SAME-SEX MARRIAGE AND LGBT WORKPLACE RIGHTS AT THE CROSSROADS

Presented by the
American Bar Association
Section of Labor and Employment Law,
Section of Individual Rights and Responsibilities,
Commission on Sexual Orientation and Gender Identity, and
Center for Professional Development
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This publication accompanies the audio program entitled “Same-Sex Marriage and LGBT Workplace Rights at the Crossroads” broadcast on June 25, 2014 (event code: CET4SSX).
1. Presentation Slides

2. The *Windsor* Blowing: Fast-Changing Protections at Work for Same-Sex Marriage, Sexual Orientation and Gender Identity
   Michael D. Homans

3. Post-DOMA Employee Benefits Issues Affecting Employees in Same-Sex Marriages, Civil Unions, and Domestic Partnerships
   Teresa S. Renaker, Julie Wilensky and Nina Wasow

4. EEOC LGBT-Related Developments
Same-Sex Marriage and LGBT Workplace Rights at the Crossroads

Wednesday, June 25, 2014 | 1:00 PM Eastern

Sponsored by the ABA Section of Labor and Employment Law, Section of Individual Rights & Responsibilities, Commission on Sexual Orientation and Gender Identity, and the ABA Center for Professional Development

Our Panelists . . .

- Michael D. Homans – Flaster/Greenberg, P.C.
- Teresa Renaker – Lewis, Feinberg, Lee, Renaker & Jackson, PC
- Alisa B. Arnoff – Scalambrino & Arnoff, LLP
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DOMA § 3, 1 U.S.C. § 7

In determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus or 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 a wife.

United States v. Windsor
133 S. Ct. 2675 (June 26, 2013)

- DOMA § 3 deprives couples in state-recognized same-sex marriages of equal protection under federal law, in violation of the Fifth Amendment
- But which same-sex marriages will be recognized under federal law
IRS Revenue Ruling 2013-17  
(Aug. 29, 2013)

- Same-sex spouses lawfully married under state or foreign law are spouses for federal tax purposes
- Place-of-celebration rule
- Domestic partners/civil union partners not spouses for federal tax purposes

DOL Technical Release 2013-04  
(Sept. 18, 2013)

Same rules as Rev. Rul. 2013-17 for Title I of ERISA, the IRC, and accompanying regulations.
IRS Notice 2014-9

- Plan qualification rules apply equally to opposite-sex and same-sex married participants
- Qualified plans must reflect the outcome of Windsor as of June 26, 2013
- Qualified plans may use state-of-residence rule through Sept. 16, 2013
- After Sept. 16, qualified plans must use place-of-celebration rule
- Any amendments required for compliance must be made by Dec. 31, 2014 for most qualified plans

DOL FMLA Guidance (Aug. 2013)

“Spouse” for FMLA purposes refers to a husband or wife as defined or recognized under state law in the state where the employee resides, including ‘common law’ marriage and same-sex marriage.
**Windsor/FMLA Interplay**

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<th>Employer's State</th>
<th>State of Employee's Residence</th>
<th>Is Same-sex Spouse a &quot;Spouse&quot; for FMLA Purposes?</th>
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<tr>
<td>SSM</td>
<td>SSM</td>
<td>Yes</td>
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<td>Non-SSM</td>
<td>Non-SSM</td>
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“Benefits coverage is now available to a legally married same-sex spouse of a Federal employee or annuitant, regardless of the employee’s or annuitant’s state of residency.”
State and Federal Developments

MARRIAGE EQUALITY AND OTHER RELATIONSHIP RECOGNITION LAWS
96.8% of Fortune 500 prohibit discrimination based on orientation
57% prohibit discrimination based on gender identity and expression -- up from 3% in 2000
Numbers drop for smaller businesses
Breach of contract claims & disclaimers -- "we're just kidding?"
TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- Language of Title VII does not explicitly include sexual orientation or gender identity/expression.

- Title VII prohibits discrimination against an employee “because of such individual's race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2.

History of application of Title VII to LGBT employees

- In the past, courts often rejected Title VII claims by LGBT employees, interpreting Title VII to apply strictly to biological sex, and holding that Congress did not intend to protect LGBT people.

- However, the U.S. Supreme Court decided two cases that recognized:
  - Title VII is not just about biological sex, but also about gender stereotypes; and
  - Title VII covers same-sex harassment, even if Congress didn’t explicitly contemplate that.
Price Waterhouse and Oncale

In two important employment cases, the U.S. Supreme Court held that gender stereotyping and same-sex harassment constitute prohibited discrimination under Title VII.


Theories and Defenses
After *Price Waterhouse* and *Oncale*

Since *Price Waterhouse* and *Oncale*, courts have held that Title VII protects **transgender employees**.

- *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Title VII covers transgender people)
- *Smith v. City of Salem*, 378 F.3d 566, 571 (6th Cir. 2004) (transgender firefighter)
- *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (transgender police officer)
- *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011)

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Some Additional Federal District Court Cases – Title VII Sex Discrimination Claims Finding in Favor of Transgender Individuals

After *Price Waterhouse* and *Oncale*

Courts have held that **LGB employees** are protected from same-sex sexual harassment and gender stereotyping.

- *Nichols v. Azteca Restaurant Enterprises* (9th Cir. 2001) (harassment of restaurant employee based on gender stereotypes)
- *Rene v. MGM Grand Hotel* (9th Cir. 2002) (sexual harassment of gay male hotel employee)

**Additional District Court Cases**

**Finding in favor of LGBT plaintiffs**

- *Terveer v. Billington*, ___ F. Supp. 2d ___, 2014 WL 1280301 (D.D.C. March 31, 2014) (denying motion to dismiss for failure to state a Title VII claim of sex discrimination where plaintiff "alleged that he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles'")

- *Koren v. Ohio Bell Telephone Co.*, 2012 WL 3484825 (N.D. Ohio Aug. 14, 2012) (denying defendant's motion for summary judgment where plaintiff alleged his supervisor discriminated against him based on sex stereotypes because he is married to a man and took his husband's last name, the court held: "That is a claim of discrimination because of sex")

- *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women.")

- *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (recognizing that the belief that men or women should only be attracted to persons of the opposite sex constitutes a gender stereotype).
Defenses to LGBT claims under Title VII

- ‘Sex’ is not the same as orientation or gender identity
- Federal courts consistently reject Title VII claims based solely on LGBT status (without stereotyping)
- To establish “stereotyping” claim, complaint must set forth specific allegations re. failure to conform
  - behavior, demeanor, or appearance in the workplace
  - non-conformity influenced employer’s decision

Sample cases rejecting ‘bootstrapping’

- *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (rejecting sex stereotyping claim by lesbian, stating “a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII’”)
- *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (dismissal affirmed where conduct alleged was “more properly viewed as harassment based on Vickers’ perceived homosexuality, rather than based on gender non-conformity”)
- *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (hostile work environment claim fails where plaintiff was subjected to vulgar statements and assault regarding his sexual orientation because “[h]is claim was, pure and simple, that he was discriminated against because of his sexual orientation.”)
- *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) (affirming dismissal where employee alleged harassment due to orientation, but acknowledging potential viability of stereotyping claim)
A transgender individual states an actionable Title VII sex discrimination claim if the employer discriminates:

- because the individual has expressed gender in a non-stereotypical fashion
- because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning; or
- because the employer simply does not like that the person is identifying as a transgender person

“In each of these circumstances, the employer is ... violating the Supreme Court’s admonition that ‘an employer may not take gender into account in making an employment decision.’ Price Waterhouse, 490 U.S. at 244.” Macy at p.8

EEOC OFO Decisions:
Actionable Title VII Claims For LGB Individuals

- **Veretto v. U.S.P.S.**, EEOC Appeal No. 0120110873 (July 1, 2011)
  - Gay mail carrier’s newspaper announcement of marriage to male partner prompted co-worker’s harassment: “you fucking queer”
  - Harasser “motivated by his attitudes about stereotypical gender roles in marriage”
  - Lesbian mail handler harassed by manager for scoring “more [sex with women] than the men in the building”
  - Evinced “sexual stereotype that having relationships with men is an essential part of being a woman”
- **Baker v. S.S.A.**, EEOC Appeal No. 012011008 (Jan. 11, 2013)
  - Claims representative mocked as being effeminate and told his “flamboyant” mannerisms were unsuited to his workplace
  - Allegations sufficient to state a claim that he was discriminated against for failure to match gender-conforming behavior and his characterization of discrimination as based on sexual orientation does not defeat an otherwise valid sex discrimination claim
Welfare Plans After *Windsor*

- Same tax treatment for SSSs
- COBRA required for SSSs who had active coverage
- Federal employee benefits law does not require coverage of SSSs in health or other welfare plans, but potential issues arise from
  - State law
  - Administrative burdens
  - Title VII

Pension Plans After *Windsor*

- Mandatory spousal protections apply to SSSs
  - Qualified Joint and Survivor Annuity (QJSA)
  - Qualified Preretirement Survivor Annuity (QPSA)
  - Spousal consent requirements
  - Qualified Domestic Relations Order (QDRO)
Welfare Plan Litigation Issues

- Retroactive benefits
- Premium refunds
- *In re Fonberg*, 736 F.3d 901 (9th Cir. Jud. Council 2013): back pay award for OPM’s refusal to enroll Oregon DP in 2009

Pension Plan Litigation Issues

- Same-sex widow of employee who died in 2009 is entitled to survivor benefit
- ERISA and the IRC establish the “floor” for spousal rights in pension plans; Windsor “leveled the floor”
- Administrator of PA-based plan not bound by PA law, notwithstanding PA choice of law provision
Pension Plan Litigation Issues

- Retroactive changes to pre-*Windsor* pension benefits, e.g.
  - Payment of single-life annuity to married participant
  - Denial of survivor annuity to surviving same-sex spouse
  - Form of distribution to same-sex surviving spouse under DC plan
  - Distribution from DC plan to non-spouse beneficiary without spousal consent

Employee Benefits – Future Litigation Issues

- Sex discrimination claims against plans that do not extend spousal benefits to SSSs
- Spousal-equivalent statuses
- Participant communications
- Free exercise claims by religious employers or secular for-profit employers
Employee Benefits – Issues for Transgender Employees

- Health plan coverage exclusions for treatment related to gender transition
- Gender-based medical necessity criteria
- Potential Title VII claims
- May violate state insurance antidiscrimination rules
- May violate ACA antidiscrimination rules
- Does a plan with a transgender exclusion provide minimum essential coverage?

