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From FMLA to FSAs: Employee Health Issues Post-DOMA

By Jessica Summers

As we previously reported, on June 26, 2013, in the case of U.S. v. Windsor, the U.S. Supreme Court held that Section 3 of the Defense of Marriage Act (DOMA) – which defined "marriage" as "only a legal union between one man and one woman as husband and wife" and "spouse" as only "a person of the opposite sex who is a husband or a wife" – was unconstitutional under the Fifth Amendment. The Court's decision in *Windsor* means that the marriage-dependent federal rights and privileges which, because of DOMA, were previously unavailable to same-sex couples, will now apply to qualifying same-sex married couples. This change will impact a number of health related employee rights and benefits (for more discussion on other areas of employment law that will be impacted see our article here). It is therefore critical that employers be aware of which specific areas will be affected and what actions they will need to take to address these changes.

Family Medical Leave Act (FMLA)

Under the FMLA, qualifying employees who work for private employers with at least 50 employees are entitled to take unpaid job and benefit protected leave for certain family and medical reasons. Among other things, an employee may take FMLA leave to care for a spouse, child or parent with a serious medical condition, to address an exigency arising out of the fact that the employee's spouse, child or parent is an active duty military member or to care for a service-member spouse, child, parent or next of kin with a serious illness or injury.

The impact of the *Windsor* decision will be that employees in qualifying same-sex marriages will now be entitled to take FMLA leave to care for their same-sex spouse ("qualifying same-sex spouse") or to address exigencies arising from a same-sex spouses' military deployment. As with most of the changes discussed below, the implementation of this change will not require any specific action by employers, however, it is something that employers and their human resources teams should be aware of when advising employees and assessing employees' eligibility for various types of leave.

Employer Provided Health Coverage and Medical Reimbursements

Many of the states that allow same-sex marriage already require that employers who provide group health coverage for opposite-sex spouses also provide the same coverage for same-sex spouses. Depending on how the Administration decides to apply *Windsor*, it is possible that employers in states that do not already have these requirements will also be required to provide equivalent benefits for same-sex spouses.

Even in states that required equivalent coverage for same-sex spouses prior to *Windsor*, Section 3 of DOMA meant that those benefits were subject to different tax treatment than the benefits provided for opposite-sex spouses. Pursuant to the Internal Revenue Code (26 U.S.C. 105), health coverage or reimbursements for medical care that are provided by an employer for an employee or his or her spouse or dependents, are not included in the employee's gross income. Such payments are also not subject to FICA tax. Prior to *Windsor*, even if the employer was required by state law or otherwise chose to offer health coverage or medical reimbursement for an employee's same-sex spouse, that amount would be included and taxed as part of the employee's gross income. In the wake of *Windsor*, such payments by an employer for a qualifying same-sex spouse will be excluded from the gross income of the employee. Additionally, the Internal Revenue Code (26 U.S.C. 152) defines a "dependent" to include the taxpayer's stepson or stepdaughter as a qualifying child. Thus, after *Windsor*, health coverage or medical reimbursements provided by an employer for the child of an employee's same-sex spouse (the employee's step-child) will also be excluded from the employee's gross income.

Unless the Internal Revenue Service (IRS) were to determine that the *Windsor* decision is not retroactive (which is unlikely), employers who provided coverage for same-sex spouses prior to *Windsor* will now be able to seek refunds from the IRS for the FICA tax which paid on the same-

sex coverage over the past few years. Employees will also be able to amend the tax returns that they have filed over the past three years to seek refunds for their part of the income and FICA taxes paid on this coverage.

COBRA

The Consolidated Omnibus Budget Reconciliation Act (COBRA) provides that employees, or their beneficiaries, who lose health benefits under certain qualifying circumstances (such as termination, divorce or death) have the right to elect to pay to continue group health benefits for themselves and/or their families for a limited period of time. Under COBRA, the right to extend benefits applies only to coverage for the employee and/or the employee's spouse, former spouse or dependent children.

***Windsor* will mean that qualifying same-sex spouses will now be entitled to extend their health benefits under COBRA in the event of divorce or if their spouse is terminated, dies or experiences some other qualifying event. Further, as discussed above, the children of an employee's same-sex spouse (the employee's step-children) will now be considered to be the employee's dependents for the purposes of health coverage and will therefore also be entitled to COBRA rights if their health coverage is terminated under a qualifying event. Again, this change will require no specific act on the part of the employer at this time. However, it is important that employers account for this change when they provide COBRA notices and are counseling employees about their COBRA options or if they decide to cover the COBRA premiums as part of an employee's severance.**

What remains unclear is whether same-sex spouses and their children can now exercise their right to elect to enroll in COBRA if the employee was already enrolled in COBRA before the *Windsor* decision or if the qualifying event (such as the employees death or divorce) occurred before the *Windsor* decision. For example, when an employee is terminated the employee and his or her spouse and dependent children may elect to extend health benefits under COBRA for up to 18 months. If an employee in a same-sex marriage was terminated three months before *Windsor*, at the time of termination, only the employee and his or her dependent children could have elected COBRA coverage. After *Windsor*, it is now unclear whether the employee's same-sex spouse and/or his or her child could now elect COBRA coverage, and, if so, whether he or she would be entitled to 18 months of COBRA from the date of election or whether the period during which the employee was on COBRA (three months in this example) would be deducted from that period. At this point, employers facing such a situation would be well advised to wait for further guidance from the Administration before taking action.

Flexible Spending Arrangements

A Flexible Spending Arrangement (FSA) is one type of option that may be offered through a cafeteria plan and gives the employees an opportunity to set aside a portion of their paycheck pre-tax for certain types of expenses. Employers may offer FSAs to reimburse expenses related to dependent care, adoption or medical care.

A medical care FSA can be used to reimburse health expenses incurred by employees, their spouses or their dependents. **Employees in a qualifying same-sex marriage will now be permitted to use their medical care FSA to cover health expenses incurred by his or her spouse or his or her same-sex spouse's children. Unless an FSA plan document provides a definition of marriage or spouse (which is unlikely), it may not be necessary for employers to amend their FSAs to accommodate the change at this time. It is likely this change will be effectuated through the administration of the plan and the information that is provided to employees about the plan. Of course, the IRS may require changes to the plan documents by regulations.**

As discussed above, it is not clear whether employees who are already in qualifying same-sex marriages will be able to immediately enroll their same-sex spouses in an FSA or whether they will need to wait until the end of the plan year.

Health Savings Accounts (HSA)

Health Savings Accounts (HSAs) allow employees who are enrolled in high-deductible health plans (HDHPs) (which have lower premiums and higher deductibles than most health plans) to place money pre-tax in a medical savings account to use for future healthcare expenses. Unlike funds in an FSA, which are lost if they are not used within the year, funds in an HSA can carry over from year to year. The maximum amount that an employee can contribute to his or her HSA is set annually by the IRS and is dependent on whether the employee has individual or family coverage. If one spouse has family coverage under an HSA, both spouses will be treated as having family coverage and the annual limit will be divided equally among the spouses, unless the spouses agree to an alternate division.

Prior to *Windsor*, as the IRS did not recognize same-sex marriages, if one or both spouses in a same-sex marriage had dependents, they alone could contribute up to the family limit without the limit being divided across the two spouses. Now, as is the case with opposite-sex spouses, qualifying same-sex spouses' contributions to HSAs will be combined for the purposes of the annual limit.

