American Benefits Council

Benefits Briefing Webinar: Health & Retirement Benefits After Windsor

September 4, 2013

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Overview

• Level Set on DOMA and *Windsor*
• Overview of Recent Revenue Ruling and Related FAQs
• Effective Date/Scope of Guidance
• H&W Implications
• Retirement Plan Implications
• Other Post-*Windsor* Guidance (including SSA eligibility, FMLA, Medicare)
State of Relationship Recognition

• Currently 13 states and the District of Columbia provide for legal same-sex marriage

- California
- Connecticut
- Delaware
- District of Columbia
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota
- New Hampshire
- New York
- Rhode Island
- Vermont
- Washington

* And some counties in New Mexico...

** Note that certain of these states may also allow for other relationship recognition (such as registered domestic partnerships)
State of Relationship Recognition

- 7 other states provide for relationship recognition other than marriage (such as civil unions, registered domestic partnerships)

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The Anatomy of DOMA

• 1996 federal statute
  – Section 1: The title
  – Section 2: Full faith and credit provision
    • Provides that one state does not have to recognize a same-sex marriage from another state
  – Section 3: Provides a federal definition of “spouse” and “marriage”
The Anatomy of DOMA

• Section 3: Provides a federal definition of “spouse” and “marriage”
  
  – States that in determining the meaning of any Act of Congress, or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or wife (Pub. L. No. 104-99, § 1 (Sept. 21, 1996), codified at 1 U.S.C. § 7 (1997))
Windsor Decision

- Plaintiff, Edith Windsor, and her partner were residents of NY state.
- In 2007 they were married in Canada; the marriage was recognized by NY state following the state legislature’s enactment of a law allowing for/recognizing same-sex marriages.
- Following her wife’s death, Ms. Windsor filed a claim for refund of approximately $363,000 of estate taxes. The IRS denied the claim on the basis that she was not an opposite-sex spouse within the meaning of DOMA.
- Ms. Windsor then sued the Department of the Treasury for a tax refund of the $363,000, alleging that she should have been eligible for a spousal deduction for federal estate tax after her wife died and that DOMA operated to violate her Constitutional rights.
- By a 5-4 decision, Supreme Court ruled that Section 3 of DOMA is an unconstitutional deprivation of liberty protected by the Fifth Amendment of Constitution.
- The Court specifically did NOT address constitutionality of Section 2 of DOMA, which remains the law... for now.
The Anatomy of DOMA

- 1996 federal statute
  - Section 1: The title
  - Section 2: Full faith and credit clause
    - Provides that one state does not have to recognize a same-sex marriage from another state
  - Section 3: Provides a federal definition of "spouse" and "marriage"

Ruled Unconstitutional

Remains Law...

Post-Windsor
Revenue Ruling 2013-17

• For federal tax purposes, marriage is valid if valid where entered into, regardless of residence—called the “state of celebration” rule
  - Gender-specific words like “husband” and “wife” include an individual married to person of the same sex
• Marriage does not include registered domestic partnerships, civil unions, and another relationships not “denominated” as a marriage
• State includes “any domestic or foreign jurisdiction having the legal authority to sanction marriages.” Marriages entered into foreign country like Canada recognized (see Treasury press release)
Revenue Ruling 2013-17

• Reasoning behind ruling
  - Efficient and fair tax administration
  - Domicile movement among states
  - Constitutional issues with gender-specific terms in Code
  - Administrative problems for individuals, employers, and plan administrators with “state of domicile” rule

• Individual tax returns
  - Prior open tax years may be, but not required to be amended
  - 2012 returns filed on or after September 16, 2013 must reflect marital status
FAQs

- FAQs for Same-sex Married Individuals
  - Q&As 10-15 cover health benefits (and associated FICA and FUTA tax issues)
  - Q&As 16-19 address qualified plans
- FAQs for Domestic Partners and Civil Unions
Effective date of Rev. Rul. 2013-17