Employee Benefits – Issues for Transgender Employees

- Plan definition of “spouse” may also affect transgender employees
Best Practices

LGB

- Policy review
  - Benefits
- E-Suite Buy-In
- Actual Enforcement
  - Workplace Dominated by One Gender or the Other
- Addressing Intolerance
T

- Education
  - Communication
  - Transition Plan
  - Confidentiality
  - Proper Use of Pronouns
  - Bathroom Use
  - “General Respect”
- Addressing Intolerance

Fostering a More Inclusive Workplace

- Communicating intolerance for discrimination generally
- Speaking up
- No assumptions about LGBT status
- Focus on business, not status
- Workplace events
Resources

- APA *amicus* brief in *Windsor*
  - [http://www.apa.org/about/offices/ogc/amicus/windsor-us.pdf](http://www.apa.org/about/offices/ogc/amicus/windsor-us.pdf)

- Same Sex Marriage Laws

- Transgender Workplace Policies & Practices

- Other Guidance
THE WINDSOR BLOWING: FAST-CHANGING PROTECTIONS AT WORK FOR SAME-SEX MARRIAGE, SEXUAL ORIENTATION AND GENDER IDENTITY

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You don't need a weather man
To know which way the wind blows.

-- Bob Dylan, Subterranean Homesick Blues

I. INTRODUCTION

This country has experienced a watershed of change in its views and laws on same-sex marriage, sexual orientation and gender identity in the year since the Supreme Court declared the Defense of Marriage Act unconstitutional in United States v. Windsor, 133 S. Ct. 2675 (June 26, 2013).

In the past year alone, ten states have recognized same-sex marriage through legislation or voter-approved propositions (bringing the total to 22 states that recognize same-sex marriage or provide nearly equivalent state-level rights). And even in the “Red States” where same-sex marriage and gay rights are not generally recognized in the law, the Windsor decision has dramatically shifted the analysis in favor of gay rights, with federal judges in Kentucky, Michigan, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah and Virginia declaring laws

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1 An earlier version of this paper was first presented at the March 2014 midwinter meeting of the Employment Rights and Responsibilities Committee.
against same-sex marriage in those states are unconstitutional violations of equal protection and due process rights. Justice Scalia predicted this result in his dissent in *Windsor*, opining that it is now all but “inevitable” that the Supreme Court will soon declare state bans on same-sex marriage unconstitutional. But countervailing winds are gusting at the state level, too, where legislatures in at least ten conservative states are pushing laws that would make it lawful for a person with “sincerely held religious beliefs” to discriminate against those in same-sex marriages, as well as other lesbian, gay, bisexual and/or transgender (“LGBT”) people in employment and public accommodations.

For the workplace, the shift has not been as dramatic so far, but substantial changes are taking place. To begin with, most large employers – public and private – now prohibit discrimination and harassment based on sexual orientation, including 96.8 percent of Fortune 500 companies (up from 72 percent in 2003). Gender identity protections also are expanding, up from just 3 percent of the Fortune 500 in 2000 to 57 percent now. With smaller employers, especially those operating exclusively in the 29 states that do not protect against discrimination based on sexual orientation, prohibitions against such discrimination are less common – but *Windsor*, more open-minded Millennials (the vast majority of whom support gay rights), and market forces are all prompting re-consideration of these issues in the workplace.

Regardless of whether these trends continue (and the panelists will weigh in on this), these developments present several unique issues for labor and employment counsel – management, plaintiffs’ side, government and in-house. This paper reviews recent developments in state and federal laws in relation to same-sex marriage and the rights of LGBT employees, emphasizing unique and developing legal issues and trends in the workplace. Employee benefits and EEOC initiatives receive brief mention here, but are addressed more fully in related papers being submitted with this conference. We conclude with a review of practical tips and issues to keep in mind in this fast-changing area of the law.

*Important note:* Before plowing into the legal issues and developments, it is important to keep in mind the human perspective here. Widespread discrimination and harassment continues against employees based on sexual orientation, gender identity and expression. More than one-third (37 percent) of gay and lesbian people have experienced workplace harassment in the last five years, and 12 percent claim they lost a job because of their sexual orientation, according to one study. See Jennifer C. Pizer, Brad Sears, Christy Mallory,
and Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A. L. Rev. 715 (2012) (available at: http://digitalcommons.lmu.edu/llr/vol45/iss3/3). For transgender people, the numbers are even more troubling. In a 2011 survey, 90 percent of transgender people reported they have experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent reporting having been discriminated against in hiring, promotion or job retention because of their gender identity. *Id.*

Whether one favors or opposes more legal protections for the LGBT community, this level of discrimination and intolerance requires serious consideration and concern.

II. STATE LAW DEVELOPMENTS

At the state level, laws that protect against discrimination based on sexual orientation, gender identity and transgender status have doubled since 2000.

A. State Laws Against Discrimination Based on Sexual Orientation

Presently, twenty-one (21) states and the District of Columbia prohibit discrimination based on *sexual orientation* (year of law’s adoption):

- California (1992)
- Colorado (2007)
- Connecticut (1991)
- Delaware (2009)
- D.C. (1977)
- Hawaii (1991)
- Iowa (2007)
- Maryland (2001)
- Massachusetts (1989)
- Maine (2005)
- Minnesota (1993)
- Nevada (1999)
- New Jersey (1992)
- New Mexico (2003)
- Oregon (2008)
- Rhode Island (1995)
- Vermont (1991)
- Wisconsin (1982)
The population of these states, combined, is roughly 138 million, which is about 44 percent of the population of the United States.

All but three of these states (New Hampshire, New York and Wisconsin) also prohibit discrimination based on gender identity and/or gender expression.

Another 11 states have laws and executive orders that protect public employees based on sexual orientation and/or gender identity.

Good on-line resources for updates on state laws on these issues are the Human Rights Campaign website at www.hrc.org/statelaws and the National Conference of State Legislatures website at http://www.ncsl.org/research/labor-and-employment/employment-discrimination-sexual-orientation.aspx. Practical Law Company also maintains an article, “State Sexual Orientation and Gender Identity and Expression Discrimination Laws: Overview,” which provides electronic links to each state’s legislation. The author relied upon these sources for this compilation.

In states that protect LGBT workers, juries have shown a willingness to punish wrongdoers and award generous damages to those who are victims of unlawful discrimination. In New Jersey, for example, an Essex County jury awarded $22 million, including $15 million in punitive damages, to a former employee of YRC Worldwide Inc., who claimed the company subjected him to a hostile work environment based on his perceived sexual orientation, in violation of the state’s Law Against Discrimination. See http://www.law360.com/articles/295847/yrc-unit-hit-with-22m-hostile-workplace-verdict; cf. Taylor v. Nabors Drilling USA, LP, 222 Cal. App. 4th 1228, 166 Cal. Rptr. 3d 676 (App. 2d Dist. 2014) (noting $160,000 jury verdict -- which court reduced to $150,000 -- on hostile work environment claim by oil rig “floorhand” who alleged harassment based on anti-homosexual epithets and crude comments).

Judges, meanwhile, continue to act as gatekeepers, requiring proof that the discrimination was based on sexual orientation as opposed to other traits or conduct that cannot be linked to orientation. See Falcon v. Continental Airlines, 2014 BL 42297 (D.N.J. Feb. 19, 2014) (holding that the airline’s requirement that a gay flight attendant could not work until he cut off his Mohawk hairstyle, , pursuant to the company’s appearance standards, did not constitute
discrimination or harassment based on sexual orientation, as the plaintiff presented no evidence to show that the treatment would not have occurred “but for” his sexual orientation).

B. State Legislation on Same-Sex Marriage

On the issue of same-sex marriage, the map is similar, but changing much more rapidly, with most same-sex marriage laws being enacted in the past four years, in addition to several state court rulings legalizing same-sex marriage. Seventeen states and the District of Columbia provide marriage licenses to same-sex couples, and another three states provide equivalent state-level rights to same-sex couples. Wisconsin provides more limited spousal rights for same-sex domestic partnerships. The states with laws protecting same-sex marriages or couples (and the year of adoption) as of February 19, 2014, are:

California (2013)  
Colorado (civil unions, 2013)  
Connecticut (2008)  
Delaware (2013)  
D.C. (2010 (domestic partnerships, 2002))  
Hawaii (2013)  
Illinois (2014)  
Iowa (2009)  
Maine (2012)  
Maryland (2013)  
Massachusetts (2004)  
Minnesota (2013)  
Nevada (domestic partnerships, 2009)  
New Hampshire (2010)  
New Jersey (2013)  
New Mexico (2013)  
New York (2011)  
New Jersey (2013)  
New Mexico (2013)  
New York (2011)  
Oregon (domestic partnerships, 2008)  
Rhode Island (2013)  
Vermont (2009)  
Washington (2012)  
Wisconsin (domestic partnerships, 2009, limited spousal rights)

A comparison to the states with anti-discrimination laws (above) shows a substantial overlap, as would be expected.

Same-sex marriage legislation, however, “goes both ways,” with more states having laws against same-sex marriage than in support of it. Twenty-nine (29) states have constitutional
amendments or laws that prohibit same-sex marriage, and limit marriage to one man and one woman:

Indiana          South Dakota (2006)
Nebraska (2000)


C. “Religious freedom” Bills Target Same-Sex Marriage

On a more cutting-edge front, and in the news of late, at least nine (9) state legislatures recently have considered or approved bills that would enable their citizens and businesses to refuse to provide services and privileges, including employment, to same-sex couples and/or gay individuals, if the refusal is based on a “sincerely held religious belief.” Some of these proposed bills limit their protections to allowing those with sincerely held religious beliefs to not be forced to recognize same-sex marriage ceremonies. Other proposals are much broader and could, theoretically, allow anyone who claims a sincere religious belief to discriminate against same-
sex couples, gays and other minorities. States that have considered such bills (and the bill’s status as of late February 2014) include:

- Arizona (approved by the legislature in 2014, but vetoed by the governor)
- Idaho (bill in senate committee)
- Kansas (bill is stalled in the Kansas state senate)
- Nevada (introduced in 2013, bill appears dead for now)
- Ohio (introduced in 2013, bill has gone nowhere)
- Oregon (ballot initiative being sought)
- South Dakota (bill appears dead for now)
- Tennessee (bill appears to be dead for now)
- Utah (compromise bills being proposed, not yet introduced)

As was evident in the Arizona case in February, even in conservative states, the public reaction to proposals that seek to endorse discrimination against same-sex couples and the LGBT community have met with fierce and vocal opposition, often supported by the mainstream media and social media campaigns. It is not clear whether this wave of support of gay rights will carry forward into legislation in the 29 states that do not prohibit discrimination against same-sex couples or LGBT workers.

