013 without recognizing same-sex marriages, participants and beneficiaries may still bring claims for spousal benefits and claims for violations of ERISA or the terms of a plan, even if the claims are based on events that happened before that date. Such claims raise issues such as:

- Available forms of benefit under defined benefit pension plans: if a same-sex married participant retired prior to *Windsor* and was treated as ineligible to elect a joint and survivor annuity, is that participant now entitled to make that election? Is a new election retroactive to the date of pension commencement, or only prospectively? If the new election has retroactive effect, must the participant repay benefits to the plan if the benefit amount has been higher than the joint-and-survivor annuity amount or, if the benefit amount has been lower than the joint-and-survivor annuity amount, must the plan make the participant whole for the difference between the joint-and-survivor amount and the lesser benefit amount? What if the participant died after retiring – is the surviving spouse entitled to a survivor annuity?[10] *See* § IV.C.3, below.

- Qualified preretirement survivor annuities: if a same-sex married participant in a defined benefit pension plan died pre-retirement before *Windsor* and the surviving spouse was deemed ineligible for a preretirement survivor annuity, is the surviving spouse now eligible? *See* § IV.C.3, below; *see Schuett v. FedEx Corp.*, 2016 WL 104267 (N.D. Cal. Jan. 4, 2016).

- Default beneficiary provisions under defined contribution or life insurance plans: if a same-sex married participant died before *Windsor* without designating a beneficiary, who gets the benefit under the plan's order of priority? *See Cozen O'Connor*, 2013 WL 3878688.

- Available forms of benefit under defined contribution plans: if a same-sex married participant died prior to *Windsor*, leaving his or her spouse as the beneficiary, may the spouse now retroactively elect a spousal form of distribution? *See* § IV.C.3, below.

- Spousal consent under defined contribution plans: if a same-sex married participant died prior to *Windsor*, having named a nonspouse beneficiary without spousal consent, can the spouse now challenge the distribution to the nonspouse? *See* 29 U.S.C. § 1155.[11]

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[10] Courts have encountered similar issues in the context of opposite-sex spouses who misrepresented themselves as single when they were in fact married. *See, e.g.*, *Hearn v. W. Conf. of Teamsters Pension Trust Fund*, 68 F.3d 301 (9th Cir. 1995). In *Hearn*, the court held that payment of a survivor annuity was mandatory, but because there was no breach of fiduciary duty by the plan administrator in paying a single-life annuity during the participant's lifetime, the survivor annuity could be reduced by the amount of the overpayment.

[11] Courts have dealt with competing claimants for mandatory spousal benefits in

Participants and beneficiaries have a strong argument that *Windsor* and subsequent federal guidance must now be applied even to facts predating *Windsor*, and that state marriage bans in effect before *Obergefell* can no longer be applied even with respect to events that occurred before *Obergefell*. In civil cases, the Supreme Court's "application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 89 (1993). In particular, the Supreme Court's application of federal law to the parties before it is the controlling interpretation of federal law and "*must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule*." *Id.* at 97 (emphasis added).

In *Windsor*, the Supreme Court struck down as unconstitutional Section 3 of DOMA and applied its ruling to the parties in that case. It affirmed the lower court's judgment requiring the United States to refund Ms. Windsor the estate taxes that she had paid to the IRS (as well as interest) following the death of her wife in 2009. *See* 133 S. Ct. at 2682, 2684. This was the case even though at the time Ms. Windsor's spouse died, DOMA precluded the IRS from recognizing Ms. Windsor as the surviving spouse. Likewise, in *Obergefell*, the lead case of four consolidated cases was brought by the widow of a same-sex marriage whose state of residence refused to issue a death certificate for showing him as his husband's surviving spouse. Again, the Supreme Court's ruling required reissuance of the death certificate.

Windsor is not the first case to remove unconstitutional bars to benefits, and courts have applied Supreme Court decisions retroactively in the benefit context. For example, in *Hurvich v. Califano*, 457 F. Supp. 760 (N.D. Cal. 1978), the court held that Mr. Hurvich, a widower, was entitled to receive Social Security "father's benefits" retroactive to the date of his wife's death in 1969. This was the case even though the Social Security statute had limited such benefits to mothers until 1975, when the Supreme Court found the statute's gender classification unconstitutional.

To date, few cases have raised retroactivity issues concerning employee benefits after *Windsor*. In *Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D.

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other contexts. For example, in *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 414 F.3d 918 (6th Cir. 2013), an interpleader action, the court applied conflict of law principles to determine which of two spouses would receive a survivor annuity under a pension plan. Similarly, in *IBEW Pacific Coast Pension Fund v. Lee*, 462 Fed. App'x 546 (6th Cir. 2012), the plan started paying a monthly spousal survivor benefit to a Mrs. Lee, but then another Mrs. Lee claimed that she had previously been married to the decedent employee, that her marriage was never dissolved, and that she never consented to the second Mrs. Lee receiving a benefit.

Pa. July 29, 2013), a same-sex couple, Ms. Tobits and Ms. Farley, were married in Canada in 2006. *Id.* at *1. Ms. Farley worked for a Philadelphia-based law firm and participated in its pension plan. *Id.*; *see id.* at *4, n.28. Ms. Farley died in 2010, three years before the *Windsor* decision. Following *Windsor*, the *Cozen O'Connor* court ordered that the pension plan correct its previous benefit denial and pay a survivor benefit to Ms. Tobits, as Ms. Farley's surviving spouse. *Id.* at 5. In the health plan context, although not directly addressing retroactivity, after *Windsor* a Ninth Circuit panel awarded back pay for the costs of health insurance to a former federal employee in Oregon who had not been permitted to enroll her same-sex domestic partner in the federal employees' health plan prior to *Windsor*.[12] *In re Fonberg*, 736 F.3d 901 (9th Cir. Judicial Council 2013).

A recent decision in January 2016 directly addressed the application of *Windsor* to an ERISA plan based on events that happened before the decision. In *Schuett v. FedEx Corporation et al.*, 2016 WL 104267 (N.D. Cal. Jan. 4, 2016), the surviving same-sex spouse of a pension plan participant who died six days prior to *Windsor* brought a claim after *Windsor* for a spousal survivor benefit. The defendant employer denied the claim on the ground that its pension plan, at the time of the participant's death, defined "spouse" by explicitly incorporating Section 3 of DOMA. The court denied FedEx's motion to dismiss the plaintiff's claim that regardless of plan's definition of "spouse," FedEx violated Title I of ERISA by failing to provide the plaintiff with a mandatory benefit under ERISA. *Id.* at *10. The court was "not persuaded at this stage of the case . . . that there is any basis for denying retroactive application of *Windsor*." *Id.*

Another recent case raised such issues. In *Pritchard v. IUOE Stationary Engineers Local 39 Pension Plan*, No. 16-cv-355-LB (N.D. Cal. filed Jan. 22, 2016), a widower whose same-sex spouse died in 2012 alleged that the plan relied on DOMA in 2015 for its continued refusal to pay a joint and survivor annuity. The complaint alleged that the plaintiff's spouse was approved on the date of his death for a retroactive disability pension, which was paid as seven months of a single life annuity, although the plan defined "spouse" at all times as "the person to whom a participant is legally married." The case settled, and the plan is now paying a survivor annuity to the plaintiff.