- Applies “prospectively” as of September 16, 2013.
- Taxpayers may rely on it for filings for open tax years.
- For benefit plans, taxpayer may rely on it “retroactively” only for certain purposes
  - Filing returns and claiming credits for health or fringe benefits
  - IRS will issue further guidance on retroactive application
Potential Implications for ER-Sponsored Health and Welfare Plans

- Full scope and extent of implications may not be known for some time

- Some very important questions remain unanswered at present; additional guidance expected
Health and Welfare Plans

- Will need to closely review plan terms
- Likely to result in changes to benefits and administration
- Affects a broad array of plans, including:
  - Major medical plans
  - HSAs / HRAs/ FSAs
  - Excludable fringe benefits
- Be very thoughtful regarding plan redesign and administrative changes, especially in the short-term as we await further guidance from the agencies and the courts
Health and Welfare Plans

- Benefit eligibility generally
- Tax treatment of employer-paid health care generally
- HSAs, HRAs, FSAs
- Code section 125 salary reduction
- COBRA
- HIPAA special enrollment rights
- FMLA
- Excludable employer-paid fringe benefits
Benefit Eligibility

• **BEFORE Windsor**
  
  – Generally, no federal requirement to offer spousal H&W benefits to any or every spouse with respect to self-insured plans; thus, not required to offer benefits to a same-sex spouse
    
    • Subject to applicable federal laws, such as federal nondiscrimination rules regarding race, sex, age, religious affiliation, etc.
      – No federal law prohibiting discrimination based on sexual orientation by private employers
    
    • Subject to applicable state, city and local laws requiring contractors with the instrumentality to provide certain benefits

  – Where the H&W plan is insured, state insurance laws could require the issuer to provide coverage/benefits to a same-sex spouse
Benefit Eligibility

• **AFTER** Rev. Rul. 2013-17
  
  – There is still no federal requirement to offer spousal H&W benefits to any or every spouse with respect to self-insured plans; thus, not required to offer benefits to a same-sex spouse
    
    • Subject to applicable federal laws, such as federal nondiscrimination rules regarding race, sex, age, religious affiliation, etc.
      
      – No federal law prohibiting discrimination based on sexual orientation by private employers
    
    • Subject to applicable state, city and local laws requiring contractors with the instrumentality to provide certain benefits
    
    • **But see VT DOI release – attempting to apply mandatory parity for civil union-ers with respect to self-insured plans**
      
      – Where the H&W plan is insured, state insurance laws could require the issuer to provide coverage/benefits to a same-sex spouse
Benefit Eligibility

• Considerations and/or Open Issues
  – Strategies for reducing potential liability for back benefits
  – Shoring up existing plan documents, SPDs, and enrollment materials to clarify which individuals are eligible for spousal benefits
Tax Treatment of ER-Paid Health Care

• **BEFORE Windsor**
  – Employer-paid coverage is excludable from an employee’s wages (just like coverage paid for by an employer with respect to an employee’s opposite-sex spouse) if the domestic partner or same-sex spouse qualifies as IRC section 152-modified “dependent”

  • Generally, to be an IRC section 152-modified “dependent”, the same-sex spouse or domestic partner must satisfy the following criteria:
    – Live with the employee; AND
    – Receive over ½ of his or her financial support from the employee
      » Note: no income threshold imposed
  • Applies for both federal income and payroll taxes
Tax Treatment of ER-Paid Health Care

• **AFTER** Rev. Rul. 2013-17:
  - For same-sex spouses **regardless of state of domicile**, employer-paid coverage is excludable from an employee’s wages.
  - What about domestic partners and civil union-ers?
    • Nothing has changed
Tax Treatment of ER-Paid Health Care

• Considerations and/or Open Issues
  – Whether an employer must cease imputing income for an employee with a same-sex spouse as of September 16, 2013 (or, for example, whether the employer could “true-up” at the end of the calendar year)
  – Does an employer need to provide amended Forms W-2 for 2012 or prior tax years?
  – IRS FAQs regarding same-sex marriage provide guidance on availability of refunds- see FAQs 10 through 14
  – Does filing for refund make business sense for employers?
  – Issue of state tax law and possible changes
FSAs, HRAs and HSAs