Many courts have rejected arguments that sincerely held religious beliefs can justify discrimination against others due to their sexual orientation or same-sex marital status. For example, in *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277 (11th Cir. 2012), an EAP counselor refused to provide counseling services to an employee in a same-sex relationship because of her “devout Christian” belief that it was “immoral to engage in same-sex sexual relationships.” *Id.* at 1280. The court held that her discharge for refusing to provide services to the employee did not constitute religious discrimination.

Similar issues relating to the tension between claims of religious freedom and the regulation of business is before the Supreme Court in *Sebelius v. Hobby Lobby Stores, Inc.* In that case, the issue is whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb et seq. (which provides that the government “shall not substantially burden a person’s exercise of religion” unless that burden is the least restrictive means to further a compelling governmental interest), allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by the Affordable Care Act, based on the religious objections of the corporation’s owners. Many believe that if the Supreme Court rules in favor of Hobby Lobby (a retail business employing
more than 13,000 people), then it could set the precedent for other business owners with sincerely held religious beliefs to ignore state and federal anti-discrimination laws, as proposed in the Arizona bill.

D. City Laws Protect Against Discrimination

At least 200 cities and local governments have ordinances that prohibit discrimination based on sexual orientation or gender identity in the workplace. These ordinances vary widely, and tend to be less used by plaintiffs’ counsel for a variety of reasons, including the fact that some do not include a private right of action.

III. THE FEDERAL LANDSCAPE ON SAME-SEX MARRIAGE & LGBT ISSUES

The federal courts have been grappling with issues relating to same-sex marriage, sexual orientation, gender identity and gender stereotyping for decades, but recent rulings and the state law developments noted above ensure that this will be a rapidly evolving area for years to come.

A. Windsor and the Evolution of the Supreme Court

In United States v. Windsor, 133 S. Ct. 2675 (2013), the Supreme Court held that the definition of marriage in the Defense of Marriage Act (“DOMA”), limiting federal recognition to unions between one man and one woman, was unconstitutional as a deprivation of due process, as well as the equal liberty interests protected by the Fifth Amendment. DOMA had applied to over 1,000 federal laws, including those relating to taxes and employee benefits. [The effects of the ruling on employee benefits are addressed in a separate article.]

Both the majority and dissenting opinions in Windsor strongly suggest that it could be just the first of many decisions to decide constitutional issues relating to same-sex marriage and sexual orientation. While Justice Kennedy’s majority opinion and Chief Justice Roberts’ dissent emphasize that the ruling is based, in large part, on federalism, and the states’ historic and traditional role of regulating domestic relations law, much in the opinion suggests that more sweeping change is ahead in the recognition of gay rights. In a decision that is long on conclusions, but short on linear rationale, the court relies on its 2003 ruling in Lawrence v. Texas, 539 U.S. 558 (which held that Texas’s state sodomy law was unconstitutional), to assert that, “Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State, and it can form ‘but one element in a personal bond that is more enduring.’” 133 S. Ct. at 2692. The court then concluded that:
DOMA seeks to injure the very class New York seeks to protect [with its laws recognizing same-sex marriage]. By doing so it violates basic due process and equal protection principles applicable to the Federal Government. The Constitution’s guarantee of equality “must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot” justify disparate treatment of that group.

... The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

*Id.* at 2693 (internal citations omitted).

Justice Scalia’s dissent is typically magnanimous, seeing the decision as an irrational power grab by a wing of the Court that is “eager -- hungry -- to tell everyone its view” on the motives of Congress in passing DOMA and the impropriety of the law. Scalia argues that “the Constitution does not forbid the government to enforce traditional moral and sexual norms.” *Id.* at 2707. Looking to the effect of this precedent, Scalia predicts that *Windsor* pre-ordains a future Supreme Court decision outlawing any state prohibition against same-sex marriage:

... the view that this Court will take of state prohibition of same-sex marriage is indicated beyond mistaking by today’s opinion. ... How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status.

*Id.* at 2709.

Indeed, federal judges in nine states -- Kentucky, Michigan, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah and Virginia -- have issued decisions, rooted in *Windsor*, invalidating state laws against same-sex marriage as unconstitutional. *See generally* http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/26/why-6-federal-judges-have-struck-down-state-gay-marriage-bans-in-their-own-words/ (highlighting a key holding in each case, and linking to the rulings). By one report, 19 decisions since *Windsor* have come down in favor of plaintiffs challenging same-sex restrictions as unconstitutional, including the ruling in *De Leon v. Perry* on February 26, 2014, holding that the Texas Constitution’s ban on same-sex marriage was unconstitutional under federal law:

After careful consideration, and applying the law as it must, this Court holds that Texas’ prohibition on same-sex marriage conflicts with the United States Constitution’s guarantees of equal
protection and due process. Texas’ current marriage laws deny homosexual couples the right to marry, and in doing so, demean their dignity for no legitimate reason. Accordingly, the Court finds these laws are unconstitutional and hereby grants a preliminary injunction enjoining Defendants from enforcing Texas’ ban on same-sex marriage.

Although the Supreme Court chose in 2013 not to rule on the issue of whether state prohibitions against same-sex marriage are unconstitutional, the issue is expected to soon percolate back to the high court through appeals of these decisions. Whether Justice Scalia’s prediction that the result is “inevitable” will hold true remains to be seen, as the Court will be required to explain or ignore the substantial references in *Windsor* to federalism arguments that it is within the province of the states, and not the federal government, to determine laws relating to marriage and domestic relations. Certainly Supreme Court precedent relating to interracial marriage establishes a basis for the court to wade into this area of the law. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (holding state anti-miscegenation laws unconstitutional as violation of fundamental equal protection and due process rights).

Taking the issue a step further, if the Supreme Court rules that bans on same-sex marriage are unconstitutional -- and continues to expand the equal protection argument started in *Lawrence*, then one would expect a decision to follow, in the not-too-distant future, in which the Supreme Court determines that discrimination by the government based on sexual orientation also is unconstitutional. After all, the court in *Windsor* stated that “Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State . . .” 133 S. Ct. at 2692. Employment discrimination is not the same as “punish[ment],” but it is close.

**B. An FMLA Issue Born of *Windsor* – Be Careful With Those ‘Spouses’**

Federal regulations have long defined “spouse” under the FMLA to mean “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 in States where it is recognized.” 29 C.F.R. § 825.102. After the DOMA was enacted, however, the Department of Labor issued an Opinion Letter in 1998 indicating that DOMA effectively limited the definition of spouse under the FMLA to only such marriages between one man and one woman.

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Windsor’s ruling negated that position, but left a somewhat open question as to whether the definition of “spouse” would revert to the definition in the federal regulations, or be expanded to recognize spouses who were legally married in any state, as the federal government has done with regard to federal taxes and employee benefits.

In August of 2013, shortly after the Windsor ruling, the Department of Labor issued Fact Sheet #28F establishing the DOL’s position that definition of “spouse” remained based on the state of residence, but expanded to include same-sex marriage: “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” (emphasis added).

This position presents challenges to the unwary employer, prompting the following four recommendations to employers and their counsel to ensure FMLA compliance:

First, employers should review and revise their FMLA policies and guidelines to comply with the revised definition.

Second, employers must be careful not to assume an employee resides in the same state in which he or she works. Since the “spouse” definition is based on where the employee resides, that state’s law on same-sex marriage will control.

Third, employers who decide to be generous and provide coverage for the care of same-sex spouses, regardless of the state of residence, should realize that they are opening themselves up to a claim for 12 additional weeks of FMLA coverage in the same 12-month period, because providing leave for a same-sex spouse for an employee residing in a state that does not recognize same-sex marriage is, by definition, not FMLA leave. Therefore, any such leave would not reduce the 12-week annual entitlement to job-protected leave under the FMLA, for qualified and eligible employees. This is called the no-good-deed-goes-unpunished rule (see also prior decisions against employers who provided FMLA-type leave to employees in the first year of employment, only to discover that such leave did not count toward the employee’s annual FMLA entitlement).

Fourth, and finally, employers and their counsel should continue to monitor this issue, as Labor Secretary Tom Perez has indicated that the DOL will take steps to implement Windsor “in a way that provides the maximum protection for workers and their families.” This suggests that the DOL may ultimately revise the regulations to extend FMLA rights to all legally married same-sex spouses regardless of their state of residence.
C. Title VII Protects Against Sexual Stereotyping, Not Sexual Orientation

It is well-settled that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation or gender identity, *per se*. But the Supreme Court and the EEOC have opened up protections for these groups when the discrimination is based on the employee’s failure to conform to gender stereotypes.

i. *Price Waterhouse v. Hopkins*

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the court held that a woman denied a partnership in an accounting firm because her appearance and conduct were deemed insufficiently “feminine,” could show disparate treatment or harassment based on gender stereotypes of appearance or behavior and therefore state a claim under Title VII (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associate with their groups”).

Although Hopkins’ orientation was not part of the fact pattern there, the decision has allowed LGBT employees to find protection under Title VII where the harassment or discrimination is based on gender stereotyping, and not simply sexual orientation or transgender status. *See, e.g.*, *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

Courts continue to recognize that discrimination based on sexual stereotyping violates Title VII in cases involving gay and transgender employees. *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (reversing summary judgment where jury could conclude that harassment based on employee’s high voice, effeminate walk, and crossing his legs “the way a woman would sit” could be due to his not fitting the stereotypical view of how a man should look, rather than due to his homosexuality); and *Muir v. Applied Integrated/Techs., Inc.*, 2013 BL 330738 (D. Md. Nov. 26, 2013) (refusing to dismiss Title VII claim by part-time worker who alleged she was terminated because she was transitioning from male to female and “did not conform to traditional gender stereotypes associated with men in society . . .”).

ii. Transgender Employees Prevail in EEOC Actions

Transgender employees also have gained protections under Title VII, thanks in large part to the EEOC’s decision in *Macy v. Holder*, EEOC Appeal No. 0120120821 (April 25, 2012), which held for the first time that a federal employee raised a cognizable sex discrimination claim under Title VII by alleging that her employer turned her down for a job after learning that she was transitioning from male to female.
More recently, the EEOC announced that it had entered into a $50,000 settlement agreement with a South Dakota grocery store which fired a clerk after she announced her plan to transition from male to female. See http://www1.eeoc.gov/eeoc/newsroom/release/9-16-13.cfm?renderforprint=1. While the EEOC touted the settlement as showing that “[t]he tides have turned and the EEOC has made a very clear statement with the Macy ruling that transgender people are protected under Title VII,” the owner of Don’s Valley Market, Don Turner, seemed unconvinced and told BNA that the company did not admit wrongdoing and “I only wish that I had the funds to truly defend myself.” Grocery Store Agrees to Fork Over $50,000 on EEOC Charge by Fired Transgender Clerk, 181 DLR A-3 (Sept. 18, 2013).