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[12] Another case raising retroactivity issues involved sex discrimination claims based on the denial of federal employee health benefits to same-sex spouses before *Windsor*. *See Hudson v. OPM et al.*, No. 15-cv-01539 (N.D. Cal.) (filed Apr. 3, 2015). The case settled in September 2015. As a result of the settlement, the plaintiff was reimbursed for amounts she spent on premiums for alternate health care for the period when she was unable to enroll her spouse in the Federal Employee Health Benefits Program.

In the context of pension benefits for federal employees, the U.S. Office of Personnel Management (OPM) granted an administrative claim in April 2014 for retroactive survivor benefits brought by the surviving same-sex spouse of a federal employee who died in 2011. The couple married in California in 2008. When the employee passed away in 2011, the surviving spouse was told she would not be eligible for any survivor benefits under the Federal Employees Retirement System because DOMA precluded recognition of the marriage. The surviving spouse filed a timely claim for survivor benefits in 2014, arguing that OPM should apply the current law, not the prior unconstitutional law, in evaluating the claim. OPM granted the claim, and the surviving spouse received a lump-sum death benefit and a monthly annuity retroactive to the date of her spouse's death. In June 2014, the Attorney General issued a memo stating that "OPM has begun the process of working with surviving spouses of federal employees and annuitants who died prior to the Windsor decision to ensure that these widows and widowers receive the benefits to which they would have otherwise been entitled had DOMA not prohibited OPM from recognizing their marriages." *See* Mem. from Att'y Gen. Eric Holder Re: Implementation of *United States v. Windsor* (June 20, 2014).

These legacy issues are likely to be rare. While the exact number of same-sex couples in the United States who were married at the time of *Windsor* is unknown, estimates run in the 100,000 range. *See* Williams Institute, Supreme Court Rulings Strike Down DOMA and Prevent Enforcement of California's Proposition 8 (June 26, 2014). For a retroactivity issue to arise under an employee benefit plan, there must be: (1) a same-sex couple validly married under the law of a state or foreign jurisdiction before *Windsor*; (2) with a spouse participating in an employee benefit plan; and (3) a triggering event occurring before *Windsor* (for example, for pension plans, the spouse retired or died, or the couple divorced); and (4) because of non-recognition of the marriage by the plan, the couple or spouse was deprived of a spousal benefit that would have been provided had the marriage been recognized. For any particular plan, retroactivity issues are likely to be unique, individualized, and best addressed on a case-by-case basis.

2. Changes in State Law.

Retroactivity issues may also arise where, prior to *Obergefell*, a plan incorporated a state's same-sex marriage plan into its terms or otherwise refused to recognize a marriage on the basis that the marriage was not valid in a particular state. Additionally, retroactivity issues may arise for couples whose marriage-equivalent relationships are converted under state law from domestic partnerships into marriages. As noted above, in Delaware, for example, all civil unions were converted to marriages effective the date of the original civil union. *See* 13 Del. C. § 218. Thus, retroactivity issues may arise as to the marriages with effective dates before *Windsor* or *Obergefell*, even though a state's recognition of same-sex marriages began after one or both of the cases.

In addition, some states have also been interpreting *Obergefell* retroactively by, for example, issuing amended death certificates where the state did not recognize a same-sex couple as married at the time of one spouse's death. For example, in Washington state, the state issued an amended death certificate listing a man who passed away in 2008 as married, when he and his spouse had entered into a registered domestic partnership in 2003. *See* http://www.king5.com/story/news/local/2015/11/04/gay-widower-victory-va-benefit/75147680. This enabled the surviving spouse to obtain his spouse's federal veterans' benefits, when eligibility for benefits was conditioned on whether the state of residency recognized the marriage. *See id.* As another example, in December 2015, a court in Utah recognized a retroactive common-law marriage where one spouse died before the couple could formally marry, which resulted in an amended birth certificate for the couple's child listing both spouses as parents. *See* http://www.sltrib.com/news/3352688-155/groundbreaking-ruling-recognizes-same-sex-common-law-marriage.

D. Title VII and Related Federal Anti-Discrimination Law.

After *Windsor* and *Obergefell*, Revenue Ruling 2013-17, and Technical Release 2013-04, plans will remain free to define "spouse" as "opposite-sex spouse" for some purposes. In particular, a health plan that provides benefits to opposite-sex spouses but excludes same-sex spouses does not violate ERISA. Recent developments in Title VII law and federal healthcare law, however, support sex discrimination claims based on denial of spousal benefits to employees' same-sex spouses.

1. Title VII.

Title VII prohibits discrimination "because of sex." Historically, courts have classified sex discrimination claims by gay and lesbian employees as claims of sexual orientation discrimination not cognizable under Title VII, on the theory that sexual orientation was an unprotected classification distinct from sex. But more recently, the Equal Employment Opportunity Commission and some courts have taken a different view of whether claims that have been classified as sexual orientation and/or gender identity discrimination claims state claims of discrimination "because of sex."

In July 2015, the EEOC issued a decision in *Baldwin v. Department of Transportation*, EEOC Appeal No. 0120133080, explicitly holding that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." 2015 WL 4397641, at *5 (EEOC) (July 15, 2015). The Commission also noted, among other things, that "[s]exual orientation

discrimination is also sex discrimination because it is associational discrimination on the basis of sex" and that "Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex." *Id.* at *5, *7. Some district courts have endorsed the reasoning of *Baldwin*. *See, e.g.*, *Isaacs v. Felder Servs., LLC*, 2015 WL 6560655 (M.D. Ala. 2015). Other EEOC decisions involving Title VII claims by gay, lesbian, or transgender federal employees include *Veretto v. U.S. Postal Serv.*, 2011 WL 2663401 (EEOC) (July 1, 2011); *Castello v. U.S. Postal Serv.*, 2011 WL 6960810 (EEOC) (Dec. 20, 2011); and *Macy v. Dep't of Justice*, 2012 WL 1435995 (EEOC) (Apr. 20, 2012).

Most recently, on March 1, 2016, the EEOC filed two Title VII sex discrimination lawsuits against private employers on behalf of gay or lesbian individuals. The EEOC's lawsuits seek, in addition to other monetary and injunctive relief for the aggrieved individuals, damages for emotional distress and punitive damages. *See U.S. EEOC v. Pallet Companies*, No. 16-cv-00595-RDB (D. Md.) (filed Mar. 1, 2016); *U.S. EEOC v. Scott Medical Health Ctr., P.C.*, No. 16-cv-00225-CB (W.D. Pa.) (filed Mar. 1, 2016).