• An employee can only reimburse tax-free the qualifying medical expenses of his or her “spouse” or Code section 152-modified “dependent”
  
  – **BEFORE** Windsor: Qualifying medical expenses of an employee’s same-sex spouse, domestic partner or civil union-er were not eligible for tax-free reimbursement unless he or she qualified as Code section 152-modified “dependent”
  
  – **AFTER** Rev. Rul. 2013-17:
    • Same-sex spouse’s expenses are eligible for tax-free reimbursement (regardless of state of domicile)
    • Expenses of employee’s domestic partner or civil union-er remain eligible for tax-free reimbursement ONLY if such partner or civil union-er qualifies as the employee’s Code section 152-modified “dependent”
      
      – Alternative: With respect to FSAs and HRAs, may be able to impute as income the FSA/HRA coverage on the front-end to allow for reimbursements; not possible with HSAs, which are subject to a 20% penalty tax
FSAs, HRAs and HSAs

• Additional comment regarding HSAs:
  – Applicable tax rules require annual HSA maximum contribution limit to be apportioned among “spouses”

  • **BEFORE** *Windsor*: Couples in a same-sex marriage, domestic partnership, or civil union, did not qualify as “spouses.”
    Thus, such couples were able to effectively contribute 2X the maximum statutory amount (albeit into separate HSAs)

  • **AFTER** *Rev. Rul. 2013-17*: It appears that same-sex spouses will now be subject to the same spousal apportionment rule that applies to opposite-sex spouses. Domestic partners and civil union-ers appear able to continue to contribute 2X the maximum amount
FSAs, HRAs and HSAs

• Considerations and/or Open Issues
  – When are/were same-sex spouses no longer permitted to make 2X the maximum contribution limit?
  – Whether certain or all expenses incurred prior to September 16, 2013 by an HSA accountholder’s same-sex spouse are reimbursable from the accountholder’s HSA
  – When the special rules regarding divorce and death apply to HSAs owned by a married same-sex spouse
Code Section 125 Salary Reduction

• Generally, an employee can only elect to pay for coverage for a “spouse” or Code section 152-modified dependent via Code section 125 salary reduction

  – BEFORE Windsor: An employee with a same-sex spouse, domestic partner or civil union-er generally could not elect to pay for the coverage for such individuals on a pre-tax basis through a cafeteria plan

  – AFTER Rev. Rul. 2013-17:
    • An employee may now pay for his or her same-sex spouse’s coverage on a pre-tax basis through a cafeteria plan
    • An employee cannot pay for his or her domestic partner or civil union-er on a pre-tax basis (unless he or she qualifies as a Code section 152-modified dependent)
Code Section 125 Salary Reduction

• Considerations and/or Open Issues
  – Ability of employers to permit employees with a same-sex spouse to modify their cafeteria plan election for the 2013 plan year.
COBRA

• Generally requires that continuation coverage be provided to a “qualified beneficiary,” which is defined, in part, as a “spouse” and “child” of the employee

  – **B E F O R E** *Windsor:* No affirmative requirement to provide COBRA coverage to domestic partners or same-sex spouses, but many employers provided for voluntary continuation coverage

  – **A F T E R** *Rev. Rul. 2013-17:*

    • To the extent an employer offers health coverage to a same-sex spouse, an employer will need to extend COBRA coverage to such same-sex spouse

    • Still no affirmative requirement to provide COBRA coverage to domestic partners or civil union-ers; but *can* provide continuation coverage voluntarily
Considerations and/or Open Issues

- To the extent an employer offered same-sex spousal coverage prior to *Windsor*, but not continuation coverage, whether the employer must provide new COBRA election window for past “qualifying events”
HIPAA Special Enrollment Rights