D. Same-Sex Harassment Remains a Viable Claim

Same-sex sexual harassment is actionable under Title VII. In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), the court held that such harassment can be “because of sex” where, for example, (1) the harasser is gay or lesbian; (2) the “harasser is motivated by general hostility to the presence of [persons of his or her own gender] in the workplace,” or (3) other comparative evidence that demonstrates that members of the opposite sex were treated differently by the harasser. Id. at 80-81. One such form of same-sex harassment can be harassment that seeks to punish noncompliance with sexual stereotypes. Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001),

In situations in which the alleged victim is gay or transgendered, a plaintiff must demonstrate that he or she is being harassed “because of . . . sex” rather than sexual orientation or gender identity. For example, in Bibby, a plaintiff who had been taunted about his sexual orientation and physically assaulted by a co-worker could not prevail under Oncale, because the evidence indicated he was being harassed because of his sexual orientation, rather than his sex.

More recently, in Roadcloud v. Philadelphia, 2014 BL 1739, 121 FEP Cases 550 (E.D. Pa. Jan. 6, 2014), the plaintiff, an “openly gay female,” claimed her supervisor harassed her with comments based on her “perceived lack of femininity, outwards signs plaintiff had engaged in sexual contact, and plaintiff’s sexual orientation.” The allegations, if proven, could be sufficient to state a claim under Title VII for failure to conform to expected gender stereotypes, the court ruled.
E. Where Does It ENDA?

The proposed federal Employment Non-Discrimination Act (ENDA) was first introduced as a bill in 1994 and would provide protections against workplace discrimination on the basis of sexual orientation or gender identity. The language of the bill tracks Title VII of the Civil Rights Act of 1964, as amended. ENDA does have some exceptions not applicable to other existing civil rights laws, including that: (1) it would not apply to religious organizations; (2) it would not allow for “disparate impact” claims; (3) it would not allow preferential treatment, including quotas, based on sexual orientation or gender identity; and (4) it would not allow the EEOC to compel employers to collect statistics on sexual orientation or gender identity.

On November 7, 2013, the Senate approved the bill by a vote of 64-32, including several Republican supporters. The Republican-controlled House is seen as unlikely to approve the measure, and govtrack.us gives the bill a 14 percent chance of being enacted. Supporters of the bill contend that a substantial majority of the U.S. population in all 50 states supports the legislation, but there are also strong opponents.

With regard to federal employees, then-President Bill Clinton signed Executive Order 13087 on May 28, 1998, amending Executive Order 11478 to prohibit discrimination based on sexual orientation in the competitive service of the federal civilian workforce. The order also applies to employees of the government of the District of Columbia, and the United States Postal Service. However, it does not apply to positions and agencies in the excepted service, such as the Central Intelligence Agency, National Security Agency, and the Federal Bureau of Investigation.

Those in favor of greater protections based on sexual orientation and gender identity have lobbied for President Obama to sign an expanded Executive Order to extend such protections to federal contractors, which in combination with federal employees make up 22 percent of the U.S. workforce. Obama has indicated support for such an Executive Order, but has not issued one, indicating a preference for legislation.

IV. Corporate America Far Ahead of Legislatures on LGBT Protections

While legislative and judicial protections for same-sex marriage, sexual orientation and gender identity issues have been developing rapidly in the past few years, they still trail big business on these issues.
An estimated 96.8 percent of Fortune 500 companies prohibit discrimination based on sexual orientation, according to a recent report by Equality Forum, in collaboration with Professor Louis Thomas of the Wharton School of the University of Pennsylvania and Ian Ayres, a Yale Law School professor. Equality Forum has even “outed” the 16 “non-compliant companies” in the Fortune 500 who do not protect against sexual orientation discrimination, but they include few household names other than Exxon Mobil, DISH Network and Seaboard.

The percentage of large companies protecting employees based on sexual orientation rose from 72 percent of the Fortune 500 in 2003, and 87 percent in 2010.

On the issue of gender identity and expression, corporate America is also ahead of the legislatures. According to Human Rights Campaign, 57 percent of the Fortune 500 companies prohibit discrimination based on gender identity, up from just 3 percent in 2000. The numbers decline when the pool of businesses is expanded, based on 2010 data, but current numbers are not available.

V. Anti-Discrimination Policies May Support Breach of Contract Claims

When employers do adopt anti-discrimination policies over and above what the law requires, they should consider whether they are creating potential contract claims for employees, especially in states that do not prohibit employment discrimination based on sexual orientation or identity. With mixed success, employees have asserted claims that the employer policies modify the employment relationship that is otherwise “at will.” See, e.g., Grimm v. US West Communications, Inc., 644 N.W.2d 8 (Iowa 2002) (holding that employee handbook’s prohibition against sexual orientation discrimination could constitute a contract); Wilkinson v. Shoney’s, Inc., 4 P.3d 1149, 1164-65 (Kan. 2000); Johnson v. Nasca, 802 P.2d 1294 (Okla. Ct. App. 1990); Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458 (1982) (finding plausible breach of contract claim based on assurance that employee would not be terminated except for cause); and Gorrill v. Icelandair/Flugleidir, 761 F.2d 847 (2d Cir. 1985) (allowing breach of contract claim based on operations manual that expressly provided that seniority would be the sole factor in selecting employees for terminations stemming from job elimination or force reduction).

Employer disclaimers remain effective at thwarting claims based on policies in their handbooks, but are not completely airtight. See generally Effectiveness of Employer's Disclaimer of Representations In Personnel Manual or Employee Handbook Altering At-Will

At least one plaintiff, a gay law professor, had success -- albeit short-lived -- in moving his breach of contract claim past summary judgment, based on his employer’s anti-discrimination policies. In *Hammer v. University of Michigan*, 120 Fair Empl. Prac. Cas. (BNA) 1747 (Dec. 3, 2013), a Michigan state court judge expressed skepticism about the University’s attempt to disown any obligation from its anti-discrimination policy due to a disclaimer in the handbook. Oral argument on the point, at an earlier stage of the case, included the following exchange with defense counsel:

*The Court*: So in other words, if you tell me that you’re not going to discriminate, I can’t really rely on that, if you’re an employer -- -

*Mr. Seryak*: That’s correct, judge. It’s not a basis for contract -- -

*The Court*: And it particularly a public employer, that’s just puffing?

*Mr. Seryak*: Your honor, its -- -

*The Court*: It’s a scam to get me to come to work for you?

*Mr. Seryak*: Judge, when we say that this is not a contract and we say that it can be modified, that’s an awfully general statement. And I submit to Your Honor that is not the basis for a contract, a damage contact. It says it’s a commitment. That’s our intent. But that doesn’t -- -

*The Court*: So we can just disregard it at our whim? When we put there in writing, right there, that the University is committed to a policy of non-discrimination, equal opportunity for all persons regardless of race, sex, color, religion, creed, national origin, or ancestry, age, marital status, sexual orientation, we’re just kidding? We don’t really mean that?

*Mr. Seryak*: We’re not saying that, Your Honor.

*The Court*: And the Courts in this state should sanction the disregard of that language by a publicly funded, highly respected, University?
Mr. Seryak: I’m not saying that, Your Honor. I’m not going to make that --

The Court: Well, then what does it mean?

The University subsequently dropped the “at will” disclaimer-based defense, but ultimately prevailed in the case when the Michigan Court of Appeals issued an unpublished decision affirming summary judgment and finding that Hammer had failed to prove that his sexual orientation was a motivating factor in the decision to deny him tenure. Id.

VI. Practice Tips As the Law Evolves

- Stereotypes versus orientation and identity. In harassment and discrimination claims by LGBT employees in states without prohibitions against discrimination based on orientation or gender identity, the employee and his or her counsel should seek to cast the evidence in terms of sexual stereotyping, while the defense will push for admissions, evidence and testimony that the adverse treatment was motivated by the plaintiff’s sexual orientation or gender identity, and had nothing to do with gender.

- Beware of FMLA errors. FMLA policies and practices should be reviewed and revised to ensure the employer provides leave in accordance with the law – no more and no less – and does not unwittingly grant excessive non-FMLA leave to employees in same-sex marriages.

- Non-discrimination policies and breach of contract. For employers that adopt anti-discrimination policies to protect on the basis of sexual orientation, gender identity and other categories not necessarily protected by state or federal law, the employer should consider a prominent disclaimer making clear employment remains at will and that the policy is not a binding contract. Even with such language, the employer may be subject to a breach of contract claim based on such a policy.

- Consider the difficulty of multi-state variations. Employers that operate in multiple states with different protections for LGBT employees may find it easier to administer a policy that provides the highest level of protection to all. Other
employers deal with this challenge by noting in the employee handbook that the employer provides equal-opportunity protections in accordance with state and local laws, including variations from state to state.

- **Balance all benefits versus legal requirements.** Many employers that have adopted anti-discrimination policies to protect LGBT employees have done so for reasons that go beyond legal mandates. Equal opportunity based on performance, recruitment and retention of a diverse pool of employees, public image, customer reactions and core values all should be considered in deciding whether to adopt such a policy. A good counselor will advise on these issues and “doing the right thing,” and not just preach compliance with the bare-bone mandates of the law.

- **Before you get married, be sure you can get divorced.** This one is not really a labor and employment issue, but it is worth noting – a growing problem arising from the state variations in same-sex marriage law is that gay couples who live in a state that does not recognize same-sex marriage, but get married in a state that does, may find themselves unable to get divorced. In Pennsylvania, for example, which does not recognize same-sex marriage, couples often travel to neighboring states (such as New York, New Jersey and Delaware) to get married. If the marriage goes bad, however, the couple cannot get divorced in Pennsylvania, because Pennsylvania law prohibits recognition of same-sex marriages and therefore the courts have no authority to divorce the couple. Worse yet, most states that recognize same-sex marriages, with few exceptions, have residency requirements as a prerequisite for filing for divorce. Therefore, at least one member of the couple must take up residency for at least six months or a year in a state that will recognize the marriage in order to then file for divorce. Again, this is not an employment law issue, but it reflects the difficulties and contradictions created by the current mishmash of state laws on same-sex marriage. Some states that recognize same-sex marriage are considering amendments to their laws to allow for divorces by couples who married there, but do not reside in the state.

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Post-DOMA Employee Benefits
Issues Affecting Employees in
Same-Sex Marriages,
Civil Unions, and
Domestic Partnerships

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I. Introduction.

Employee benefits issues affecting same-sex couples changed dramatically in June 2013 with the Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, the Court struck down as unconstitutional Section 3 of the federal Defense of Marriage Act (DOMA), which defined “marriage” and “spouse” wherever those terms appear in federal statutes and regulations. Section 3 defined “marriage” to mean only an opposite-sex marriage and “spouse” to mean only an opposite-sex spouse. The Supreme Court held in a 5-4 opinion that Section 3 deprives couples in state-recognized same-sex marriages of equal protection under federal law, in violation of the Fifth Amendment to the United States Constitution.