While results are mixed, federal district courts are increasingly recognizing discrimination claims brought by gay and lesbian employees as alleging sex discrimination under Title VII. For example, a federal court held that a gay employee sufficiently pled a claim for sex discrimination under Title VII because as a gay man, the employee's "sexual orientation was not consistent with the defendant's perception of acceptable gender roles." *Terveer v. Billington*, 34 F. Supp. 3d 100, 2014 WL 1280301, at *9 (D.D.C. Mar. 31, 2014); *see also Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (permitting plaintiff to go to trial on Title VII sex discrimination claim alleging mistreatment because he "chose to take his [male] spouse's surname – a 'traditionally' feminine practice"); *Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (noting that "[s]exual orientation discrimination can take the form of sex discrimination"); *but see Evans v. Georgia Reg'l Hosp.*, 2015 WL 5316694, at *3 (S.D. Ga. Sept. 10, 2015) ("[I]t is simply *not* unlawful under Title VII to discriminate against homosexuals or based on sexual orientation."), *report and recommendation adopted*, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015); *Currie v. Cleveland Metro. Sch. Dist.*, 2015 WL 4080159, at *3 (N.D. Ohio July 6, 2015) ("[C]laims of harassment on the basis of sexual orientation cannot give rise to a Title VII retaliation claim.").

These developments have major implications for employee benefits. On January 29, 2015, the EEOC issued a probable cause finding that Wal-Mart's refusal to provide spousal health benefits to the charging party's same-sex spouse constituted sex discrimination. In particular, the EEOC noted that the charging party "was subject to employment discrimination in that she was treated differently

and denied benefits *because* of her sex, since such coverage would be provided if she were a woman married to a man." *See Cote v. Wal-Mart Stores East, LP* (Jan. 29, 2015), *available at* http://www.glad.org/uploads/docs/cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.pdf. Ms. Cote filed suit on July 14, 2015, alleging sex discrimination claims under Title VII, the Equal Pay Act, and the Massachusetts Fair Employment Practices Law. *Cote v. Wal-Mart Stores, Inc.*, No. 1:15-cv-12945-WGY (D. Mass.). The suit alleges claims on behalf of a national class of current and former Wal-Mart employees in same-sex marriages, as well as a Massachusetts sub-class. The suit challenges both Wal-Mart's refusal to provide spousal healthcare benefits prior to January 1, 2014, and its ongoing refusal, expressed in the EEOC investigation, to acknowledge any obligation to provide benefits on an equal basis to employees in opposite-sex and same-sex marriages.

In a similar context, a district court denied a motion to dismiss a Title VII claim brought by gay and lesbian employees against a company that provided health benefits to same-sex spouses but not to opposite-sex spouses. *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014). The court determined that the plaintiff "allege[d] disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id.* at *3.

In addition, on July 21, 2014, President Obama signed an executive order amending Executive Orders 11478 and 11246, which bans federal contractors from discrimination based on sexual orientation and gender identity. *See* Executive Order, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity. The order also makes clear that federal employees, who were already explicitly protected from discrimination on the basis of sexual orientation, are also protected from gender identity discrimination. *Obergefell* strengthens potential sex-discrimination claims by eliminating any defense that a plan relies on a particular state's marriage law in refusing to recognize same-sex marriages.

2. Affordable Care Act § 1557.

Section 1557 of the Affordable Care Act prohibits discrimination in healthcare on the basis of sex and other classifications protected by federal civil rights laws, including Title VII, which are incorporated by reference into the ACA. 42 U.S.C. § 18116. These protections are enforceable by private action. *See Rumble v. Fairview Health Servs.,* 2015 WL 1197415 (D. Minn. 2015). The Department of Health and Human Services, which is charged with enforcing § 1557, has issued a proposed regulation stating that this prohibition on sex discrimination includes discrimination on the basis of sex stereotyping and gender identity. 80 FR 54172-01

(Sept. 8, 2015). While the proposed regulation does not explicitly include sexual orientation, the HHS Office of Civil Rights' supplementary information to the proposed rule notes that "[a]s a matter of policy, we support banning discrimination in health programs or activities . . . on the basis of sexual orientation." 80 FR 54172, at 54176. It discusses the EEOC's *Baldwin* decision and states that "[t]he final rule should reflect the current state of nondiscrimination law, including with respect to prohibited bases of discrimination." *Id.* at 54177. It further seeks comments on "the best way of ensuring that this rule includes the most robust set of protections supported by the courts on an ongoing basis." *Id.* The nondiscrimination section also "complements" the nondiscrimination regulations that apply to the ACA Marketplaces, which explicitly prohibit discrimination on the basis of sex, gender identity or sexual orientation. *Id.* at 54189. A final regulation is expected in 2016.

The extent to which § 1557 reaches employer-sponsored plans is not yet entirely clear. The proposed regulation states that § 1557 does not apply to an employer's provision of employee health benefits where provision of those benefits is only health program or activity operated by the employer – that is, the regulation reaches an employer-sponsored plan directly where the employer is, for example, a hospital or a health insurer, but not where the employer is not otherwise involved in the healthcare system. *See* 80 FR 54172-01 (Sept. 8, 2015).

However, the proposed regulation also states that § 1557 applies to any health program or activity that receives federal funding, including credits, subsidies, or contracts of insurance. *Id.* If a health program or activity receives federal funding, the civil rights provision applies to the entire program or activity, not just to the portion that receives federal funding. *Id.* For example, in a case decided before publication of the proposed regulation, where a hospital received Medicaid funding, § 1557 protected a transgender patient against sex discrimination in treatment, even though the hospital received no federal funding in connection with his admission. *Rumble*, 2015 WL 1197415.

Thus, it appears that under the proposed regulation, an employer-sponsored plan that is funded by the purchase of insurance from an insurer that participates in the ACA Marketplace would be subject to § 1557, although the plan itself is not sold on an exchange, receives no federal funding, and is not sponsored by an employer that is otherwise involved in healthcare. As another example, a self-funded plan that is administered by an insurer that participates in the Marketplace apparently would be covered by § 1557.

To the extent that § 1557 applies to employee benefit plans, they are prohibited from discriminating on the basis of sex, and the proposed regulation, developing caselaw, and EEOC decisions support the conclusion that this prohibition includes discrimination on the basis of sexual orientation. Therefore, in addition to being potentially liable for sex discrimination under Title VII directly,

an employer-sponsored plan that discriminates against same-sex couples could be liable under § 1557.