• Requires employers to provide an enrollment opportunity to an employee’s new spouse, or where the spouse loses coverage under another employer’s plan
  – **BEFORE Windsor:** Employers were only required to extend these rights to an opposite-sex spouse; however, an employer could voluntarily extend these enrollment rights to an employee’s same-sex spouse, domestic partner or civil union-er
  – **AFTER Rev. Rul. 2013-17:** Appears employers must now extend these rights to a same-sex spouse to the extent an employer provides same-sex coverage generally
    • An employer may voluntarily extend these enrollment rights to an employee’s domestic partner or civil union-er
HIPAA Special Enrollment Rights

• Considerations and/or Open Issues
  – To the extent an employer offered coverage to an employee’s same-sex spouse prior to *Windsor*, but not voluntary special enrollment rights, whether the employer must provide new special enrollment rights in accordance with HIPAA to such same-sex spouse now.
FMLA

• Requires employers to permit employees to take a time-limited leave of absence to care for a “spouse” or child.
  
  – **BEFORE Windsor:** Employers were only required to extend these leave rights to an opposite-sex spouse; however, an employer could voluntarily extend these enrollment rights to an employee’s same-sex spouse, domestic partner or civil union-er
  
  – **AFTER Windsor:** Recent DOL guidance suggests that an employer must extend these rights to an employee to care for a same-sex spouse **ONLY WHERE THE EMPLOYEE RESIDES IN A STATE THAT RECOGNIZES SAME-SEX MARRIAGE**
    
    • “State of Domicile” rule is inconsistent with IRS/Treasury position
    
    • Will DOL’s position evolve?
    
    • Note: An employer may voluntarily extend equivalent leave rights to an employee’s same-sex spouse, domestic partner or civil union-er
ER-Paid Fringe Benefits

• The IRC provides for a host of tax-free employer-paid fringe benefits. They are generally limited to the employee, his “spouse” and dependents

  – **BEFORE Windsor:** Otherwise excludable fringe benefits provided to a same-sex spouse, domestic partner and civil union-er generally were taxable as wages to the employee

  – **AFTER Rev. Rul. 2013-17:**

    • Qualifying fringe benefits provided to a same-sex spouse should be excludable from the employee’s income (such as “de minimis” employer-paid group term life insurance for an employee’s spouse)

    • The same qualifying fringe benefits provided to an employee’s domestic partner or civil union-er should remain taxable as wages to the employee (unless, in certain instances, they qualify as a dependent of the employee)
ER-Paid Fringe Benefits

• Considerations and/or Open Issues
  – Whether some or all of the employer-paid fringe benefits delivered prior to September 16, 2013 are eligible for income exclusion
Benefit Considerations for Children of Same-Sex Couples

• Benefit eligibility and tax treatment of employer-paid benefits largely turns on state law definition of legal parent/child relationship
  – State relationship recognition laws (such as same-sex marriage law) may operate to make both members of the same-sex union a parent of a child; however, often state laws require an independent adoption proceeding
  – Where an employee is not a legal parent to a minor age individual, then existing rules apply
    • Such as employer may extend voluntary coverage generally, as well as voluntarily comply with HIPAA, FMLA, and COBRA with respect to such minor age individual
    • Coverage/benefits are taxed unless the minor age individual is a Code section 152-modified dependent (which is unlikely)
Retirement and Pension Plan Implications

• General plan administration changes in place by September 16, 2013
• Spousal consent procedures
  ▪ QJSA/QOSA
  ▪ QPSA
  ▪ Profit sharing beneficiary designation
  ▪ Consent to loan
• Direct rollovers
• After-death required minimum distributions
• Hardship distributions
Retirement and Pension Plan Implications

- Additional 415(b) limit for subsidized QJSA
- 10% penalty exceptions
  - Medical expenses
  - Health premiums for unemployed
  - Qualified higher education expenses
  - First-time homebuyer
- Prohibited transaction: Married for party-in-interest purposes
- Processing QDROs in post-\textit{Windsor} environment
  - If valid QDRO, anti-alienation rule not violated.
Retroactivity of Windsor Case Regarding Retirement Plans