While *Windsor* does not mandate that any state make same-sex marriage available (and does not address Section 2 of DOMA, which provides that states are not required to recognize same-sex marriages from other jurisdictions), an increasing number of jurisdictions permit same-sex couples to marry.1 As of June 10, 2014, same-sex couples can marry in nineteen states and the District of Columbia, as well as many foreign jurisdictions.2

This paper will discuss guidance from the IRS and the Department of Labor post-*Windsor*, and then highlight several general questions regarding employee benefits that remain open for same-sex couples. The paper will then focus on specific employee benefits issues for same-sex couples and how *Windsor* and the post-DOMA guidance from federal agencies changes the outcome of those issues under federal law and plan terms.

1 In *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), decided the same day as *Windsor*, the Supreme Court held that the Ninth Circuit Court of Appeals had lacked jurisdiction to review a federal district court’s order holding unconstitutional California’s constitutional provision that “only marriage between a man and a woman is valid or recognized in California,” clearing the way for same-sex marriages to resume in California. Because of the jurisdictional basis for the opinion, it does not affect same-sex marriage laws in states other than California.

2 See Freedom to Marry, Where State Laws Stand, available at http://www.freedomtomarry.org/pages/where-state-laws-stand; Freedom to Marry, The Freedom to Marry Internationally, http://www.freedomtomarry.org/landscape/entry/c/international. In Utah, Arkansas, Michigan, and Wisconsin, same-sex couples were permitted to marry for brief windows of time following judicial decisions striking down state same-sex marriage bans, but the decisions have been stayed on appeal.
II. IRS Guidance: Revenue Ruling 2013-17.

On August 29, 2013, the IRS issued Revenue Ruling 2013-17, answering three questions pertinent to employee benefit plans after the demise of DOMA § 3:

(1) Whether same-sex spouses lawfully married under state or foreign law are spouses for federal tax purposes: Yes. The terms “spouse,” “husband and wife,” “husband,” and “wife” include individuals married to a person of the same sex, if the couple is validly married under state or foreign law.

(2) Whether the IRS recognizes such a marriage for federal tax purposes even if the state in which the couple is domiciled does not recognize the marriage: Yes. The IRS has adopted a “place-of-celebration” rule, recognizing the marriage if it was validly entered into in a state or foreign jurisdiction whose laws authorize the marriage of two individuals of the same sex, regardless of whether the marriage is recognized by the state of domicile.

(3) Whether registered domestic partners and civil union partners are spouses for federal tax purposes: No. The terms “spouse,” “husband and wife,” “husband,” “wife,” and “marriage” do not include relationships or persons in relationships not denominated as marriage under the law of the state in which they were entered.


Taxpayers may rely on the Revenue Ruling retroactively for open years for purposes of filing tax returns, amended returns, adjusted returns, or claims for credits or refunds. This means that individuals in same-sex marriages may amend federal tax returns to file jointly and may file claims to recover taxes paid on imputed income, among other issues, and employers may also file claims to recover taxes paid on imputed income. See § VII.C.2, below; see Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law, available at http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples.

For all other federal tax purposes, Revenue Ruling 2013-17 applies prospectively as of September 16, 2013. However, this prospective application for federal tax purposes does not control potential participant claims under ERISA Title I, as discussed more fully below in § V.C.1.

Revenue Ruling 2013-17 provides uniformity with respect to federal law, but
whether same-sex married couples who live in a state that does not recognize their marriage can file joint state tax returns depends on state tax law. For example, in Missouri, which has a state constitutional amendment banning same-sex marriage, the governor issued an executive order providing that same-sex married couples who file a joint federal return must file joint Missouri returns, because under state tax law, the state must accept jointly filed state returns from couples who file federal joint returns. See Executive Order 13-14 (Nov. 14, 2013), at http://governor.mo.gov/news/executive-orders/executive-order-13-14. Other states that do not recognize same-sex marriages require taxpayers in same-sex marriages to file state returns as single. See, e.g., La. Dep’t of Rev., Revenue Information Bulletin No. 13-024 (Sept. 13, 2013), at http://revenue.louisiana.gov/forms/lawspolicies/RIB%202013-024.pdf.


On September 18, 2013, the Department of Labor issued Technical Release No. 2013-04, which provides additional guidance for employee benefit plans on the definition of “spouse” and “marriage” under ERISA following Windsor. See DOL Technical Release No. 2013-04, available at http://www.dol.gov/ebsa/newsroom/tr13-04.html. Consistent with Revenue Ruling 2013-17, the DOL’s guidance provides that in Title I of ERISA, the Internal Revenue Code, and accompanying regulations:

- [T]he term “spouse” will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriage.

- [T]he term “marriage” will be read to include a same-sex marriage that is legally recognized as a marriage under any state law.

Id. The Technical Release notes that adopting a contrary rule for employee benefit plans based on state of domicile would raise “significant challenges” for employers that operate or have employees in more than one state or whose employees move to another state while entitled to benefits. For example, the need for and validity of spousal elections, consents, and notices could change each time an employee or former employee moved to a state with different marriage recognition rules. See id. By recognizing marriages that are valid in the state where they were celebrated, the DOL’s rule “provides a uniform rule of recognition that can be applied with certainty by stakeholders, including employers, plan administrators, participants, and beneficiaries.” Id.
In addition, consistent with the Revenue Ruling 2013-17, the DOL’s Technical Release further notes that the terms “marriage” and “spouse” as used in Title I of ERISA, the Internal Revenue Code, and related regulations do not include relationships and persons in relationships that are not denominated a marriage under state law, such as domestic partnerships and civil unions. See id.

The DOL’s guidance means that for qualified employee benefit plans, spousal benefits and/or consents mandated by ERISA and the IRC must be provided to same-sex spouses, regardless of where the couple resides. See § VIII, below.

IV. IRS Guidance: Notice 2014-19

On April 4, 2014, the IRS issued Notice 2014-19, providing guidance on application of the Windsor decision and Revenue Ruling 2013-17 to Qualified Retirement Plans. Under this Notice, any retirement plan qualification rule that applies because a participant is married must be applied equally to same-sex spouses. Qualified plans must reflect the outcome of Windsor as of June 26, 2013 or risk losing tax qualification. Through September 16, 2013, a plan will not lose its tax qualification for recognizing only same-sex spouses of participants domiciled in states that recognize same-sex marriage. After that date, the marriage must be recognized regardless of the state of domicile.

It is important to note that under Notice 2014-19, plans may recognize same-sex marriage for some or all purposes prior to June 26 or September 16, 2013. The Notice does not provide relief from any claim that an individual participant or same-sex spouse may bring asserting rights to spousal benefits that accrued before June 2013.

If amendments are required for compliance with the Notice, they must be done by year-end 2014 in most circumstances. The Notice also provides a rule of interpretation: if a plan does not define “spouse” or “marriage” in a manner inconsistent with Windsor, an amendment is not required but the plan must be operated in accordance with the Notice.

V. Issues After Windsor and Related Guidance from the IRS and DOL.

After Windsor and related guidance from the IRS and DOL, there are four major categories of issues for employee benefits for same-sex couples: (1) the status of spousal-equivalent relationships, such as domestic partnerships and civil unions; (2) the interpretation of plan terms; (3) retroactivity questions arising from the invalidity of DOMA and the incremental recognition of same-sex marriage in the states; and (4) issues of the application of federal antidiscrimination laws, particularly Title VII of the Civil Rights Act of 1964 and the proposed Employment Non-Discrimination Act (ENDA).
A. Domestic Partnership/Civil Union Issues.

One set of issues arises post-DOMA relating to employees in spousal-equivalent statuses under state law. Seven states – including some states that also offer same-sex marriage – make a status available to same-sex couples, such as civil union or registered domestic partnership, that carries the same rights and obligations as marriage under state law (CA, CO, HI, IL, NJ, NV, OR). This paper will refer to these statuses as “domestic partnerships.” Many of these state laws specifically provide that the state’s domestic partners will be treated as spouses for all purposes under state law, including for purposes of marital property, taxation, intestacy, and parentage. See, e.g., Cal. Fam. Code § 297.5; Colo. Rev. Stat. 14-15-107. Legislative history is often clear that the intent of these state laws is to treat domestic partners as married spouses. See, e.g., Colo. Rev. Stat. 14-15-102 (stating that the purpose of the Colorado Civil Union Act is “to provide eligible couples the opportunities to obtain the benefits, protections, and responsibilities afforded by Colorado law to spouses”). In addition, states that do not make civil marriage available to same-sex couples but have a robust domestic partnership law often recognize out-of-state same-sex marriages as domestic partnerships. See, e.g., Colo. Rev. Stat. 14-15-116.

Under DOMA § 3, domestic partners could not be treated as spouses under federal law even where they were treated as spouses for purposes of state law. As noted above, now that Section 3 has been repealed, the IRS and DOL have made clear that for purposes of federal employee benefits law and federal tax law, the

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3 Same-sex marriage is available in numerous states that provide or provided same-sex couples with civil unions or registered domestic partnerships. These states have taken varying approaches as to whether to continue to provide equivalent statuses. For example, in California, New Jersey, Hawai’i, and Illinois, same-sex couples may marry or enter into spousal-equivalent statuses, which will continue to be recognized as such. See Cal. Sec’y of State, California Domestic Partnership Registry, available at http://www.sos.ca.gov/dpregistry; New Jersey Dep’t of Health, Frequently Asked Questions, available at http://www.state.nj.us/health/vital/faq.shtml#ssm; Hawai’i Act. 001, available at http://www.capitol.hawaii.gov/splsession2013b/SB1_HD1_.pdf; Illinois Religious Freedom and Marriage Fairness Act, Ill. Public Act 98-0597. Some states that formerly provided domestic partnerships or civil unions no longer do so now that marriage is available to same-sex couples, however. See, e.g., State of Delaware, Delaware Marriage, available at http://www.delaware.gov/marriage/ (noting that no new civil unions will be created); Rhode Island Dep’t of Health, Rhode Island’s Marriage Equality Law, available at http://www.health.ri.gov/records/about/marriageequalitylaw/index.php (noting that civil unions are not available after August 1, 2013).

The treatment of these statuses by employee benefit plans is likely to become less significant as same-sex marriage becomes better established. That is, because same-sex married couples are recognized as such for federal law purposes even if they reside in a non-same-sex marriage state, it is unlikely to be significant for federal law purposes whether the state where they reside recognizes them as domestic partners or civil union parties – although it may be significant for state law purposes.

