

SCOTUS Strikes Down DOMA - Employer Obligations in Virginia, D.C., and Maryland

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Employers must take heed and review their employee benefit packages in light of the Supreme Court's opinion, *United States v. Windsor*, finding that the Defense of Marriage Act (DOMA) is unconstitutional. The opinion directly impacts employers in the 12 states, including Maryland and the District of Columbia recognizing same-sex marriage. While the impact may not be as significant in the remaining states not recognizing same-sex marriages, the changes in federal taxation and benefits will create an additional burden for employers operating multi-jurisdictional companies, particularly for Virginia which borders with two states recognizing same-sex marriage.

What is DOMA?

DOMA was passed in 1996 by President William J. Clinton and defined marriage as a union between a man and a woman. DOMA barred the federal government from recognizing same-sex marriages legalized by the person's home state, and therefore, prohibited the benefits available to married couples to same-sex couples even in the states legalizing same-sex marriage. Section 2 of DOMA permitted states to not recognize marriages legally performed in other states. Section 3 prohibited the federal government from recognizing same-sex marriages and consequently, from providing employee benefits to same-sex married couples.

What was the ruling in *Windsor*?

In a 5-4 vote the Supreme Court found that DOMA was a violation of the Fifth Amendment which protects against abuses of government. Same-sex couples legally married will now be entitled to numerous benefits previously only afforded under federal law to heterosexual couples. What *Windsor* did not do, was strike Section 2, therefore leaving intact each state's ability to not recognize same-sex marriages performed in other states.

How does this impact employers in the Washington, D.C. metro area?

Both Maryland and the District of Columbia recognize same-sex marriage but Virginia does not. In the Washington D.C. metro area, where many people work and live in different states and employers operate across state lines, the opinion will have a lasting impact on employers.

Maryland and the District of Columbia

Employers in Maryland and D.C. are directly impacted by the Supreme Court's ruling and must review their policies to ensure they comply with the federal law.

SCOTUS Strikes Down DOMA - Employer Obligations in Virginia, D.C., and Maryland (Cont.)

- **Employee Benefit Plans:** Employers must now treat employees' same-sex spouses equally for the purposes of benefits controlled by federal laws.
- **Consolidated Omnibus Budget Reconciliation Act (COBRA):** Employers will be required to offer continuation coverage to same-sex spouses.
- **Pension Plans:** Employers will need to revise their plans to define the definition of spouse to include marriages between same-sex spouses.
- **Open Enrollment Periods for Health Plans:** Under HIPPA marriage is considered a triggering event that allows for open enrollment for spousal coverage outside of the company's annual open enrollment period. Employers will now need to provide same-sex spouses the opportunity to enroll in employee plans.
- **401(k) Plans:** Same-sex spouses will now be treated automatically as beneficiaries under 401(k) plans unless the spouse agrees otherwise.
- **Contributions to same-sex spouse coverage:** Previous amounts paid by employers for a same-sex spouse's health insurance was treated as taxable income to the employee. Employees will now be able to pay for this cost with pretax earnings.

Another benefit impacted by the opinion is the Family Medical Leave Act (FMLA). Under FMLA "spouse" means a husband or wife as defined or recognized under the state law where the individual resides. Without a doubt, same-sex spouses residing in Maryland or D.C. and working there will be entitled to FMLA leave. However, it is not yet clear whether an employer would be required to provide FMLA leave to an employee who resides in Virginia but works in Maryland or D.C. For the purposes of treating all employees equally, an employer should offer the same benefits and coverage to all of its employees, regardless of the state of residence.

How does DOMA affect employers in Virginia?

It remains unclear what impact, if any, the opinion will have in states such as Virginia that do not recognize same-sex marriages. While Virginia Attorney General Ken Cuccinelli has stated that opinion has "no effect on Virginia Marriage Amendment or any other Virginia law related to marriage," Virginia employers cannot simply operate in a vacuum. Since Section 2 of DOMA was not challenged, Virginia will still be permitted to continue to not recognize same-sex marriages legally performed in other states. However, there will be additional administrative measures employers will need to take for employees who are residents of D.C. and Maryland. For IRS purposes, a person's residence determines the applicable taxes. Therefore, employees in same-sex marriages and residing in D.C. and Maryland will be entitled to federal employee benefits and tax breaks even if working Virginia. As an added wrinkle, the opinion does not define what happens when an individual legally married in one state moves to another.

At this stage, many questions remain which can only be answered in time through additional court opinions or executive orders. Employers need to be prepared to answer their employees' questions from that will soon arise and carefully consider their decisions, effective dates for changes and the policies for carrying out these changes.