3. Plan Administration Burdens.

In addition to the potential for sex-discrimination claims, plans that exclude same-sex spouses from benefits while including opposite-sex spouses will face an administrative burden from the need to ascertain the sex of each spouse that an employee seeks to enroll. Moreover, most employers are not likely to want to inquire in to the sex of their employees' spouses as a condition of enrolling those spouses in a health plan. An example of a highly intrusive and likely infeasible approach appears in one reported decision, where a health plan was amended to provide as follows: "[T]he Plan defines a spouse as a male or female member of a legally recognized marriage between a man and a woman. . . . For purposes of deciding whether a marriage is between a man and a woman, in all cases, the Board will only recognize the anatomical sex of the individual at the time of birth." *Radtke v.* Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund, 867 F. Supp. 2d 1023, 1028 (D. Minn. 2012). The intent of this provision is clear: to exclude not only same-sex spouses, but also any spouse in an opposite-sex marriage where a party has undergone a gender transition – both of which would be likely to give rise to a sex-discrimination suit. But even for an employer or plan willing to run that risk, the obligation to determine the "anatomical sex . . . at the time of birth" of each participant and potential beneficiary would create a substantial plan administration burden and likely give rise to significant employee relations problems.

E. Selected Recent Employee Benefits Decisions.

1. Same-Sex Widow Entitled to Pension Benefit.

As noted above, in the first post-*Windsor* ERISA decision, a district court awarded a surviving spouse benefit under a profit-sharing plan to a participant's same-sex widow. *Cozen O'Connor P.C. v. Tobits*, 2013 WL 3878688 (E.D. Pa. July 29, 2013). The couple married in Canada in 2007 and lived in Illinois. One spouse worked in the Chicago office of a Philadelphia-based law firm, which sponsored a profit-sharing plan. The participant spouse died in 2010, without having executed a valid beneficiary designation for her plan account. Both the widow and the participant's parents filed claims for the benefit, and the plan filed an interpleader action. The plan terms did not define "spouse," other than incorporating the ERISA-permitted requirement that the couple have been married for at least a year as of the earlier of the annuity starting date or death. After *Windsor*, the court held that the widow was entitled to the benefit under the plan's default order of priority. The court explained that ERISA and the IRC establish the "floor" for spousal rights in pension plans, and that Windsor "leveled the floor," requiring equal treatment of

legally married couples. Because the couple were validly married in Canada, and the Illinois probate court had recognized the widow as a surviving civil union partner, which is equivalent to a surviving spouse under Illinois law, the widow was entitled to be treated as the surviving spouse under the plan. The plan's Pennsylvania choice-of-law provision – Pennsylvania being a non-marriage state – did not control the outcome because ERISA preempted Pennsylvania law.[13]

2. Former Federal Employee in Oregon Entitled to Reimbursement for Her Domestic Partner's Health Benefits.

A Ninth Circuit panel awarded back pay for the costs of health insurance to a former federal employee in Oregon who had not been permitted to enroll her same-sex domestic partner in the federal employees' health plan. *In re Fonberg*, 736 F.3d 901 (9th Cir. Judicial Council 2013); *see* § V.B, below. The court concluded that Ms. Fonberg and her partner were treated differently in two ways. First, they were treated differently from opposite-sex couples who could marry and gain spousal benefits under federal law, which the court found was discrimination on the basis of sexual orientation in violation of the District of Oregon's Employment Dispute Resolution plan. Second, they were treated differently compared to other same-sex couples in other states in the Ninth Circuit, who could marry and gain federal benefits under *Windsor*, and this violated "the principle that federal employees must not be treated unequally in the entitlements and benefits of federal employment based on the vagaries of state law." *See id*. It further found that OPM's "distinction based on the sex of the participants in the union" constituted sex discrimination and a deprivation of due process and equal protection. *See id.*

3. No ERISA Section 510 Claim for Health Plan's Exclusion of Same-Sex Spouses.

A district court in the Southern District of New York dismissed a case alleging that an ERISA-governed health plan's exclusion of same-sex spouses and domestic partners violates Section 510 of ERISA, which prohibits employers from discriminating against participants for exercising rights to which they are entitled under an employee benefit plan. *Roe v. Empire Blue Cross Blue Shield*, No. 12-cv-04788 (NSR), 2014 WL 1760343 (S.D.N.Y. May 1, 2014), *aff'd*, 589 Fed. App'x 8 (Dec. 23, 2014). The plaintiffs also alleged that the defendants breached their fiduciary duties by enforcing a plan term that violated ERISA. The plan at issue did not define "spouse," but contained an exclusion stating, "Same sex spouses and domestic partners are NOT covered under this plan." 2014 WL 1760343 at *1. The plaintiff filed a proposed class action in 2012 on behalf of participants or

[13] Although the parents initially appealed, they dismissed the appeal following issuance of Rev. Rul. 2013-17.

beneficiaries of Blue Cross Blue Shield insurance plans in New York and participants and beneficiaries of the particular plan at issue who are affected by the policy of denying coverage to same-sex spouses. The court dismissed the case, noting that ERISA does not require a health plan to provide benefits to spouses at all, that the Plan did not violate ERISA, and that Section 510 of ERISA did not apply.

The plaintiffs had not raised, and the court did not address, "whether the Exclusion is lawful under other federal laws." *Id.* at *8. While it is clear that health plans are not required by ERISA to provide coverage for any spouses, opposite- or same-sex, *see* § IV.B.1 below, those seeking to challenge plan terms that are discriminatory on their face can argue that such discrimination violates federal anti-discrimination laws such as Title VII. *See* § III.D, above.

4. Administrative Judge Overturns Denial of Spousal Benefit to Same-Sex Widower of Federal Employee.

In *Kapple v. OPM*, 2015 WL 241655 (MSPB Jan. 16, 2015), an administrative law judge of the Merit Systems Protection Board overturned the denial of a spousal benefit to the widower of federal employee. The couple had been registered domestic partners in California since 2005. In July 2013, less than two weeks after the Supreme Court reinstated same-sex marriage in California, they married. After the employee passed away in January 2014, OPM denied the widower a spousal survivor benefit because the couple had been married for fewer than nine months at the time of the employee's death, as required by the statute governing the Federal Employees Retirement System (FERS). The Administrative Judge overturned OPM's denial of benefits, concluding that the period when the couple were registered domestic partners before they married "counts towards the nine months of marriage required for spousal benefits" in the statute. The decision noted that "California treats domestic partnership as equivalent to marriage for all purposes," and concluded that to interpret the term "marriage" in the federal statute as including "only the label the state gave the relationship rather than its substance would raise serious constitutional questions."

5. Judge Allows Claim to Proceed for Same-Sex Widow Denied Pension Benefit Where Plan Incorporated DOMA § 3 and Participant Died Before *Windsor*.

As noted above, in *Schuett v. FedEx Corporation et al.*, 2016 WL 104267 (N.D. Cal. Jan. 4, 2016), the surviving same-sex spouse of a pension plan participant who died six days prior to *Windsor* brought a claim after *Windsor* for a spousal survivor benefit. FedEx denied the claim on the ground that its pension plan, at the time of the participant's death, defined "spouse" by explicitly incorporating Section 3 of DOMA. The plaintiff brought suit, raising several claims in the alternative. The court denied FedEx's motion to dismiss the plaintiff's claim that regardless of plan's

definition of "spouse," FedEx violated Title I of ERISA by failing to provide the plaintiff with a mandatory benefit under ERISA. *Id.* at *10. The court was "not persuaded at this stage of the case . . . that there is any basis for denying retroactive application of *Windsor*." *Id.* The court granted FedEx's motion to dismiss the claim for benefits under the terms of the plan, since the plan terms excluded same-sex spouses. The court also dismissed the plaintiff's claim for breach of fiduciary duty alleging misinformation given to the participant spouse before her death.