Employee benefit plans will likely face questions regarding the status of domestic partners under their terms. For example, if a plan does not define “spouse” but incorporates California law, California registered domestic partners may argue that they are entitled to be treated as spouses under the plan terms even if the plan terms do not explicitly provide benefits for domestic partners. Other issues may also arise under plan terms, particularly for claims that arise pre-Windsor.

4 Additionally, in the wake of Windsor, state bans on same-sex marriage will continue to be the subject of constitutional challenges under both state and federal constitutions. As of May 1, 2014, 72 lawsuits have been filed in 31 states and territories by same-sex couples seeking to marry or have their existing marriages recognized. See Freedom to Marry, “Marriage Litigation,” at http://www.freedomtomarry.org/litigation. Litigation challenging state laws in nine states is currently pending in the U.S. Courts of Appeals. See id. An analysis of these constitutional issues is outside the scope of this paper, but many commentators – including Justice Scalia in his Windsor dissent – believe that Windsor bolsters these constitutional challenges. Indeed, several recent decisions overturning state same-sex marriage bans or state bars on recognition of out-of-state same-sex marriages have relied heavily on Windsor. See, e.g., DeBoer v. Snyder, No. 12-CV-10285, 2014 WL 1100794, at *15 n.6 (E.D. Mich. Mar. 21, 2014); Bostic v. Rainey, No. 13c-CV-395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); Bourke v. Beshear, No. 13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); Bishop v. U.S. ex rel. Holder, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1195 (D. Utah 2013) (noting that while Windsor “does not answer the question presented here . . . its reasoning is nevertheless highly relevant and is therefore a significant doctrinal development”). All of these cases are currently on appeal.
B. Plan Interpretation Questions.

Plan language establishing spousal benefits has been subject to interpretation, but the DOL’s Technical Release 2013-04 and IRS Notice 2014-19 resolve some previous questions. Plan language generally falls into the following categories:

- Plan does not define “spouse” with reference to sex or with reference to any state’s law: pursuant to Technical Release 2013-04 and Notice 2014-19, there is a strong argument that the plan provides benefits to all legally married spouses, regardless of the law of the state where they live or work. See, e.g., Cozen O’Connor P.C. v. Tobits, 2013 WL 3878688 (E.D. Pa. July 29, 2013).

- Plan defines spouse by specific reference to DOMA: there is an argument that invalidity of DOMA means that the plan provides benefits to all legally married spouses.

- Plan defines spouse as “opposite-sex spouse”: the plan term is clear, but plans are required to treat same-sex spouses as spouses for federal tax purposes due to Revenue Ruling 2013-17, and pension plans must provide certain mandatory benefits to same-sex spouses pursuant to Technical Release 2013-04. See § VIII.C, below. In addition, plans defining spouse as “opposite-sex spouse” may be subject to sex discrimination claims. See § V.D, below.

To the extent that plans have discretion to define eligibility for spousal benefits not mandated by ERISA or the Internal Revenue Code, for the reasons cited in Technical Release 2013-04, a “place of celebration” rule will be the most efficient for plan administrators. It avoids the need for plan administrators to inquire into the sex of each married plan participant’s spouse, as well as the need for plan administrators to monitor the state of domicile for all same-sex married employees and former employees and their spouses. In addition, a place-of-celebration rule avoids the need for changes to plan terms and administrative procedures as state laws change – a trend that seems likely to continue.

C. Retroactivity Issues.

Significant retroactivity issues can be expected to arise from both DOMA’s unconstitutionality and from the changing landscape of same-sex marriage in the states.

The invalidity of DOMA raises the question whether same-sex married spouses are entitled to be treated as married under federal law retroactive to the dates of their marriages. Revenue Ruling 2013-17 and Notice 2014-19 make clear that for federal tax purposes, employee benefit plans must recognize many same-sex marriages beginning June 26, 2013, and all same-sex marriages beginning September 16, 2013. Thus, a plan does not fail to comply with requirements of the Internal Revenue Code because it fails to recognize a same-sex marriage prior to that date. However, federal tax law does not control claims by participants and beneficiaries under ERISA § 502(a), 29 U.S.C. § 1132(a). See Crawford v. Roane, 53 F.3d 750, 756-57 (6th Cir. 1995) (holding that court has no power to resolve tax qualification issues in an action under ERISA § 502, but “[e]ven if this Court would determine that the Plan is disqualified for tax-deferred treatment, the written terms of the Plan would continue to be effective as a written contract between the participant, his beneficiaries, and the Plan sponsor.”). In addition, federal tax law does not control claims by participants under Title VII. See § V.D, below.

In particular, if a participant or beneficiary has a claim for benefits under the terms of a plan, if the plan can be read to provide spousal benefits to same-sex spouses, that claim can still be brought even if it arises before Windsor. See, e.g., Cozen O’Connor P.C. v. Tobits, 2013 WL 3878688 (E.D. Pa. July 29, 2013) (holding that surviving same-sex spouse was entitled to spousal benefit where plan did not exclude same-sex spouses from definition of spouse). In sum, although a plan can comply with federal tax law prior to June 26 or September 16, 2013 without recognizing same-sex marriages, participants and beneficiaries may still bring claims for spousal benefits and claims for violations of ERISA or the terms of a plan, even if the claims arise before that date.

Such claims could raise issues such as the following:

- Available forms of benefit under defined benefit pension plans: if a same-sex married participant retired prior to Windsor and was treated as ineligible to elect a joint and survivor annuity, is that participant now entitled to make that election? If the participant is entitled to make that election, must he or she repay benefits to the plan that were paid as a single life annuity? What if the participant died after retiring – is the surviving spouse entitled to a survivor annuity? See § VIII.C, below.

- Qualified preretirement survivor annuities: if a same-sex married participant in a defined benefit pension plan died pre-retirement prior to Windsor and the surviving spouse was deemed ineligible for a
preretirement survivor annuity, is the surviving spouse now eligible, and is eligibility retroactive to the date of death? See § VIII.C, below.

- Default beneficiary provisions under defined contribution or life insurance plans: if a same-sex married participant died prior to *Windsor* without designating a beneficiary, who gets the benefit under the plan’s order of priority? See *Cozen O’Connor*, 2013 WL 3878688 (addressing interpleader of profit-sharing plan benefit where competing claimants were participant’s same-sex widow and parents).

- Available forms of benefit under defined contribution plans: if a same-sex married participant died prior to *Windsor*, leaving his or her spouse as the beneficiary, may the spouse now retroactively elect a spousal form of distribution? See § VIII.C, below.

- Spousal consent under defined contribution plans: if a same-sex married participant died prior to *Windsor*, having named a nonspouse beneficiary without spousal consent, can the spouse now challenge the distribution to the nonspouse? See ERISA § 205, 29 U.S.C. § 1155.

Participants and beneficiaries have a strong argument that *Windsor* and subsequent federal guidance must now be applied even to facts predating *Windsor*. In *Windsor*, the Supreme Court struck down as unconstitutional Section 3 of DOMA and applied its ruling to the parties in that case. It affirmed the lower court’s judgment requiring the United States to refund Ms. Windsor the $363,053 in estate taxes that she had paid to the IRS (as well as interest on the taxes) following the death of her wife in 2009. See 133 S. Ct. at 2682, 2684. This was the case even though at the time that Ms. Windsor’s wife died, DOMA precluded the IRS from recognizing Ms. Windsor as the surviving spouse. The Supreme Court has stated that in civil cases, its “application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision.” *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 89 (1993). In particular, the Supreme Court’s application of federal law to the parties before it is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” Id. at 97 (emphasis added).

*Windsor* is not the first case to remove unconstitutional bars to benefits, and courts have applied Supreme Court decisions retroactively in the benefit context. For example, in *Hurvich v. Califano*, 457 F. Supp. 760 (N.D. Cal. 1978), the court held that Mr. Hurvich, a widower, was entitled to receive Social Security “father’s benefits” retroactive to the date of his wife’s death in 1969. This was the case even though the Social Security statute had limited such benefits to mothers until 1975, when the Supreme Court found statute’s gender classification unconstitutional.
While these retroactivity issues have not yet been litigated, in April 2014, the U.S. Office of Personnel Management (OPM) granted an administrative claim for retroactive survivor benefits brought by the surviving same-sex spouse of a federal employee who died in 2011. The couple had married in California in 2008. When the employee passed away in 2011, the surviving spouse was told that she would not be eligible for any survivor benefits under the Federal Employees Retirement System because DOMA precluded recognition of the marriage. The surviving spouse filed a timely claim for survivor benefits in 2014, arguing that OPM should apply the current law, not the prior unconstitutional law, in evaluating the claim. OPM granted the claim, and the surviving spouse received a lump-sum death benefit and a monthly annuity retroactive to the date of her spouse’s death in 2011.5

Retroactivity issues are likely to be rare. While the exact number of same-sex couples in the United States who had married under the law of a state or a foreign jurisdiction at the time of Windsor is unknown, estimates run in the 100,000 range. See Pew Research Center, How many same-sex marriages in the U.S.? At least 71,165, probably more (June 26, 2013), available at http://www.pewresearch.org/fact-tank/2013/06/26/how-many-same-sex-marriages-in-the-u-s-at-least-71165-probably-more/. For a retroactivity issue to arise under an employee benefit plan, there must be: (1) a same-sex couple validly married under the law of a state or foreign jurisdiction before Windsor; (2) with a spouse participating in an employee benefit plan; and (3) a triggering event occurred before Windsor (for example, for pension plans, the spouse retired or died, or the couple divorced); and (4) because of non-recognition of the marriage by the plan, the couple or spouse was deprived of a spousal benefit that would have been provided had the marriage been recognized. Thus, for any particular plan, retroactivity issues are likely to be unique, individualized, and best addressed on a case-by-case basis.

2. Changes in State Law.

Retroactivity issues also arise from the incremental recognition of marriages in the states. The facts of Windsor present a good example: the Supreme Court noted that the New York couple in Windsor, Ms. Windsor and Ms. Spyer, became

5 In May 2014, one of the former plaintiffs in Pedersen v. OPM, a 2010 case challenging the constitutionality of DOMA, filed suit seeking a survivor benefit under a defined benefit plan sponsored by Bayer. See Passaro v. Bayer Corp., No. 14:cv-00671-WWE (D. Conn.). The couple married in 2008 in Connecticut and the plaintiff’s same-sex spouse passed away in 2009. In 2010, the plaintiff was denied the survivor benefit due to DOMA, and he filed suit challenging DOMA’s constitutionality. In 2013, after Windsor, the plaintiff obtained a judgment in the Pedersen case that DOMA was unconstitutional as applied to him. In this case, the plaintiff alleges that in 2014, Bayer told him that it would not voluntarily pay the benefit. While this case seeks a retroactive benefit, the analysis is likely different because the plaintiff has a judgment in an earlier case.
New York domestic partners in 1993 and married in Canada in 2007. 133 S. Ct. at 26863. In 2008, New York’s governor directed state agencies to begin recognizing out-of-state same-sex marriages. That direction was the subject of litigation that did not resolve until 2009. New York ultimately began making civil marriage available to same-sex couples in 2011. Meanwhile, Ms. Spyer died in 2009. The Supreme Court noted that the “State of New York deems their Ontario marriage to be a valid one.” Id. However, the Supreme Court had no occasion to determine what would have happened if New York had not recognized same-sex marriages until after Ms. Spyer’s death.

