CONNER & WINTERS
Attorneys and Counselors at Law

CLIENT ALERT

Employee Benefits/ Compensation

DALLAS

Sarah E. Fry
214-217-8866
sfry@cwlaw.com

Mark L. Mathis
214-217-8050
mmathis@cwlaw.com

Robert J. Stokes
214-217-8057
bstokes@cwlaw.com

Randall J. White
214-217-8063
rwhite@cwlaw.com

HOUSTON

Douglas M. Selwyn
713-650-3850
dselwyn@cwlaw.com

Terral J. Smith
512-600-1012
tsmith@cwlaw.com

TULSA

Debbie L. Blackwell
918-586-8970
dblackwell@cwlaw.com

Paul E. Braden
918-586-8584
pbraden@cwlaw.com

Allison McGrath Gardner
918-586-8506
agardner@cwlaw.com

Mary P. Huckabee
918-586-5677
mhuckabee@cwlaw.com

Steven W. McGrath
918-586-5684
smcgrath@cwlaw.com

Eric S. Smith
918-586-8505
esmith@cwlaw.com

Anne B. Sublett
918-586-8994
asublett@cwlaw.com

Martin R. Wing
918-586-8551
mwing@cwlaw.com

WASHINGTON, DC

G. Daniel Miller
501-984-6556
dmiller@cwlaw.com

Henry Rose
202-887-0467
hrose@cwlaw.com

Erica L. Summers
202-887-0466
esummers@cwlaw.com

DOMA Ruling Profoundly Impacts Employee Benefits Plans

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On June 26th, the Supreme Court of the United States (the "Court"), announced two decisions affecting same-sex marriages. One case, *United States v. Windsor*, is expected to have a substantial impact on most employee benefit plans and many other programs maintained by employers.

In its *Windsor* decision, the Court struck down Section 3 of the Defense of Marriage Act ("DOMA") due to its failure to comply with Constitutional requirements. Section 3 provided that in determining the meaning of Federal laws –

> *"the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."*

Section 2 of DOMA was not at issue in *Windsor*. Accordingly, it was not directly addressed by the Court. The extent to which it may ultimately be affected by the ruling on Section 3 is not clear. Section 2 provides that same-sex marriages entered into in states, territories, possessions and Indian tribes that recognize same-sex marriages need not be recognized by states, territories, possessions and Indian tribes that do not recognize same-sex marriages.

A total of 13 states either already recognize same-sex marriages or are expected to recognize such marriages soon, taking into account a companion case, *Hollingsworth v. Perry*, which cleared the way for and has led to the resumption of same-sex marriages in California. The other states are Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont and Washington. The District of Columbia also recognizes same-sex marriage. New Mexico and New Jersey neither explicitly prohibit nor condone same-sex marriage. Some states may recognize same-sex marriages that occur in the states listed above even though they do not allow such marriages.

The *Windsor* decision essentially requires, for Federal law purposes, that same-sex marriages must be recognized. The impact on employees in state-sanctioned relationships that approximate marriage, such as civil unions or domestic partnerships, is unclear at this point.

Windsor's application to employee benefit plans and arrangements is anything but simple. The Internal Revenue Code generally relies on the law of the state in which individuals are domiciled to determine marital status. Plans and arrangements, including tax-qualified pension plans, welfare plans and non-qualified deferred compensation plans, are heavily regulated by Federal tax laws. There are myriad ways in which *Windsor* will affect the operation of these arrangements.

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Shortly after the Court's decision was announced, the White House released the following statement from President Obama –

> *"I've directed the Attorney General to work with other members of my Cabinet to review all relevant Federal statutes to ensure this decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly."*

Until the various agencies that regulate employee benefit plans and arrangements issue guidance, the full impact of the Court's decision is difficult to predict.

We expect the agencies will soon address the potential retroactive effect of the decision and the various compliance issues for qualified and other retirement plans. We also believe that the Court's decision will impact a whole host of employee benefit provisions, including qualified joint and survivor benefits, pre-retirement survivor annuities, death benefits, hardship distributions, rollovers, loans in money purchase pension plans, health care coverage and the taxation thereof, flexible benefit plans, HSAs, HRAs, COBRA rights, employment taxes and refunds for prior periods, HIPAA special enrollment rights, dependent care accounts, beneficiary provisions of qualified and nonqualified plans, minimum distributions under qualified plans, life insurance coverage of dependants and many other issues.

Employers can expect employees, particularly those employees in same-sex marriages or other similar arrangements, to begin asking questions about the impact of the Court's decision on benefit plans and related tax issues. In responding to these questions, we recommend at this early stage that employers caution their employees to remain patient. The employees should be assured that the impact of the Court's decision will be given effect as soon as practicable.

Employers with employees or former employees, including retirees, who are entitled to benefits (collectively, "Participants") and who are in same-sex marriages must exercise caution. Some issues will be of more immediate concern. Additional questions arise concerning the possible retroactive effect of the decision on benefit plan obligations. In short, instances that could serve to create excessive risk may need to be dealt with on an *ad hoc* basis until a more informed response can be implemented based on anticipated guidance.

A few examples of more pressing issues for benefit plans with Participants *who are domiciled in a state that recognizes same-sex marriages* illustrate the point –

- The spousal consent and survivor rules that govern important aspects of the administration of tax-qualified pension plans other than governmental plans and non-electing church plans are matters of immediate concern. The safer practice in applying the spousal consent rules for the affected plans will be to assume that Participants who are in same-sex marriages in the states that recognize such marriages are subject to the spousal consent rules. For example, plans subject to the qualified joint and survivor annuity rules ("QJSA"), including defined benefit pension plans, money purchase pension plans, target benefit plans, and defined contribution plans (other than money purchase pension plans) that are required to apply the QJSA rules, are required to obtain spousal consent for most forms of payment.

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- Other than for governmental plans and non-electing church plans, beneficiary designations naming someone other than a same-sex spouse may be invalid. For example, defined contribution plans, like 401(k) plans, require spouses to consent to a beneficiary designation that names someone other than the spouse as a beneficiary. In addition, married Participants in plans subject to the QJSA rules must obtain spousal consent to name a beneficiary other than the spouse for a qualified pre-retirement survivor annuity to be paid if the Participant dies prior to the commencement of benefit payments. Finally, also at issue are designations of an ex-spouse when the Participant did not re-designate his or her ex-spouse as a beneficiary following a divorce or other proceeding where property is divided pursuant to a qualified domestic relations order. Caution dictates that sponsors delay processing distributions to beneficiaries other than the spouse when the distribution may ultimately be invalid.
- Health and welfare plan enrollment and COBRA continuation rights for same-sex spouses will also arise immediately, and should be made available while coordinating carefully with any insurers and with reference to the existing welfare and cafeteria plan enrollment provisions.

Employers should take special care when dealing with retirees and former employees who are in same-sex marriages. If they are entitled to benefits and are domiciled in a state that recognizes their marriages, we anticipate that, in most instances, their marriages will be respected.

We recommend that employers begin collecting governing documents, including summary plan descriptions, other vital participant communications and employment policies, such as policies regarding FMLA and USERRA. These documents will need to be evaluated. In virtually every instance where the word “spouse” appears, there will be a potential issue.

In the coming weeks and months, we are hopeful that the Internal Revenue Service and other agencies will provide definitive guidance upon which plan sponsors may rely. CW