IV. Effect of *Windsor* and Related Federal Guidance on ERISA-Governed Employee Benefit Plans.

A. Background.

1. Scope of ERISA Coverage.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA"), governs most employee benefits provided by private employers and unions. Specifically, ERISA governs two distinct kinds of plans: "employee pension benefit plans" and "employee welfare benefit plans." The term "employee pension benefit plan" or "pension plan" includes any plan that provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of employment or beyond. 29 U.S.C. § 1002(2). The term "employee welfare benefit plan" or "welfare plan" includes any plan that provides, "through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c)" of the LMRA. 29 U.S.C. § 1002(1).[14]

ERISA contains a wide-reaching preemption clause providing that it supersedes "any and all state laws" that relate to employee benefit plans, except state laws that regulate insurance, banking or securities. 29 U.S.C. § 1144. This

[14] ERISA does not govern plans that provide benefits not enumerated in its definitional sections. It also does not govern benefits provided by federal, state, or local governments ("government plans"), or by churches or associations or conventions of churches ("church plans"). 29 U.S.C. § 1003(b). Church plans may elect ERISA coverage as to their pension plans. 29 U.S.C. § 1003(b)(2). Whether pension plans established by church-affiliated entities, such as healthcare organizations, are exempt from ERISA is in question. Some courts have also found that churches may elect ERISA coverage for their welfare plans, though the law remains unsettled.

"insurance savings clause" allows states to regulate insured ERISA plans indirectly by regulating the terms of insurance policies, as discussed below.

2. Section 3 of DOMA.

Under Section 3 of DOMA, where ERISA referred to "marriage" or "spouse," these terms excluded same-sex spouses and civil union partners/domestic partners. The same applied to other benefits-related federal laws such as the Internal Revenue Code and the statutes governing federal employees' health and pension benefits.

While DOMA governed the interpretation of the terms "marriage" and "spouse" in the statute itself, DOMA did not prescribe the meanings of these terms as they appeared in ERISA-governed plans. With possible limited exceptions, even before *Windsor*, private employers were free to define these terms in their benefit plans to include same-sex couples, or to use other terms to extend eligibility to same-sex spouses or civil union partners/domestic partners, as the plan chose to define those terms. *See Union Sec. Ins. Co. v. Blakeley*, 656 F3d 275 (6th Cir. 2011) (holding that whether an opposite-sex cohabitant was a domestic partner within the meaning of an ERISA-governed life insurance plan should be determined by reference to the plan language, not by reference to a federal common-law definition of "domestic partner"); *see also Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69 (3d Cir. 2011) (holding that meaning of "children" in a welfare plan was to be determined by reference to the intent of the parties and not to state law).

B. Welfare Plan Issues.

1. Availability of Coverage and Mandated Benefits Under Insurance Law.

As noted above, ERISA does not require a group health plan to provide health benefits to any spouses – opposite- or same-sex – of employees. Thus, neither *Windsor* nor *Obergefell* requires that ERISA-governed health plans provide benefits to same-sex spouses.[15] State and federal laws governing insured health plans, however, may mandate that plans providing benefits to opposite-sex spouses also provide benefits to same-sex spouses and domestic partners.

States are free to regulate insured ERISA plans through regulation of insurance. California's Insurance Equality Act ("IEA"), for example, requires that HMOs and insurance policies provide coverage for registered domestic partners

[15] Plan participants in same-sex marriages might have potential ERISA claims for spousal health benefits under the terms of their particular plan, however, depending on whether and how the plan defines "spouse."

equal to any coverage provided for married spouses. Cal. Health & Safety Code § 1374.58(a); Cal. Ins. Code §§ 381.5(a), 10121.7(a). As a result, an insured employer health plan marketed, issued, or delivered to a resident of California must provide benefits to registered domestic partners if, and to the extent that, it provides benefits for married spouses. However, an ERISA-governed health plan in California that is not funded through the purchase of insurance – that is "self-funded" – need not provide benefits to registered domestic partners.

Other states have also enacted legislation mandating that insured benefits be extended to same-sex spouses and domestic partners to the same extent as opposite-sex spouses, or mandating that insurance policies offer such benefits. Some state insurance commissioners have also mandated that insurers provide spousal benefits to same-sex spouses.[16] In June 2014, Washington state officials issued a letter to benefit plan administrators, insurance companies, and employers stating that providing health care coverage to opposite-sex spouses but not same-sex spouses violates Washington state law. *See* Letter from Wash. Atty. Gen., Wash. Ins. Comm'r, & Wash. Human Rights Comm'n (June 5, 2014). The Washington state agencies have taken the position that this applies not only to insured plans, but to self-funded plans as well, stating that "[t]he federal preemption provisions in ERISA . . . cannot be used to carve out same-sex marriages recognized in Washington state for unequal treatment by excluding them from healthcare benefits that are otherwise provided to other married couples in this state." Frequently Asked Questions, Washington State Joint Letter on Health Coverage for Same-Sex Spouses (June 5, 2014) (available at http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/FAQ%20Insurance%20Equality%20FINAL.pdf).

The federal government also regulates insurance, including qualified health plans offered through Affordable Insurance Exchanges (as part of the Patient Protection and Affordable Care Act). On March 14, 2014, the Centers for Medicare & Medicaid Services (of the Department of Health & Human Services) issued guidance to clarify the regulations' prohibition against discrimination based on sexual orientation. *See* CMS, Frequently Asked Question[s] on Coverage of Same-Sex Spouses (Mar. 14, 2014). The regulations preclude a health insurance issuer in the group or individual market that offers coverage of an opposite-sex spouse from refusing to offer coverage of a same-sex spouse. The regulations do not require a group health plan "to provide coverage that is inconsistent with the terms of eligibility for coverage under the plan, or otherwise interfere with the ability of a dependent spouse for purposes of eligibility of coverage under the plan." *See id.* at 1-2. Rather, the regulations prohibit an issuer from choosing to decline to offer to a plan sponsor (or individual in the individual market) the *option* to cover same-sex

[16] *See* State of Conn. Ins. Dep't, Bulletin IC-21 (rev. July 10, 2009); State of New York Ins. Dep't, Circular Letter No. 27 (2008).

spouses under the coverage on the same terms and conditions as opposite-sex spouses. *Id.* at 2.

2. Continuation Coverage.

a. Federal Law (COBRA).