Retroactivity issues may also arise in states that provide for the “conversion” under state law of domestic partnerships into marriages. In Delaware, for example, same-sex couples in civil unions can act to convert their civil unions to marriages, and for those who do not act, on July 1, 2014, all civil unions will automatically be converted to marriages. See 13 Del. C. § 218. The effective date of each marriage for state law purposes will be deemed to be the date of the original civil union. See id. Thus, retroactivity issues may arise as to the marriages with effective dates prior to Windsor.

D. Title VII and the Employment Non-Discrimination Act (ENDA).

After Windsor, Revenue Ruling 2013-17, and Technical Release 2013-04, plans will remain free to define “spouse” as “opposite-sex spouse” for some purposes. However, recent developments in Title VII law may lay the groundwork for sex discrimination claims based on denial of spousal benefits to same-sex married employees. Historically, courts have classified sex discrimination claims by gay and lesbian employees as claims of sexual orientation discrimination that are not cognizable under Title VII. More recent developments, however, suggest that courts may begin to take a different view of whether claims that have been classified as sexual orientation and/or gender identity discrimination claims may in fact state claims of discrimination “because of sex.”

In particular, the Equal Employment Opportunity Commission has found that claims by gay and lesbian federal employees alleging sex-stereotyping state a sex discrimination claim under Title VII. For example, in Veretto v. U.S. Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (E.E.O.C.) (July 1, 2011), the Commission held that discrimination based on the sex stereotype that men should only marry women can constitute discrimination based on sex. Likewise, in Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (E.E.O.C.) (Dec. 20, 2011), the Commission concluded that discrimination based on the sex stereotype that women should only have sexual relationships with men can constitute discrimination based on sex. In April 2012, the Equal Employment Opportunity Commission issued its decision in Macy v. Dept. of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (E.E.O.C.) (Apr. 20, 2012). Macy
involved a transgender applicant for federal employment. The Commission held that a complaint of discrimination based on gender identity, change of sex, and/or transgender status was cognizable under Title VII. Although dealing directly with discrimination against a transgender person, the rationale of *Macy* has been widely viewed as supporting the argument that claims of discrimination against gay and lesbian employees are cognizable under Title VII.⁶

Citing these and other decisions, the EEOC has issued guidance stating that federal employees who believe they have been discriminated against on the basis of sexual orientation have a right to pursue sex discrimination claims. See Equal Employment Opportunity Commission, Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees, available at http://www1.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm?renderforprint=1.

In addition, a federal district court recently held that a gay employee sufficiently pled a claim for sex discrimination under Title VII because as a gay man, the employee’s “sexual orientation was not consistent with the defendant’s perception of acceptable gender roles.” *Terveer v. Billington*, __ F. Supp. 2d __, 2014 WL 1280301, at *9 (D.D.C. Mar. 31, 2014).

Although the rationale that discrimination against gay and lesbian employees may violate Title VII or other antidiscrimination laws has not been tested in the benefit plan context, a plan provision limiting spousal benefits to opposite-sex spouses could be seen as embodying a sex stereotype that women should marry men and men should marry women. One such claim has been brought so far, in *Hall v. BNSF Railway Co.*, No. 13-02160 (W.D. Washington), filed on December 3, 2013. Hall asserts that his employer’s refusal to enroll his same-sex spouse in its health plan is a violation of the Equal Pay Act.⁷ Although DOMA did not directly affect such a claim, or similar potential claims, the elimination of DOMA eliminates a potential rationale – whether correct or not – for such a plan design decision.

ENDA is proposed federal legislation that would prohibit discrimination in employment on the basis of sexual orientation and gender identity. The most recent version of ENDA, which was passed by the Senate on November 7, 2013, does not

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⁶ In recent years, federal courts have concluded that discrimination against transgender individuals because of their gender non-conformity is gender stereotyping prohibited by Title VII. See *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) (citing Title VII cases).

⁷ It is not clear whether the plan at issue in *Hall* is an ERISA plan.
contain the benefits plan carve-out present in previous versions. See https://www.govtrack.us/congress/bills/113/s815/text. Prior versions provided that nothing in ENDA would be construed to require an employer to treat as married for purposes of any employee benefits plan any person who was not married within the meaning of DOMA § 3. See, e.g., S. 811 (112th Cong.) (Employment Non-Discrimination Act of 2011).

E. Selected Early Post-Windsor Court Decisions.

1. Same-Sex Widow Entitled to Pension Benefit.

In the first post-Windsor ERISA decision, the U.S. District Court for the Eastern District of Pennsylvania awarded a surviving spouse benefit under a profit-sharing plan to a participant’s same-sex widow. Cozen O’Connor P.C. v. Tobits, 2013 WL 3878688 (E.D. Pa. July 29, 2013). In Cozen O’Connor, the couple married in Canada in 2007 and resided in Illinois. One spouse worked in the Chicago office of a Philadelphia-based law firm, which sponsored a profit-sharing plan. The participant spouse died in 2010, without having executed a valid beneficiary designation for her plan account. Both the widow and the participant’s parents filed claims for the benefit, and the plan filed an interpleader action. The plan terms did not define spouse, other than incorporating the ERISA-permitted requirement that the couple have been married for at least a year as of the earlier of the annuity starting date or death. After Windsor, the court held that the widow was entitled to the benefit under the plan’s default order of priority. The court explained that ERISA and the IRC establish the “floor” for spousal rights in pension plans, and that Windsor “leveled the floor,” requiring equal treatment of legally married couples. Because the couple were validly married in Canada, and the Illinois probate court had recognized the widow as a surviving civil union partner, which is equivalent to a surviving spouse under Illinois law, the widow was entitled to be treated as the surviving spouse under the plan. The plan’s Pennsylvania choice-of-law provision – Pennsylvania being a non-marriage state – did not control the outcome because ERISA preempted Pennsylvania law.

Although the parents initially appealed, they dismissed the appeal following issuance of Rev. Rul. 2013-17.

2. Ohio Required to Recognize Maryland Marriage.

In the first post-Windsor decision on the validity of a state non-recognition law, the U.S. District Court for the Southern District of Ohio issued a temporary restraining order prohibiting the local Ohio registrar from accepting a death certificate for a same-sex-married person that did not reflect that the person was married and that his husband was his surviving spouse. Obergefell v. Kasich, No. 13-cv-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013). The couple resided in Ohio
and traveled to Maryland to be married. When one spouse’s death from ALS was imminent, they filed suit to compel recognition of the marriage on the death certificate. The court held that Ohio’s statute prohibiting recognition of out-of-state same-sex marriages, enacted in 2004, was a denial of equal protection. The court emphasized that Ohio recognizes out-of-state opposite-sex marriages even where the couple could not have married in Ohio, such as where the couple are first cousins or where one spouse is underage.

On December 23, 2013, the district court issued a permanent injunction requiring Ohio to recognize valid out-of-state same-sex marriages on Ohio death certificates. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968 (S.D. Ohio 2013). The state of Ohio appealed. As of May 1, 2014, the case is being briefed in the Sixth Circuit.

3. Missouri Court Denies Survivor Benefits to Unmarried Same-Sex Partner of Deceased Highway Patrol Employee.

The Supreme Court of Missouri affirmed a decision denying survivor benefits to a same-sex partner of a deceased highway patrol employee. *Glossip v. Missouri Dep’t of Transp. & Hwy. Patrol Employees’ Retirement Sys.*, __ S.W.3d __, 2013 WL 5942601 (Mo. Oct. 29, 2013) (en banc). The couple had been in a relationship since 1995, but had never married. The court concluded that the plaintiff was properly denied survivor benefits because he and the patrolman were not married. *Id.* at *1, *5-6. The court rejected the argument that the state could not constitutionally condition the receipt of benefits on marital status given that Missouri banned same-sex marriage. *Id.* at *6. It noted that the case would “require a different analysis” if, as in *Windsor*, the couple “had been married under the law of another state or jurisdiction.” *Id.*

4. Former Federal Employee in Oregon Entitled to Reimbursement for Her Domestic Partner’s Health Benefits.

A Ninth Circuit panel awarded back pay for the costs of health insurance to a former federal employee in Oregon who had not been permitted to enroll her same-sex domestic partner in the federal employees’ health plan. *In re Fonberg*, __ F.3d __, 2013 WL 6153265 (Nov. 25, 2013); see § IX.B, below. The court concluded that Ms. Fonberg and her partner were treated differently in two ways. First, they were treated differently from opposite-sex couples who could marry and gain spousal benefits under federal law, which the court found was discrimination on the basis of sexual orientation in violation of the District of Oregon’s Employment Dispute Resolution plan. Second, they were treated differently compared to other same-sex couples in other states in the Ninth Circuit, who could marry and gain federal benefits under *Windsor*, and this violated “the principle that federal employees
must not be treated unequally in the entitlements and benefits of federal employment based on the vagaries of state law.” See id. at *2. It further found that the Office of Personnel Management’s “distinction based on the sex of the participants in the union” constituted sex discrimination and a deprivation of due process and equal protection. See id.

5. No ERISA Section 510 Claim for Health Plan’s Exclusion of Same-Sex Spouses.

A district court in the Southern District of New York recently dismissed a case alleging that an ERISA-governed health plan’s exclusion of same-sex spouses and domestic partners violates Section 510 of ERISA, which prohibits employers from discriminating against participants for exercising rights to which they are entitled under an employee benefit plan. Roe v. Empire Blue Cross Blue Shield, No. 12-cv-04788 (NSR), 2014 WL 1760343 (S.D.N.Y. May 1, 2014). The plaintiffs also alleged that the defendants breached their fiduciary duties by enforcing a plan term that violated ERISA. The plan at issue did not define “spouse,” but contained an exclusion stating “Same sex spouses and domestic partners are NOT covered under this plan.” Id. at *1. The plaintiff filed a proposed class action in 2012 on behalf of participants or beneficiaries of Blue Cross Blue Shield insurance plans in New York and participants and beneficiaries of the particular plan at issue who are affected by the policy of denying coverage to same-sex spouses. The court dismissed the case, noting that ERISA does not require a health plan to provide benefits to spouses at all, that the Plan did not violate ERISA, and that Section 510 of ERISA did not apply.