September 4, 2013
Kent A. Mason
Guidance on Retroactivity from Government

- Treasury.
  - No guidance on retroactivity yet. Very helpful guidance in Revenue Ruling on current issues.
  - Many possibilities, including:
    - No retroactive disqualification, provided corrections are made within a specified period.
    - No retroactive disqualification. Compliance required prospectively.
Guidance on Retroactivity from Government (cont.)

- Treasury (cont.)
  - Meaning of correction: unclear. Example. Past payment of lump sums from defined benefit plan without spousal consent to participants not married for pension purposes at the time of distribution. For correction guidance, see EPCRS (Rev. Proc. 2013-12, especially section 6.04 and Appendix A, section .07.)
Guidance on Retroactivity from Government (cont.)

- Treasury (cont.)
  - Notice to participants likely required, but to which ones? And how far back in time do plans have to go? Same-sex couples could have been married in a different state or country. Under EPCRS, corrections generally need to be made for closed years.
  - Aside from notice, would plans be required to make affirmative and reasonable efforts to determine which such participants had same-sex spouses?
  - Or could correction be limited to:
    - Same-sex spouses for which the employer has records, and
    - Same sex spouses who make a claim?
Guidance on Retroactivity from Government (cont.)

- Treasury (cont.)
  - Meaning of prospectivity: unclear. Example. Participant in 401(k) plan dies in 2012, leaving account to her children. Same-sex spouse did not consent to this beneficiary designation. The account has not been paid. This triggering event occurred in 2012, but the payment has not yet been made. Under a prospective standard, does Windsor apply?
Guidance on Retroactivity from Government (cont.)

- **Department of Labor.** Outlook for guidance on retroactivity unclear.
  - Without guidance, the issue of retroactivity for ERISA purposes would be left fully to the courts. Even with guidance, participant claims would be decided by the courts.

- **PBGC.** Outlook for guidance on retroactivity unclear, but initial guidance may be limited to the treatment of benefits under plans taken over by the PBGC.
Possible Effects of ERISA Retroactivity

• The following discussion is not comprehensive by any means. It is intended to illustrate the types of issues that may arise. The following discussion is intended to raise issues, rather than to describe definitive answers.
  
  ▪ Example: 401(k) plan death benefit issue. Plan paid out participant's death benefit in 2012 to non-spouse beneficiary without consent of a same-sex spouse.
  
  • As discussed below, this arguably violates conditions of 401(k) plan exemption from QJSA rules with respect to that participant. Even if so, no effect on applicability of the exemption with respect to other participants.
Possible Effects of ERISA Retroactivity (cont.)

- Analysis of plan terms: assume plan defines “spouse” as opposite gender.
  - Arguably, plan simply loses its exemption from the QJSA rules with respect to this participant. This could trigger a right to a payment of 50% of the death benefit to the same-sex spouse as a qualified preretirement survivor annuity benefit (“QPSA”).
  - The contrary argument, however is that the Plan’s distinction between opposite-sex marriage and same-sex marriage is invalid, as inconsistent with federal law. In that case, the same-sex spouse is entitled to 100% of the death benefit. See generally Cozen O’Conner, P.C. v. Tobits, Civ. Action No. 11-0045, (U.S. Dist. Ct. for E.D. of Pa., July 29, 2013).
  - Recoupment from non-spouse beneficiary?
Possible Effects of ERISA Retroactivity (cont.)

- **Example. DB plan paid out lump sum to participant in 2010 without consent of same-sex spouse.**
  - Same-sex spouse might make a claim to survivor annuity component of QJSA unless now waived. (EPCRS guidelines not controlling regarding this issue or the examples below, but those guidelines could be used explicitly or implicitly by courts.)
  - Recoupment from participant?