Amendments to ERISA by the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA") added the requirement that ERISA-governed group health plans provide continuation coverage to employees and their "qualified beneficiaries" in the case of a loss or reduction of coverage due to various "qualifying events," including termination of employment, reduction of hours, divorce, death of the employee, and bankruptcy of the employer. 29 U.S.C. §§ 1161-67. However, the term "qualified beneficiary" includes only a spouse or a dependent child. 29 U.S.C. § 1167(3). As a result of *Windsor*, an ERISA-governed health plan is required to provide continuation coverage to employees' same-sex spouses if the plan provides active coverage to same-sex spouses, because a beneficiary must be enrolled in the plan prior to the qualifying event – such as termination of employment, divorce, or death – to be eligible for continuation coverage. Thus, a group health plan could theoretically exclude same-sex spouses from coverage and thereby avoid the requirement to provide continuation coverage. As discussed above in Section III.D, such an exclusion could expose the employer to Title VII claims.

An ERISA-governed health plan is not required to provide continuation coverage to domestic partners, even if it provides regular coverage to domestic partners. Nothing precludes a plan from providing continuation coverage to persons who are not qualified beneficiaries, including domestic partners.

b. State Law.

State insurance law may mandate continuation coverage for same-sex spouses and domestic partners in insured plans that cover opposite-sex spouses.

3. Welfare Plan Tax Issues.

a. Eligibility for FSAs, HSAs, and HRAs.

Under DOMA, domestic partners and same-sex spouses who were not tax dependents could not receive benefits under a Flexible Spending Account, Health Reimbursement Arrangement, or Health Savings Account. *See* Rev. Rul. 2006-36. Now, same-sex spouses are eligible for such benefits, but domestic partners are not. In addition, shortly after *Windsor*, employers that sponsor cafeteria plans were permitted to allow employees in same-sex marriages to change their elections mid-

year so long as they were married as of June 26, 2013, because the *Windsor* decision itself constituted a change in legal marital status. IRS Notice 2014-1.

b. Whether Employer Contributions Are Includible in Gross Income.

Employer contributions for medical or life insurance benefits for an employee's spouse are not includible in the employee's taxable income for federal tax purposes, and the employee may make contributions toward such benefits on a pre-tax basis. IRC §§ 105(b), 106(a); Treas. Reg. § 1.106-1. Under DOMA, for a non-dependent domestic partner or same-sex spouse, however, employer contributions were taxable to the employee, and employee contributions were required to be made on an after-tax basis. Priv. Ltr. Rul. 9717018 (Apr. 25, 1997).

Unequal tax treatment of welfare plan benefits for same-sex spouses, as well as the administrative burden on employers of compliance with the requirement to impute income to employees, were a focus of the court in *Massachusetts v. United States Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2887. Assessing the state's standing to challenge the application of DOMA § 3, the court agreed that the state had been injured by DOMA in several ways, including payment of increased Medicare taxes for state employees due to imputed income on health benefits for same-sex spouses.

Numerous states enacted legislation excluding the value of coverage for a non-dependent domestic partner from gross income for state tax purposes and permitting employees to make contributions for such coverage on a pre-tax basis for state tax purposes. *See, e.g.*, Oregon Dep't of Rev., Registered Domestic Partners in Oregon. In addition, in an effort to ameliorate the tax inequality, some employers "grossed up" employees' earnings to cover the federal tax on employer contributions for same-sex spouses (prior to DOMA) and domestic partner benefits. *See* "For Gay Employees, an Equalizer," The New York Times (May 21, 2011). In October 2013, California enacted legislation making an employer's "gross-up" payment non-taxable at the state level. Cal. Rev. & Tax Code § 17141(a).

Revenue Ruling 2013-17 ended federal taxation of imputed income for benefits for same-sex spouses, including authorizing refund claims by employees and employers. However, the imputed income issue persists for non-tax-dependent domestic partners.

C. Pension Plan Issues.

1. Division of Qualified Plan Benefits on Dissolution.

ERISA preempts state marital property law and generally prohibits alienation or assignment of pension plan benefits, although it provides for the division of pension benefits after termination of a marriage. *See* ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). In particular, the prohibition on alienation of benefits does not apply to "the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order" ("DRO"), if the DRO is determined by the plan administrator to meet the requirements for a qualified domestic relations order ("QDRO"). ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

ERISA defines a DRO to include only a judgment, decree, or order that "relates to the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B). Under DOMA, "spouse" could not include a domestic partner or same-sex spouse. Thus, it appeared that a judgment, decree, or order entered by a state court in connection with the dissolution of a domestic partnership or same-sex marriage would not be a DRO – and therefore could not be determined to be a QDRO – unless it related to a tax-dependent domestic partner or same-sex spouse. A plan administrator that qualified a DRO arising out of such a dissolution while DOMA was in effect risked violating the anti-alienation provision.

After DOMA and Technical Release 2013-04, these barriers to qualification of a DRO no longer exist for DROs issued in dissolutions of same-sex marriages, but continue to exist for dissolutions of domestic partnerships.

A second question arises as to the requirement that a DRO "relate[] to . . . marital property rights." It is possible that a DRO relating to marital property rights of a domestic partner could meet this requirement. *See Owens v. Automotive Machinists Pension Trust*, 551 F.3d 1138 (9th Cir. 2009) (holding that a state court order related to "marital property rights" when it directed payment of pension benefits to a tax dependent who had lived for 30 years in a "quasi-marital" opposite-sex relationship with the employee; DOMA did not control the meaning of "marital property" in ERISA § 206). Since 2010, the IRS has recognized the community property obligations of same-sex married couples and domestic partners in community property states, and requires that they file their federal income tax returns accordingly, supporting the argument that the meaning of "marital property" is a question of state law. *See* IRS Chief Counsel Advisory 201021050.

2. Taxation of Distributions to an Alternate Payee.

When a qualified retirement plan makes a distribution to an alternate payee who is the spouse or former spouse of the plan participant, the alternate payee is treated as the distributee. IRC § 402(e)(1). However, where an alternate payee is not a spouse or former spouse, the distribution is reported as income to the plan

participant. Thus, the distribution will be reported on a Form 1099-R issued to the participant. *See* Internal Revenue Service, 2012 Instructions for Forms 1099-R and 5498.

For alternate payees in dissolutions of same-sex marriages, issuance of a 1099-R to the alternate payee is authorized by the Code after Rev. Rul. 2013-17. However, the reporting issue persists as to domestic partnership dissolutions.

3. Survivor Benefits.

ERISA also protects spousal interests in pension benefits under qualified plans by requiring that the default benefit for a married participant in a defined benefit plan be a qualified joint and survivor annuity and that plans provide a qualified preretirement survivor annuity for the surviving spouse of a married participant who dies before retiring. 29 U.S.C. § 1055. While DOMA was in effect, these requirements likely did not extend to a participant in a domestic partnership or a same-sex marriage – although, as noted, IRS recognized community property rights of same-sex spouses and domestic partners in community property states.

