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The DOMA Decision

On June 26, 2013, the Supreme Court declared that Section 3 of DOMA – the Defense of Marriage Act – was unconstitutional. That decision is effective on July 21, 2013, and will have an affect on virtually all group health plans.

What Was Section 3 of DOMA?

Section 3 of DOMA set a federal standard for the definition of a married spouse – specifically, that for federal purposes, a marriage was a “legal union between one man and one woman as husband and wife” and that a spouse was a “person of the opposite sex who is a husband or a wife.”

The Court, in a 5-4 decision, declared in essence that the definition of a marriage was a task generally left to the several states and not an issue the federal government had authority to govern. They did not take up other parts of DOMA, namely Section 2, which gives states the right to refuse to recognize same-sex marriages performed under laws of other states.

Impact on Employer Health Benefit Plans

Practically speaking, the Court’s decision means that employers will have to take a very close look at their benefit plan design, the laws regarding same-sex marriage in their state, and if insured, the policies their insurance carriers will be required to follow regarding this rule. The decision allows all spouses who are legally married to be treated equally, barring a state law where the employer is domiciled to the contrary.

Employers Currently Offering Domestic Partner Coverage

For employers currently offering coverage to Domestic Partners, careful attention will need to be paid to how Domestic Partners are defined in the plan documents. While the DOMA decision allows for same-sex spouses to be treated the same as opposite-sex spouses, it **doesn’t** extend those same rights to Domestic Partners and people joined in Civil Unions. That means that while benefits can still be extended to Domestic Partners, those benefits will still result in a tax liability for the employee. However, if the Domestic Partner was a same-sex spouse, the spouse is now no different than any other spouse, and their benefits can be treated on a tax-free basis (presuming the employer has a Cafeteria Plan in place and the employee has elected to participate in it.)

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Employers Not Currently Offering Domestic Partner Coverage

Employers that do not currently offer Domestic Partner coverage will now need to allow employees to enroll same-sex spouses onto the plan just like any other spouse. They can continue to exclude Domestic Partners and people joined in a Civil Union with the employee, however.

Employers Not Intending to Offer Same-Sex Spousal Coverage

Some employers do not wish to offer coverage to same-sex spouses. This is a question that will likely be decided by state law – for instance, if a state doesn't recognize the same-sex marriage that was performed in another state, and the plan is insured (i.e. subject to state law), then the possibility may exist that a spouse could be defined per the laws of the state the employer is domiciled in. Self-funded plans, on the other hand, will need to follow federal law, which now treats all spouses equally if they are legally married. However, neither the ACA nor ERISA requires employers to offer any spousal coverage. More guidance is needed in this area.

Taxation Issues

Since same-sex spouses were considered to be Domestic Partners under federal law prior to the Court's ruling, employers who extended Domestic Partner coverage were required to impute the value of the Partner's health coverage on the employee's income. That practice is no longer needed and indeed must end with respect to same-sex spouses. There is an open question as to whether the employer or the employee can file a new return for prior years to properly reflect the appropriate changes; expect guidance from the IRS on this issue soon.

Other Issues

Other items that employers need to address include the following:

Recognition of Same-Sex Marriages from Other States

Since Section 2 of DOMA was not at issue in the Court's decision, there exists the possibility that states may take action to either recognize same-sex marriages from other states if they don't already, or the opposite action of **not** recognizing same-sex marriages from other states. This will have a definitive impact on insurance carriers and the policies they have to follow. Employers with fully-insured plans will need to pay close attention to this issue and maintain an open dialog with their carriers as the situation evolves.

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Redefine Spouse

As stated above, the effect of declaring DOMA unconstitutional depends on whether a health plan is insured or self-funded. Although insured plans will contain a definition of spouse that complies with applicable state law, employers will have to decide how to define “spouse” for purposes of their self-funded plans. Spouse can no longer be defined with reference to DOMA. Instead, employers may choose to define spouse as an individual married to a participant for federal income tax purposes, or with reference to a specific state law.

Subsidies under ACA

Under the ACA, taxpayers with household income between 100% and 400% of the federal poverty line who purchase insurance through an Exchange will qualify for a premium tax credit. “Household income” includes the modified adjusted gross income of spouses and tax dependents.

Following the Court’s decision, a spouse will include same-sex spouses. Adding the income of a same-sex spouse could cause an employee who would be otherwise eligible for a premium tax credit to be ineligible. Similarly, an individual who would otherwise be eligible for Medicaid may be ineligible.

Children of Same-Sex Spouses

Under the ACA, health coverage must be extended to any child who has not attained age 26. “Child” includes a biological or adopted son or daughter, as well as a stepson or stepdaughter. Under previously issued Answers to Frequently Asked Questions for same-sex couples, the IRS indicated that if a same-sex partner (including a domestic partner, civil union partner or spouse) is the stepparent of his or her partner’s child under the laws of the state in which the partners reside, then the same-sex partner is the stepparent of the child for federal income tax purposes. After the Court’s decision, a child of a same-sex spouse will be treated as a stepchild and entitled to extended coverage.

Extend COBRA Coverage

Due to DOMA, a Domestic Partner could not qualify as a federally recognized spouse, even if state law were to recognize a same-sex Domestic Partner as an employee’s spouse. Thus, COBRA has not required plans to extend continuation coverage to same-sex spouses who were covered under an employer’s plan, although some plans provided “COBRAlike” coverage to these individuals. Now that DOMA has been declared unconstitutional, COBRA continuation coverage will have to be extended to same-sex spouses in the same manner extended to opposite-sex spouses. Guidance is needed as to various

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existing situations such as where an employee with a same-sex spouse recently incurred a termination of employment and COBRA was not offered to a same-sex spouse who has since incurred medical expenses.

Change in Pre-tax Elections

Clearly if a plan allows an employee to change an election due to a spouse's change in status or special enrollment event, prospectively, a same-sex spouse will be treated the same as an opposite-sex spouse. Guidance is needed for various situations, such as where a same-sex spouse lost a job or acquired a dependent prior to the Court's decision, but that event was not recognized as a change in status at the time. Possibly, the IRS will require or allow employers to have special enrollment periods for these situations, as well as for participants whose same-sex marriages were in effect recognized by this decision, and now wish to make a mid-year election to cover their spouses.

Flexible Spending Accounts/Health Savings Accounts/Health Reimbursement Arrangements

The Code limits reimbursements under FSAs, HSAs and HRAs to qualifying medical expenses incurred by the taxpayer and the taxpayer's spouse and tax-dependents. After this decision, expenses incurred by a same-sex spouse will be reimbursable.

There are some disadvantages for same-sex spouses that result from the decision as well. With respect to HSAs, where either spouse has family HDHP coverage, the maximum HSA contribution for family coverage is split between spouses. Prior to the decision, a same-sex spouse would be entitled to contribute an amount up to the entire family contribution limit. In addition, if a spouse participates in a non-HDHP, both the employee and spouse become ineligible for an HSA. Prior to the decision, a same-sex spouse could participate in a non-HDHP and not affect the employee's eligibility for an HSA.

States That Currently Perform Same-Sex Marriages

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

Conclusion

The Supreme Court's decision will, as stated earlier, impact virtually all employer health plans at some level. Assurance will work with our clients to ensure their plans are brought into compliance with this decision. In the meantime, if you have any questions feel free to reach out to your Assurance team!