- **Example. DB plan which subsidizes QJSAs but not other benefits began paying out an unsubsidized benefit to a participant with a same-sex spouse in 2010. The participant might make a claim to make a new election to receive the subsidy.**
Possible Effects of ERISA Retroactivity (cont.)

- Example. Same facts as preceding example, but the employer also maintains a nonqualified plan that provides the benefits that the DB would have provided but for the section 415 limit and the section 401(a)(17) limit on compensation taken into account. The participant might also make a claim for the subsidy under the nonqualified plan.

- Example. A DB plan began paying a single life annuity to a participant in 2010 without the consent of her same-sex spouse. Should the plan offer a choice now between an adjusted QJSA or, with spousal consent, continuation of the single life annuity? If a plan sponsor does so, what precedent would it set with respect to other potential liabilities?
Possible Effects of ERISA Retroactivity (cont.)

- Example. A DB plan death benefit with respect to a participant is forfeited in 2010, even though the participant had a same-sex spouse. The same-sex spouse might make a claim for a QPSA or other benefits available under the plan to opposite-sex spouses.
Possible Effects of ERISA Retroactivity (cont.)

- Repercussions of DB issues.
  - Critical issue. For example, DB plan paid out lump sum to participant in 2010 without consent of same-sex spouse. Is any liability to same-sex spouse a 2010 liability? If not, to what year should it relate?
    - If it is a 2010 liability, this could affect compliance with numerous 2010 requirements; e.g., funding, benefit restrictions, ERISA section 4010 reporting, the application of reportable event exemptions, etc.
    - If it is not a 2010 liability, such potentially very disruptive retroactive effects would not exist.
    - The better analysis would appear to be that the liability relates to 2010 but did not arise in 2010 because it did not exist until the law changed in 2013.
Possible Effects of ERISA Retroactivity (cont.)

- With respect to notifying participants and beneficiaries of their rights under Windsor, and determining who has what rights, what should a fiduciary do? See slide 3 for a discussion of a similar set of issues under the Internal Revenue Code. Possible statute of limitations issue?
Under the above analysis, when would the liability arise for, for example, funding purposes?

- As of July 22, 2013 for ERISA purposes.
- Difficulties in estimating scope of liability.
- If a liability arises in 2013 after a plan’s valuation date for 2013, does the liability have to be taken into account for 2013 for funding purposes? Arguably yes if the liability would, if treated as attributable to a plan amendment, cause the plan to violate the rule prohibiting plans under 80% funded from increasing benefits. See Treas. Reg § 1.430(d)-1(d)(2). For reasons noted below, however, this seems extremely unlikely. So extremely likely the liability would first have to be recognized for 2014.
Possible Effects of ERISA Retroactivity (cont.)

- How would such a liability be treated for purposes of the prohibition on plan amendments to plans that are (or would become) less than 80% funded?
  - Arguably, the liability could be attributable to a plan amendment (adopted currently or in a later year, but retroactively effective), which could be prohibited by the restriction on plan amendments. It seems clear that the government will clarify that this is not the case. See, e.g., Treas. Reg. § 1.436-1(c)(4)(iii) (regarding Treasury’s general power to make changes in this regard).
Possible Effects of ERISA Retroactivity (cont.)

- Would such a liability trigger a requirement in 2013 to recertify an AFTAP for purposes of the benefit restrictions, such as the restriction on lump sums?
  - If the liability is treated as attributable to a plan amendment (adopted currently or in a later year but retroactively effective) but that amendment is exempted from the restrictions on plan amendments, it is unclear if a new certification for 2013 would be required. See Treas. Reg. sec. 1.436-1(h)4).
Possible Effects of ERISA Retroactivity (cont.)

- Distributed annuity contracts/terminated plan.
  - Example. A plan has been terminated with some participants receiving lump sums and other receiving distributed annuity contracts.
    - Claim of same-sex spouse who did not consent to lump sum?
    - Claim of same-sex spouse to spousal rights under an annuity contract issued before the Windsor decision?
Is Windsor Retroactive for ERISA Purposes?

