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Departing from Prior Practice, DOJ Declines to Defend Section 3 of the Defense of Marriage Act

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On February 23, 2011, the Department of Justice (DOJ), at the direction of President Obama, announced that it will no longer defend the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), including in two cases pending before two United States district courts. Section 3 of DOMA (Section 3), which was enacted in 1996, defines "marriage" as a legal union between a man and a woman and limits the term "spouse" to a person of the opposite sex. According to the DOJ, Section 3 is unconstitutional, under the Fifth Amendment's Equal Protection Clause, as applied to same-sex couples who are legally married under state law.

Over the past several years, employers have allowed employees to add domestic partners, same-sex spouses and civil union partners (collectively referred to herein as "same-sex domestic partners") to coverage under employer-sponsored group health plans. In addition, some employers have provided special accommodations to domestic partners of participants in tax-qualified pension plans even though they are not automatically entitled to various protections provided to opposite sex spouses. Underlying all of these design decisions was an understanding that, due to Section 3, same-sex domestic partners could not qualify as "spouses" for federal tax law purposes. Now that the President has instructed the DOJ that Section 3, as applied to legally married same-sex couples is unconstitutional, questions have arisen as to the impact on employee benefit plans. This client alert reviews the DOJ's announcement and addresses some common questions of concern for employee benefit plan sponsors.

The DOJ's Position and the Debate on Section 3's Constitutionality

The DOJ's position, outlined in a letter to Speaker of the House of Representatives John Boehner, articulated the reasons for the President's determination that Section 3 is unconstitutional. [Click here to access the full text of the letter to Boehner]The letter discussed the history of discrimination against gays and lesbians and the congressional debate during the passage of DOMA which contained "expressions reflecting moral disapproval of gays and lesbians and their intimate and family relationships." According to the DOJ, the latter was "precisely the kind of stereotype-based thinking and animus the Equal Protection Clause is designed to guard against." Based on the factors it considered, the DOJ determined that a more rigorous standard of review, as opposed to the rational basis standard applied in previous challenges, should apply. The DOJ concluded that Section 3 could not survive such a heightened level of scrutiny and thus determined that it was unconstitutional. As a result, the DOJ indicated that it would no longer defend Section 3's constitutionality as applied to same-sex couples who are legally married under state law.

Notwithstanding its position on defending the constitutionality of Section 3, the DOJ concluded the letter by stating that given the Executive branch's duty to faithfully execute the laws, it (including federal agencies such as the Internal Revenue Service (IRS), Department of Labor and the Department of Health and Human Services) would continue to "comply with" Section 3 until it is either repealed by Congress or the Judiciary renders a definitive decision against the law's constitutionality.

What Are the Implications of the DOJ's Position for Employer-Sponsored Benefit Plans?

As mentioned above, many employers provide coverage to employees' same-sex domestic partners. When that coverage is provided, it is generally taxable (for federal tax purposes) to the employees on the theory that these partners are not "spouses" (under Section 3). (While a same-sex domestic partner might qualify as an employee's federal tax dependent even if not a spouse, this does not typically happen.) The DOJ's announcement does not change that result. The announcement specifically directed federal agencies to continue to "comply with" Section 3. That means that DOMA is still the law of the land and same-sex domestic partner coverage under employee benefit plans is not eligible for the favorable tax treatment afforded to "spouses" because the domestic partners do not qualify as "spouses" under federal law.

However, the DOJ's indication that it will not defend Section 3 may very well have an impact on the tax treatment of same-sex domestic partner benefits going forward. For example, suppose an employer were to decide not to comply with Section 3 and instead treat its employees with same-sex domestic partners as "spouses" for federal tax law purposes. Because the agencies are supposed to "comply with" Section 3, presumably that would mean that the IRS could (and would) challenge such a position. Nevertheless, how far would the IRS push the point? If the matter were to go to litigation, would the government defend its position based on Section 3? If not (because of the DOJ's announcement), does that mean that the hypothetical employer can ultimately prevail in its tax position?

We are not at all suggesting that employers ignore Section 3 in light of this DOJ announcement. To the contrary, DOMA is still applicable law and employers should comply with its rule when designing their plans and when tax reporting and withholding. Nevertheless, this example illustrates how the DOJ's position of non-defense might result in greater uncertainty for employers that provide same-sex domestic partner benefits for their employees. Adding to this uncertainty will be the uneven legal landscape if and when federal circuits differ in their determination as to DOMA's constitutionality.

Of course, if Congress were to repeal Section 3 or if the U.S. Supreme Court ruled it unconstitutional, the implications would be far-reaching. (The latter result is more likely in the absence of DOJ defending the law's constitutionality, although the legal landscape was further complicated by Speaker Boehner's recent indication that the House of Representatives may take action to defend Section 3.) [Click here for the July 15, 2010, client alert on the Decision by the U.S. District Court of Massachusetts ruling that DOMA was unconstitutional for an in-depth discussion of implications for employers.] With so many federal laws impacted by the definition of "spouse" or "marriage" (particularly those affecting spousal benefits, spousal consent requirements, domestic relations orders, COBRA, and taxation of medical benefits), employers will be in a difficult position of deciding how to modify plans and policies and reprogram payroll systems. Also, there would be a question of the effective date of any such change and how that might impact amounts that were already treated as taxable.

Employers should continue to follow these developments closely and consider the potential implications on employee benefit plans and employment policies.

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