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Domestic Partner Benefits

If High Court Finds DOMA Unconstitutional, Plan Qualification at Stake, Attorney Says

The qualified status of many current Employee Retirement Income Security Act plans might be at stake if the U.S. Supreme Court strikes down the constitutionality of the Defense of Marriage Act, benefits attorneys said May 23 during a meeting of the Washington chapter of the Worldwide Employee Benefits Network.

''Some plans might need to make corrections to remain qualified,'' because they include language directly from DOMA to specify spousal benefits, said Elizabeth T. Dold, a principal at Groom Law Group in Washington.

DOMA Section 2 provides that individual states are not bound by the Full Faith and Credit Clause of the Constitution to recognize same-sex marriage legally performed in other jurisdictions, and Section 3 provides that ''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'' (53 PBD, 3/19/13; 40 BPR 790, 3/26/13).

The constitutionality of DOMA is in play in the challenge to California Proposition 8, which banned same-sex marriage in the state, and in *United States v. Windsor*, U.S., No. 12-307, *argued* 3/27/13 (60 PBD, 3/28/13; 40 BPR 832, 4/2/13), said Kathryn A. Bjornstad, an associate at Groom Law Group in Washington. In *Windsor*, Edith Windsor is challenging the tax code provisions that required her to pay $363,053 in estate taxes upon her wife's death. The two women were married in Toronto in 2007, a union that the lower courts concluded would have been recognized by their home state of New York. Windsor paid the tax bill and filed a request for a refund. The Internal Revenue Service denied the request, and Windsor sued in federal district court.

While the lawsuit was pending, the U.S. attorney general announced that the Department of Justice would no longer defend DOMA in federal court, concluding that the law was unconstitutional (37 PBD, 2/24/11; 38 BPR 427, 3/1/11). However, the federal government would continue to enforce the law.

Windsor emerged victorious from both the district court and the U.S. Court of Appeals for the Second Circuit, which held that the Justice Department's changed position did not deprive it of standing and, applying heightened scrutiny, that DOMA violated equal protection.

If the high court strikes the law down, Dold said she hopes IRS ''will help us, at least with qualified plans, to be prospective,'' without disqualifying plans retroactively for relying on DOMA as law.

However, Rhonda G. Migdail, of counsel to Keightley & Ashner in Washington and a former manager of employee plans at IRS, said that plans will likely be able to rely on previous IRS determinations, which could prevent retroactive liability or plan disqualification for past actions.

Dold also said she is recommending to clients that they file protective claims for tax refunds in case DOMA is found unconstitutional.

The filings are needed because same-sex married taxpayers could be due a refund on federal income taxes and Federal Insurance Contributions Act (FICA) taxes—collectively, Medicare and Social Security—they paid on employer-provided benefits that were added back in as taxable wages at the federal level. Employers can also file for a refund on their portion of FICA taxes paid on such benefits (69 PBD, 4/10/13;40 BPR 937, 4/16/13).

''We told people to get their protective claims in,'' Dold said, ''in case DOMA is bye-bye.''

By Stefanie Trilling

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