However, plans have always been free to provide survivor benefits to same-sex spouses and domestic partners, although such survivor benefits would not have been qualified joint and survivor annuities (QJSAs) or qualified pre-retirement survivor annuities (QPSAs) while DOMA was in effect (now, such benefits are qualified for same-sex spouses but not domestic partners). As the United States wrote in a case challenging the constitutionality of DOMA, "Section 3 of DOMA imposes no blanket prohibition against a private retirement plan's provision of benefits to the same-sex spouse of a plan participant." Brief of the United States Regarding the Constitutionality of DOMA Section 3, *Cozen O'Connor, P.C. v. Tobits*, No. 2:11-cv-00045, Dkt. No. 97, p. 2.

Survivor benefits provided to a domestic partner may carry different tax consequences for the beneficiary than survivor benefits paid to a spouse. For example, the "5-year rule" and the "life expectancy rule," which relate to required timing of distributions of benefits under qualified plans, include a special rule for distributions to the surviving spouse of an employee, which allows a surviving spouse to postpone receiving distributions until the end of the year in which the participant would have attained age 70½. IRC § 401(a)(9)(B)(iv). Because a domestic partner is not a federally recognized spouse, he or she may not have this option. Before *Windsor* and subsequent guidance, many plans also treated same-sex spouses as ineligible for these forms of distribution.

After *Windsor* and subsequent guidance, qualified defined benefit plans are required to provide QJSAs and QPSAs to participants in same-sex marriages, but

not to domestic partners. In addition, as noted above, retired participants and surviving same-sex spouses may have retroactive claims for these benefits.

4. Rollovers.

The Internal Revenue Code authorizes rollover distributions to non-spouse beneficiaries of defined contribution pension plans (such as 401(k) plans), regardless of whether such rollovers are provided for by the plan terms. IRC §§ 402(c)(11) 402(f)(2)(A). The resulting IRA is treated as an inherited IRA, and therefore does not offer the full range of benefits extended to surviving spouses, but it does offer non-spouse beneficiaries, including domestic partners, the opportunity to shelter such benefits from taxation.

After *Windsor* and related agency guidance, same-sex spouse beneficiaries can avail themselves of the full range of distribution options provided to opposite-sex spouses, and participants and surviving spouses may have claims for retroactive benefits. However, domestic partners remain ineligible for spousal treatment under federal tax law.

5. Non-Qualified Pension Plans.

Many employers provide benefits to highly compensated employees in the form of nonqualified deferred compensation or "top hat" plans. Such plans may provide benefits in excess of those permitted under IRC § 415. Such plans are subject to the preemption and civil enforcement provisions of ERISA, but not to the funding, vesting, participation, and spousal protection provisions, among others. *See* ERISA §§ 201(2), 301(a)(3), 401(a)(1), 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1); U.S. Dep't of Labor ERISA Op. 90–14A; *Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1491 (N.D. Cal. 1993).

As non-qualified plans, top hat plans are not required to provide spousal benefits under the IRC, and they are exempted from ERISA's spousal protection provisions. However, the terms of such plans are enforceable under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Therefore, if the terms of a top hat plan provide either that the form of benefit under the plan follows the form of benefit under a related qualified plan, or independently provides a spousal benefit, those terms should be enforceable as to same-sex spouses. In addition, if a nonqualified plan explicitly provides spousal benefits to opposite-sex spouses, but not to same-sex spouses, it may be subject to liability under Title VII.

Nonqualified deferred compensation benefits earned and vested after 2004 may be subject to additional requirements under IRC § 409A. 118 Stat. 1640, Pub. L. 108-357, Title VIII, § 885(d) (Oct. 22, 2004). Section 409A(a)(4)(C) provides rules for changes in the time and form of distribution under plans that permit such changes to be made at the election of a participant. *See also* 26 C.F.R. § 1.409A-2.

These rules may impact changes to form-of-benefit elections by nonqualified plan participants under some plans.

V. Government Employee Benefits Issues.

A. State Employees.

1. Generally.

As noted above, ERISA does not govern benefits provided by state or local governments to their employees. Accordingly, state and local governments are generally free to provide benefits to same-sex spouses and domestic partners of their employees, and may be required by law to do so.[17] In particular, because *Obergefell* requires all states to permit and recognize same-sex marriages, all states must provide benefits to state employees in same-sex marriages on the same basis that they provide benefits to state employees in opposite-sex marriages. In Texas, for example, which has more than 311,000 state employees, *Obergefell* thus results in a significant expansion of the number of employees eligible for spousal benefits.[18]

2. Federal Tax Issues for Governmental Welfare Benefit Plans.

State and local government employees will face the same issues with taxation of welfare benefits as do private-sector employees. Such benefits are no longer taxable for same-sex married employees, but are taxable for employees with domestic partners.

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[17] State and local governments have faced litigation over their provision of such benefits, particularly in states that had constitutional amendments banning same-sex marriage. *See National Pride at Work, Inc. v. Governor of Mich.*, 481 Mich. 86 (2008) (state's constitutional amendment banning same-sex marriage precludes public employers from providing same-sex domestic partner benefits); *Knight v. Superior Ct.*, 128 Cal. App. 4th 14 (2005) (state's domestic partnership law did not violate constitutional amendment banning same-sex marriage); *S.D. Myers, Inc. v. City & County of S.F.*, 336 F.3d 1174 (9th Cir. 2003) (city's requirement that city contractors provide domestic partner benefits not preempted by state's domestic partnership law); *see also Irizarry v. Bd. of Educ. of City of Chicago*, 251 F.3d 604 (7th Cir. 2001) (no equal protection or due process violation in extending benefits to same-sex but not opposite-sex domestic partners).

[18] *See, e.g.*, "Benefits to be extended to spouses of Texas' gay state workers," The Dallas Morning News (June 29, 2015), at http://www.dallasnews.com/news/state/headlines/20150629-benefits-to-be-extended-to-spouses-of-gay-state-of-texas-workers.ece.

In addition, before *Windsor*, the Internal Revenue Code specifically denied tax-qualified status to state-sponsored long-term care plans that covered same-sex domestic partners or same-sex spouses. IRC § 7702B(f). As a result, states have carved their long-term care plans out of requirements that state government provide benefits to same-sex domestic partners. *See* Cal. Fam. Code § 297.5(g). States will presumably remove these exclusions as to same-sex spouses, but not domestic partners, following *Windsor, Obergefell*, and Rev. Rul. 2013-17.

3. Tax Qualification Issues for Governmental Pension Plans.

While governmental pension plans are not subject to ERISA, they are subject to the Internal Revenue Code. Thus, issues such as tax reporting of distributions to non-spouse alternate payees apply equally to governmental pension plans.

Shortly after the enactment of California's Domestic Partner Rights and Responsibilities Act, the IRS ruled that a county's IRC § 457(b) deferred compensation plan would fail tax qualification requirements if it interpreted the term "spouse" in the plan to include domestic partners. Priv. Ltr. Ruls. 200524016, 200524017 (June 17, 2005). However, it does not appear that tax qualification would be jeopardized if a plan were amended to extend benefits to domestic partners by its terms rather than by interpretation of the term "spouse." *See Helgeland v. Wis. Municipalities*, 307 Wis. 2d 1 (2008).

