KUSHNER & COMPANY
The best team wins

FOR YOUR BENEFIT

HR Strategy and Employee Benefits

HR Implications from the *Obergefell* Supreme Court Decision on Same-Sex Marriage

In a landmark 5-4 decision issued on June 26, 2015, the US Supreme Court declared the same-sex marriage was legal in all 50 states, and that each state had to recognize a same-sex marriage legally performed elsewhere, either in the US or abroad. The decision was an extension of the 2013 *Windsor* Supreme Court decision invalidating Section 3 of the Defense of Marriage Act (DOMA), which had significant impact on employer-provided benefits covered by ERISA. The *Obergefell* decision will require employers to review many of their HR policies and programs.

Employee Benefits

In essence, the starting point is for employers to now recognize that same-sex marriage is to be treated no differently than opposite-sex marriage for employee benefit purposes. Any employee married anywhere in the US, or married abroad in a country that recognizes same-sex marriage, is to be considered married for benefit purposes (and some other purposes discussed later).

The *Windsor* decision and subsequent guidance from the IRS resolved many issues for employer sponsored qualified retirement plans. Since 2013, a same-sex spouse was to be treated the same as an opposite-sex spouse. Since, unlike health insurance, the Internal Revenue Code governs these plans, uniform federal requirements prevailed.

The unanswered (at least as of the writing of this article in late July, 2015) from the *Obergefell* decision relates to qualified defined benefit pension plans. Since the *Obergefell* decision declared state bans on same-sex marriage unconstitutional, the general legal principal is that it should be as if the state ban was never enacted. Retroactivity for a same-sex couple married before June 26th meant that any defined benefit election, such as a Qualified Joint and Survivor Annuity, may have had to have been offered, just like for opposite-sex couples. Most plans did not do so. Guidance from the IRS is needed to resolve how to handle suddenly recognized marriages that occurred prior to June 26th. Already, lawsuits have been filed by retirees in a number of federal districts seeking such retroactive effect. Since an individual annuity pays a much higher benefit than a joint annuity, this could have a tremendous effect on the funding level of a defined benefit pension plan.

For health benefits, while potentially a health plan could define a spouse only as the opposite sex of the employee, the EEOC has indi-

cated that the employer could be open to a sex discrimination lawsuit under Title VII of the Civil Rights Act in the wake of *Obergefell*. Employers contemplating such a distinction should get a written legal opinion from a qualified employment and labor attorney.

The as-yet unanswered question on health coverage for a same-sex spouse is when that spouse could enroll mid-year in the plan. HIPAA Special Enrollment rights enable a mid-year election when a marriage occurs, so just like a newly married opposite-sex couple, a newly married same-sex couple clearly has that ability within 30 days of the marriage. But what happens if the same-sex marriage occurred more than 30 days before June 26th, the date of the Supreme Court ruling? Many carriers and stop-loss vendors have begun providing a special mid-year open enrollment for some period of time, but not all have yet done so. You'll want to check with your carrier or stop-loss vendor on this issue.

Lastly, many progressive employers looking to attract and retain top talent had instituted domestic partner (DP) benefits in years past. In a recent study, 30 percent of those employers are now considering dropping domestic partner benefits. The most often cited reason is that DP benefits were offered since same-sex couples did not then have the same right to marry as opposite-sex couples. After *Obergefell*, they now do. As always, review your HR strategies to determine if still offering DP benefits may help your organization recruit and retain the people you want.

FMLA

After the *Windsor* decision in 2013, FMLA leave was clarified to allow for the care of a same-sex spouse or dependents of the same-sex spouse. However, in states that did not recognize same-sex marriage, employers could choose to not allow an FMLA leave for the care of a same-sex spouse or dependent. With the *Obergefell* decision, FMLA leave (in employers with 50 or more employees) now obviously includes same-sex spouses and dependents.

Conclusion

As always, employers are encouraged to review their HR strategies and their implementation in programs, policies, and procedures to ensure compliance with all applicable federal and state laws. A careful review of benefit plan documents to examine how the plan defines "marriage" or "spouse" is now in order.

Kushner & Company's mission is to help organizations "transform the workplace"—beginning with the recognition of the leader's vision. Our consulting and administration teams approach every opportunity with that vision in mind by learning as much as possible about the organization and industry. Our specific areas of expertise include HR Strategy, Organizational Development, and Total Rewards Consulting and Administration, including Health Care Reform (PPACA).

For Your Benefit *articles are provided as a service by Kushner & Company for the exclusive use of our clients and subscribers and should not be construed as legal or tax advice. If you would like to speak to someone about any of our services for your organization, please contact us at info@kushnerco.com or 800-KUSHNER, ext. 227 or visit www.kushnerco.com*