



Now What? Employee Benefits After DOMA

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Employee Benefits Insider

July 2, 2013

Following the landmark Supreme Court decision in *U.S. v. Windsor*, the list of issues facing employers is extensive. Fear not. We offer our guidance below, to help triage and prioritize next steps.

What You Can Do Now

The first step in providing employee benefits to same-sex spouses is *identifying who these spouses are*.

1. Notify Participants. Employees with same-sex spouses need a way to communicate this information to the employer. Specifically, employees need to know how to do the following:

- Change payroll status to "married"
- Update withholding on Form W-4
- Obtain spousal consent for any non-spouse beneficiary designations

2. Anticipate Retirements and Pause on Lump Sums.

Participants who are identified as "unmarried" and contemplating retirement need to be alerted to the changes. Consider Frank, who is listed as unmarried in company records but who lives with his same-sex spouse in Iowa.

- Frank is scheduled to retire on August 1 with a lump sum benefit. Before a check is printed, Frank should be given a new retirement kit, and an opportunity to re-elect a retirement benefit. Spousal consent will be needed before a lump sum can be paid.



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- If Frank had already commenced his retirement benefit in the form of a single life annuity, it may be too late to change his payment form to a survivor annuity.

Note that Frank's employer could amend the pension plan to allow Frank to convert his single life annuity to a spousal QJSA, in connection with his marriage. The federal government has stated that it will offer this option to retired federal employees.

3. **Update Payroll.** Spousal recognition carries legal rights and tax benefits. Systems should be updated for each participant's change in status as a result of *Windsor*. Consider Lucille and Jenny, who were married in 2011 and live in New York.

- Savings Plan: Lucille becomes Jenny's default beneficiary in the 401(k) plan, although the effect on Jenny's existing beneficiary designation is unclear.
- Pension Plan: Lucille becomes Jenny's beneficiary for pre-retirement death benefits. Jenny cannot elect retirement benefits in a form other than a joint and survivor annuity unless she obtains Lucille's consent.
- Health Plan: Lucille becomes eligible for medical coverage on a tax-free basis effective immediately, to the extent the plan provides coverage for same-sex spouses; Jenny can pay premiums for this coverage on a pre-tax basis. COBRA coverage will be available.

Note that Jenny's employer could offer a mid-year special enrollment period for newly recognized same-sex spouses. The U.S. Office of Personnel Management is reportedly offering this option to all federal employees, for a 60-day period.

- FSA Plan: Lucille's medical expenses can be reimbursed under Jenny's health FSA.

What Should Wait for Guidance

Where possible, we recommend waiting for IRS guidance in the scenarios below.

In a promising sign from the Obama administration, the U.S. Office of Personnel Management (OPM) has announced that it will recognize all legally married same-sex spouses of federal employees and retirees. An OPM spokesman has confirmed that "legally married" will be interpreted to mean a valid marriage license, without regard to the state of residency. See the OPM announcement here:

<https://www.chcoc.gov/transmittals/TransmittalDetails.aspx?TransmittalID=5700>



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1. **Same-Sex Spouses Who Reside in a "No" State.** Susan and Laura got married in New York but live in New Jersey, which does not recognize same-sex marriage. It is not clear whether their same-sex marriage could (or should, or must) be recognized under the benefit plans.

2. **Same-Sex Spouses Who Reside in Different States.** Bob and Tim got married in Washington state, and then Tim moved for his new job to Oregon, which does not recognize same-sex marriage. It is not clear whether their same-sex marriage could (or should, or must) be recognized under the plans of Bob's employer in Washington, or Tim's employer in Oregon.

3. **Death Benefits for "Unmarried" Participants.** Linda is listed as unmarried in the company's payroll records, although she has a same-sex domestic partner (Joyce) enrolled in the health plan. Linda and Joyce were married in 2012. Linda recently designated her brother as beneficiary under the 401(k) plan. Following Linda's death, it is not clear whether her 401(k) plan account should be paid to her brother (the designated beneficiary), or to Joyce (her same-sex spouse, who did not consent to another beneficiary).

4. **Mid-Year Health Plan Changes.** Pedro and Michael got married in 2011. It is unclear whether Pedro can treat the *Windsor* decision as a "change in status" under the Cafeteria Plan, and as a "special enrollment event" under HIPAA with regard to health plan enrollment. We welcome IRS guidance treating federal *recognition of marriage* as an event permitting mid-year changes to health and welfare plans.

5. **Retroactive Claims.** Frances is the widow of Patricia, who died in July 2012. Frances has applied for spousal survivor benefits under the pension plan of Patricia's employer. It is unclear whether qualified plans can (or should) recognize same-sex spouses on a retroactive basis. No action should be taken until the agencies address this issue. In the meantime, plan administrators should utilize all available extensions before responding to claims for benefits on these matters.

6. **Plan Amendments.** Hold off on amending qualified plans, nonqualified plans, and health and welfare plans until we hear from the IRS and DOL. There are too many unresolved questions at this time on key issues, such as cross-state recognition and effective date. A carefully-drafted plan amendment may reduce your potential fiduciary liability.