B. Federal Employees.

Interpretation of the term "spouse" or "marriage" in federal law to extend benefits to the same-sex domestic partners or same-sex spouses of federal employees was precluded by DOMA before *Windsor*. On June 19, 2009, President Obama signed an executive memorandum extending certain benefits to domestic partners of federal employees. However, the statutes governing the primary federal employee benefits programs, the Federal Employees Health Benefits (FEHB) Program and Federal Employees Retirement System (FERS) both limit benefits to spouses. *See* 5 U.S.C. Chs. 84, 89. Thus, DOMA § 3 restricted these spousal benefits to opposite-sex spouses.

As discussed above, OPM issued guidance stating that all legally married same-sex spouses of federal employees are eligible for benefits under these and other programs in the wake of *Windsor*.[19] *See* OPM, Benefits Administration Letter

[19] As noted above, in April 2015, a federal employee whose same-sex spouse was denied health benefits under the FEHB Program before *Windsor* filed suit against OPM and her employing agency. *Hudson v. OPM et al.*, No. 15-cv-01539 (N.D. Cal.). The lawsuit alleges that the agencies' denial of the benefits pre-*Windsor* and the

No. 13-203 (Jul. 3, 2013). As noted above, OPM granted a claim for retroactive survivor benefits under FERS for the widow of a federal employee in a same-sex marriage who died several years before *Windsor,* and is working with other same-sex spouses of federal employees who died before *Windsor*. *See* § III.C, above. In addition, OPM provided notice of a two-year opportunity for annuitants in same-sex marriages to elect survivor annuities for their spouses under the Civil Service Retirement System and FERS. *See* 78 Fed. Reg. 47018 (Aug. 2, 2013).

OPM has noted that same-sex couples in a domestic partnership or form of relationship other than marriage will "remain ineligible for most Federal benefit programs." *Id.* While domestic partners are not eligible for benefits under the relevant statute for the FEHB program and FERS, a Ninth Circuit panel awarded a former federal employee in a domestic partnership received back pay for the cost of health insurance for her partner on the basis that the former employee was subjected to sex discrimination. *See In re Fonberg*, § III.E.3, above. In addition, an administrative law judge recently held that, when evaluating a same-sex widow's eligibility for survivor benefits under FERS, the period when the couple was registered domestic partners before they married "counts towards the nine months of marriage required for spousal benefits" in the FERS statute. *See* III.E.5, above.

VI. Other Employment-Related Federal Benefits Affecting Same-Sex Couples.

A. Family and Medical Leave Act.

Until March 27, 2015, the regulations implementing the Family and Medical Leave Act (FMLA) defined "spouse" by reference to the law of the state where an employee lived: "Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the state where the employee resides, including common law marriage in states where it is recognized." 29 C.F.R. § 825.122 (prior version). After *Windsor*, the Department of Labor stated that the state-of-residence requirement applied to same-sex marriages. U.S. Dep't of Labor, Fact Sheet #28F (Aug. 2013). Thus, an employee in a same-sex marriage who lived in a state that did not recognize the marriage was not entitled to FMLA leave to care for his or her spouse, even though the marriage was recognized for many other federal law purposes.

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failure after *Windsor* to grant the employee's request for reimbursement for the alternate coverage she obtained for her wife are sex discrimination in violation of the Equal Pay Act (a federal statute prohibiting sex discrimination in compensation) and unjustified personnel actions warranting back pay. The case settled in September 2015.

On June 27, 2014, the Department of Labor published a notice of proposed rulemaking to revise the FMLA regulations to adopt a place-of-celebration rule and to expressly include same-sex marriages in addition to common-law marriages. *See* 79 Fed. Register 36455. On February 23, 2015, the DOL issued a final rule consistent with the notice of proposed rulemaking that went into effect on March 27, 2015.[20] 80 Fed. Register 9989.

B. Social Security.

The Social Security Act provides that a marriage will be recognized for purposes of an application for benefits if the courts of the state in which the insured individual is domiciled at the time of the application or, if the insured individual is dead, in which he or she was domiciled at the time of death, would find that the applicant and the insured individual were validly married at the time the application is filed or at the time of death. 42 U.S.C. § 416(h)(1)(A)(i). However, an applicant may also be recognized as a spouse even if the courts would not have recognized the marriage as valid, but under the laws applied by such courts, the applicant would have the same status as a spouse with regard to intestate personal property. 42 U.S.C. § 416(h)(1)(A)(ii).

In interpreting subsection (i), the Social Security Administration issued guidance after *Windsor* in early 2014 on the processing of claims by individuals in same-sex marriages based on where the person who paid into Social Security (the number holder) lived – benefits were not paid if the number holder lived in a state that did not recognize the marriage. Following *Obergefell*, the Social Security Administration updated its guidance in February 2016 for processing claims based on same-sex marriages. *See* SSA, POMS GN 00210.000 (Feb. 8, 2016). The guidance states that "SSA is no longer prohibited from recognizing same-sex marriages for the purpose of determining entitlement to or eligibility for benefits." SSA, POMS GN 00210.001 (Feb. 5, 2016). In particular, the SSA will now "recognize a valid same-sex marriage as of the date of the marriage, including during periods when the number holder's (NH's) state of domicile did not recognize same-sex marriages . . . ." SSA, POMS GN 00210.002 (Feb. 2, 2016).

In interpreting subsection (ii), on June 20, 2014, the Social Security Administration issued guidance for processing claims involving "non-marital legal relationships," providing that the SSA will recognize a claimant as married if state law allows the claimant to inherit from his or her partner on the same terms as a

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[20] On March 26, 2015, a federal district judge in Texas granted a request from the states of Texas, Arkansas, Louisiana, and Nebraska, which did not recognize same-sex marriages, for a preliminary injunction with respect to the final rule. *See Texas v. United States*, No. 15-cv-00056 (N.D. Tex.). On June 26, 2015, following *Obergefell*, the court dissolved the preliminary injunction. (Dkt. No. 45.)

spouse could inherit. *See* SSA, POMS GN 00210.004 (June 20, 2014, updated Jan. 26, 2015, updated February 10, 2016). The most recent update to the guidance clarifies that if a couple is in a qualifying non-marital legal relationship and then marries, the durations of each status may be combined for purposes of satisfying the Social Security statute's marriage duration requirement. *Id.* (updated Feb., 10, 2016).

VII. Conclusion.

As described above, *Windsor*, *Obergefell*, and guidance from the IRS and Department of Labor have drastically changed the landscape of federal employee benefits law for individuals in same-sex marriages, domestic partnerships, and civil unions. While the Supreme Court decisions create uniformity at the federal level and now the state level for individuals in same-sex marriages with respect to federal tax law and benefits mandated by ERISA, the IRC, and related regulations, certain open questions remain, particularly with respect to transitional issues involving participants who had life events preceding changes in the law, participants in marriage-equivalent relationships, and plans that seek to maintain distinctions between opposite-sex and same-sex married couples.