• Nature of claim under Windsor.
  ▪ Example. Claims for survivor annuity benefits by same-sex spouses who did not give required consents to past lump sums paid under DB plan.
Is Windsor Retroactive for ERISA Purposes? (cont.)

• These claims might well not be claims for benefits under the terms of the plan, pursuant to ERISA section 502(a)(1)(B).
  ▪ Some plans explicitly define “spouses” as opposite-sex spouses in light of DOMA.
  ▪ Some plans are silent on the meaning of “spouse”, but have been interpreted to be limited to opposite-sex spouses. Generally, plan administrator’s interpretations are entitled to deference under court decisions.
  ▪ Some plans may provide that all terms shall be interpreted so as to comply with ERISA and the Code. Previously, such plans were reasonably interpreted to refer to opposite-sex spouses. Effect of Windsor?
These claims could arguably be brought as requests to reform the plan to comply with Windsor (and ERISA in light of Windsor). Plan reformation claims might be made under the equitable remedies of ERISA section 502(a)(3).
Is Windsor Retroactive for ERISA Purposes? (cont.)

• Retroactivity of equitable remedies.
  - In the context of Title VII, the Supreme Court has held that if the following conditions are satisfied, a court’s ruling should not be given retroactive effect for purposes of the equitable remedies of Title VII.
Is Windsor Retroactive for ERISA Purposes? (cont.)

• The court ruling establishes a new principle of law that affected parties reasonably would not have acted upon prior to the court’s action.
• Retroactive remedies are not needed to ensure future compliance.
• Retroactive remedies would have significant adverse and inequitable results.
Is Windsor Retroactive for ERISA Purposes? (cont.)

- These cases were specifically applied in pension cases involving women receiving smaller annuity benefits or paying more for equivalent annuity benefits.
- The first two criteria are clearly met with respect to the application of Windsor to retirement plans. The third criteria might well be also met, depending on the extent of the burdens imposed by retroactivity.
Some argue that the “Manhart trilogy” cited above have been overruled by the “Harper” trilogy. See Harper v. Virginia Department of Taxation, 509 U.S. 86 (1993); James B. Beam Distilling Company v. Georgia, 501 U.S. 529 (1991); Lampf, Pleva, Lipkind, Prupis & Petig-Row v. Gilbertson, 501 U.S. 350 (1991). These cases generally take the position that courts announce what the law is and has always been, and thus court decisions are retroactive by their nature.
There are good arguments that the Manhart trilogy is still valid. None of the Manhart trilogy has been described as overruled by the Supreme Court. And the Manhart trilogy did not address a rule of law but rather addressed the proper scope of an equitable remedy, which is similar to the ERISA equitable remedy. See Cooper v. IBM personal Pension Plan, 2004 WL 322918 (S.D. Ill. 2004) (holding Manhart trilogy still good law).
Is Windsor Retroactive for ERISA Purposes? (cont.)

• There is a reasonable argument that Windsor may not be retroactive with respect to retirement plans for purposes of ERISA section 502(a)(3). But without a court decision (or any other authority) to that effect, it would be hard to rely on this position. (Cozen O’Conner, P.C. v. Tobits, cited earlier, assumed retroactivity, but did not address the Manhart issue and thus is of little precedential value on this point.)
Other Post-Windsor Agency Guidance

- **SSA** - August 9, 2013 press release indicates they are now processing some retirement spouse claims for same-sex couples [“State of Domicile” rule?]

- **DOL** - For FMLA, “Spouse means a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage” [Fact Sheet #28F]

- **HHS/CMS** - August 29, 2013 memorandum provides that Medicare Advantage organizations must cover services in a skilled nursing facility (SNF) in which a validly married same sex spouse resides to the extent that they would be required to cover the services if an opposite sex spouse resided in the SNF. [“State of Celebration” rule]
QUESTIONS?

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