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Supreme Court Strikes Down Defense of Marriage Act, Creating New Rights For Same-Sex Spouses and New Obligations for Employers

By Raquel S. Lord, Esq.

In the much-anticipated, landmark ruling on June 26, 2013, the Supreme Court struck down as unconstitutional a portion of the Defense of Marriage Act that defined marriage under federal law as between an opposite-sex couple. Though the Court's decision in many ways creates more questions than answers, employers should understand the far-reaching implications in the realms of employee benefits, leave, and discrimination issues, with particular complications for multi-state employers.

The Facts

Edith Windsor and Thea Spyer were New York residents in a long-term domestic partnership since 1963. They registered as domestic partners in 1993, when New York began to permit same-sex couples to do so. In 2007, Windsor and Spyer married in a ceremony in Ontario, Canada, but continued to reside in New York, where they lived until Spyer died in 2009.

Following Spyer's death, Windsor, to whom Spyer left her entire estate, sought to claim the estate tax exemption for surviving spouses¹, but was barred from doing so by the Defense of Marriage Act ("DOMA"), which excluded same-sex partners from the definition of the term "spouse," as it is used in federal laws. Windsor paid more than \$360,000 in federal

estate taxes and filed a lawsuit against the federal government in the United States District Court for the Southern District of New York, arguing that DOMA violates the guarantee of equal protection under the law contained within the Fifth Amendment of the Constitution.

While Windsor's suit was pending, President Obama directed that the Department of Justice no longer defend the constitutionality of Section 3 of DOMA, which contained the definition in question. Concluding that a heightened "strict" scrutiny analysis should apply to laws that classify on the basis of sexual orientation, the Executive Branch ordered that the Department cease defending DOMA against challenge by legally married same-sex couples.

The United States District Court and Court of Appeals

Both the United States District Court and Second Circuit held that the provision of DOMA that defines marriage as opposite-sex marriage is unconstitutional and ordered the government to refund the estate taxes Windsor had paid, with interest.

The Supreme Court's Decision

The Court began its analysis of the constitutionality of DOMA by noting that the definition and regulation of marriage has historically been viewed as within the authority of the individual states. DOMA, the Court stated, "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next." Through it, the federal government sought to impose restrictions on a defined class of individuals. The Court's task was to decide "whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment."

The Court noted that, in recognizing same-sex unions and later by authorizing same-sex marriages, New York gave "protection and dignity" to the bond of same-sex couples. DOMA, it found, "singles out a class of persons deemed by a State entitled to recognition and protection," thereby violating basic due process and equal protection requirements applicable to the federal government. The Court further stated that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" weighed in favor of a finding that the law's purpose was discriminatory and, therefore, improper. The Court affirmed the Second Circuit, holding the federal statute invalid.

Employment Implications of the Court's Decision

Under the Supreme Court's holding, the federal government now must look to the law of the individual states to determine whether a same-sex couple is considered married. This means that the federal government must recognize same-sex marriages in states that do; it does not require state governments to recognize them.

The definition of the term "spouse" under DOMA touches on over 1,000 federal statutes in which marital status is addressed, including, among others, the Health Insurance Portability and Accountability Act ("HIPAA"), the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"), and the Internal Revenue Code ("IRC"). While many of the questions that arise as a result of the *Windsor* decision will likely be

addressed by future guidance and interpretation from federal agencies, employers can count on the decision significantly impacting on many employee benefit plans. For example, under HIPAA, marriage is considered a "qualifying event" that triggers an employee's ability to enroll immediately a new spouse in a company-sponsored health insurance plan. The *Windsor* decision now extends this right to same-sex couples. It also means that if benefits are extended to same-sex couples, even in a state that does not recognize same-sex marriage, like New Jersey, an employee's right to continued coverage under a company's health insurance plan pursuant to COBRA extends to the same-sex spouses' coverage as well.

The decision will also impact leaves of absence under the federal Family and Medical Leave Act ("FMLA"). Employers now must protect an employee's job while the employee cares for a same-sex spouse with a serious health condition as defined under the FMLA.

▶ Bottom Line

While many questions remain unanswered at this early stage as to the ultimate reaches of the decision, employers at least should begin to think about the potential implications for their workplace. For example, employers may want to review existing plan documents and health benefits and leave policies, as well as policies related to retirement benefits, payroll and fringe benefits. For employers in New Jersey, a state that does not recognize same-sex marriage, but recognizes civil unions, all potential implications are not yet entirely clear. It may be helpful to discuss these issues with your attorney or plan administrator.

¹ The federal estate tax exemption excludes from taxation "any interest in property which passes or has passed from a decedent to his surviving spouse." 26 U.S.C. §2056(a).

Supreme Court to Review Ruling Invalidating NLRB Recess Appointments

By Raquel S. Lord, Esq.

On June 24, 2013, the Supreme Court granted certiorari to review a January 2013 ruling by the D.C. Circuit which invalidated three of President Obama's recess appointments to the National Labor Relations Board (the "NLRB" or the "Board") as unconstitutional. In the historic ruling, the D.C. Circuit struck down the appointments to the Board, which needs a three-member quorum to operate, leaving hundreds of rulings by the Board in which the challenged appointees participated in a state of uncertainty.

The main question the Court will consider is whether the Constitution's recess appointment clause allows a president to make appointments only during recesses that occur between Senate sessions. The D.C. Circuit concluded in the affirmative, thereby finding unconstitutional the recess appointments of three Board members, which were made while the Senate was holding pro forma sessions and was therefore not actually in recess.

The impact of a potential affirmation by the Court may be far reaching. If the Court agrees with the D.C. Circuit's logic, more than 300 previous recess appointments by presidents in both parties would be considered

invalid. More generally, the Court's decision to review the D.C. Circuit's ruling lays the foundation for an important test of the reaches of the executive branch's powers. Meanwhile, various rulings and pronouncements of the NLRB which were rendered following the recent appointments in January 2012 may be subject to attack. This matter should be followed closely by all employers and their attorneys.

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.