The plaintiffs had not raised, and the court did not address, “whether the Exclusion is lawful under other federal laws.” Id. at *8. While it is clear that health plans are not required by ERISA to provide coverage for any spouses, opposite- or same-sex, see § VII.B.2 below, those seeking to challenge plan terms that are discriminatory on their face can argue that such discrimination violates federal antidiscrimination laws such as Title VII. See § V.D, above.

VI. Relevant Federal Statutes.

A. ERISA.

1. Plans Regulated by ERISA.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. (“ERISA”), governs most employee benefits provided by private employers and unions. Specifically, ERISA governs two distinct kinds of plans: “employee pension benefit plans” and “employee welfare benefit plans.” The term “employee pension benefit plan” or “pension plan” includes any plan that provides retirement income to

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employees or results in a deferral of income by employees for periods extending to
the termination of employment or beyond. ERISA § 3(2), 29 U.S.C. § 1002(2). The
term “employee welfare benefit plan” or “welfare plan” includes any plan that
provides, “through the purchase of insurance or otherwise, (A) medical, surgical, or
hospital care or benefits, or benefits in the event of sickness, accident, disability,
death or unemployment, or vacation benefits, apprenticeship or other training
programs, or day care centers, scholarship funds, or prepaid legal services, or (B)
any benefit described in section 302(c)” of the LMRA. ERISA § 3(1), 29 U.S.C. §
1002(1).

As discussed below, the distinction between pension benefits and welfare
benefits is significant in the context of benefits for same-sex couples, because
pension plans are subject to special rules protecting spousal benefits, and because
when DOMA was in effect, welfare plan benefits had tax consequences for same-sex
couples.

2. Plans Not Regulated by ERISA.

ERISA does not govern plans that provide benefits not enumerated in its
definitional sections, including moving expenses, bereavement leave, family medical
leave, maternity and paternity leave, merchandise discounts, memberships,
membership discounts, and travel benefits. See Air Transport Ass’n of Am. v. City
& County of San Francisco, 992 F. Supp. 1149, 1174 (N.D. Cal. 1998), aff’d in part
and remanded in part on other grounds, 266 F.3d 1064 (9th Cir. 2001).

ERISA also does not govern benefits provided by federal, state, or local
governments (“government plans”), or by churches or associations or conventions of

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8 An analysis of non-ERISA plans is beyond the scope of this paper. It bears
noting, however, that the regulations under the Family and Medical Leave Act
define spouse with reference to the law of the state where an employee is domiciled:
“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 in states where it is recognized.” 29 C.F.R. § 825.122. After Windsor,
the Department of Labor issued guidance stating that this state-of-residence
recognition requirement applies to same-sex marriages. U.S. Dep’t of Labor, Fact
Sheet #28F: Qualifying Reasons for Leave Under the Family Medical Leave Act
(“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.”).
Church plans may elect ERISA coverage as to their pension plans. ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2). Whether pension plans established by church-affiliated entities, such as healthcare organizations, are exempt from ERISA is in question. See Rollins v. Dignity Health, __ F. Supp. 2d __, No. 13-cv-1450-THE, 2013 WL 6512682 (N.D. Cal. Dec. 12, 2013) (collecting cases). While the law remains unsettled, some courts have found that churches may elect ERISA coverage for their welfare plans. See Medellin v. CommunityCare HMO, Inc., 2011 WL 1299066 (N.D. Okla., Mar. 31, 2011) (collecting cases); Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004) (discussing election of ERISA coverage by church welfare plan to avoid city requirement that contractors provide health benefits to employees’ same-sex domestic partners); but see Okerman v. Life Ins. Co. of N. Am., CIV-S-00-0186 GE970, 2001 WL 36203082 (E.D. Cal. Dec. 24, 2001) (holding that church plan was not an ERISA plan because it had not made an affirmative election, but also apparently concluding that such an election was not available); Dep’t of Labor, Advisory Letter No. 95–07A (“It is the Department’s understanding that an election pursuant to Code section 410(d), as referenced in ERISA section 4(b)(2), is available for purposes of Title I of ERISA only to a pension benefit arrangement.”). Courts that have concluded that church welfare plans can elect ERISA coverage have generally required an affirmative election. See Rinehart v. Life Ins. Co. of N. Am., 2009 WL 995715, at *5 (W.D. Wash. Apr. 14, 2009) (finding that employer never made “an affirmative election under § 410(d) as required to have [ ] ERISA apply to the LTD plan” despite filing IRS Form 5500s for years); Medellin, 787 F. Supp. 2d at 1265-66 (“[B]ased on the absence of any affirmative election in the record, the Court is unwilling to find that the Plan is governed by ERISA because of an election pursuant to Section 410(d).”); Torres v. Bella Vista Hosp., Inc., 523 F. Supp. 2d 123, 141 & n.3 (D.P.R. 2007) (“I defer to the Code of Federal Regulations, which imposes a strict requirement that the electing party state explicitly that it is making its election under § 410(d). 26 C.F.R. § 1.410(d)-1(c)(5).”).

3. ERISA Preemption.

ERISA supersedes “any and all state laws” that relate to employee benefit plans, except state laws that regulate insurance, banking, or securities. ERISA § 514, 29 U.S.C. § 1144. Thus, state and local governments cannot directly mandate the provision of ERISA-governed benefits, including benefits for same-sex couples. See Air Transport Ass’n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1174 (N.D. Cal. 1998), aff’d in part and remanded in part on other grounds, 266 F.3d 1064 (9th Cir. 2001).

Likewise, state anti-discrimination laws are preempted by ERISA insofar as they apply to employee benefit plans, except to the extent that state law is consistent with Title VII. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) (in pre-Pregnancy Disability Act case, holding New York Human Rights Law
pregnancy discrimination provision preempted as to ERISA plans). Thus, state
prohibitions on sexual orientation or marital status discrimination are inapplicable
to ERISA plans, except to the extent that sexual orientation discrimination
constitutes sex-stereotyping under Title VII. See § V.D, above.

However, the “insurance savings clause” allows states to regulate insured
ERISA plans indirectly by regulating the terms of insurance policies. FMC Corp. v.
Holliday, 498 U.S. 52, 58 (1990); see Kentucky Ass’n of Health Plans Inc. v. Miller,
538 U.S. 329 (2003) (“any willing provider” statute saved from preemption); Rush
law saved from preemption). As discussed below, some states mandate the provision
of same-sex spouse or domestic partner coverage by insured plans through a
regulation of insurance, or mandate that insurers offer employers the option of
providing such coverage.

B. DOMA.

Section 3 of the federal Defense of Marriage Act (“DOMA”) defined the terms
“marriage” and “spouse” for purposes of federal law: “In determining the meaning of
an Act of Congress, or of 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
a wife.” 1 U.S.C. § 7. Thus, before Windsor, where ERISA referred to “marriage” or
“spouse,” these terms excluded same-sex spouses and civil union partners/domestic
partners. The same applied to other benefits-related federal laws such as the
Internal Revenue Code and the statute governing the Federal Employees’ Health
Benefit Program (“FEHBP”), 5 U.S.C. Ch. 89.

While DOMA governed the interpretation of the terms “marriage” and
“spouse” in the statute itself, DOMA did not prescribe the meanings of these terms
as they appeared in ERISA-governed benefit plans. With possible limited exceptions
discussed below, even before Windsor, private employers were free to define these
terms in their benefit plans to include same-sex couples, or to use other terms to
extend eligibility to same-sex spouses or civil union partners/domestic partners, as
the plan chose to define those terms. See Union Sec. Ins. Co. v. Blakeley, 656 F3d
275 (6th Cir. 2011) (holding that whether an opposite-sex cohabitant was a domestic
partner within the meaning of an ERISA-governed life insurance plan should be
determined by reference to the plan language, not by reference to a federal common-

law definition of “domestic partner”); see also Baldwin v. Univ. of Pittsburgh Med.
Ctr., 636 F.3d 69 (3d Cir. 2011) (holding that meaning of “children” in a welfare
plan was to be determined by reference to the intent of the parties and not to state
law).
C. Internal Revenue Code Definition of “Dependent.”

After Windsor and Rev. Rul. 2013-17, same-sex spouses can no longer be tax dependents under federal tax law. See Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law, available at http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples. However, the status of a same-sex domestic partner as a tax dependent will continue to affect a variety of issues under pension and welfare plans because domestic partners and civil union partners are not recognized as spouses under federal law. See Rev. Rul. 2013-17.

To be treated as a dependent under the Internal Revenue Code, a domestic partner must: (1) have the same principal place of abode as the employee and be a member of the employee’s household, (2) receive more than half of his or her support for the taxable year from the employee, and (3) have gross income less than the applicable exemption amount ($3,700 in 2011). IRC §§ 151(d), 152(d). Other requirements for dependent status, such as that the dependent not be a spouse (for federal law purposes) or child of the employee, would by definition be met by a domestic partner.

For federal tax purposes, before Windsor the IRS recognized the community property rights of same-sex spouses and domestic partners in community property states that recognize those rights (currently CA, NV, and WA). See IRS CCA 201021050 (May 28, 2010), available at http://www.irs.gov/pub/irs-wd/1021050.pdf; IRS, 1040 Instructions 2012, p. 20, available at http://www.irs.gov/pub/irs-pdf/i1040gi.pdf; IRS, 1040EZ Instructions 2012, p. 10, available at http://www.irs.gov/pub/irs-pdf/i1040ez.pdf. Revenue Ruling 2013-17 does not appear to change this rule for domestic partners. For this reason, in these states a domestic partner, if not recognized under federal law, is likely to have income in excess of the applicable exemption amount, because even if the domestic partner has no income, one-half of the employee’s income will be attributable to him or her. In addition, the support requirement is unlikely to be met unless the employee provides more than 50 percent of the domestic partner’s support from separate property.

VII. Welfare Plan Issues.

A. Continuation Coverage.

1. Federal Law.

Amendments to ERISA by the Consolidated Omnibus Budget Reconciliation Act of 1986 (“COBRA”) added the requirement that ERISA-governed group health plans provide continuation coverage to employees and their “qualified beneficiaries” in the case of a loss or reduction of coverage due to various “qualifying events,”
including termination of employment, reduction of hours, divorce, death of the employee, and bankruptcy of the employer. ERISA §§ 601-607, 29 U.S.C. §§ 1161-67. However, the term “qualified beneficiary” includes only a spouse or a dependent child. ERISA § 607(3), 29 U.S.C. § 1167(3). As a result of Windsor and Technical Release 2013-04, an ERISA-governed health plan is required to provide continuation coverage to employees’ same-sex spouses if the plan provides active coverage to same-sex spouses, because a beneficiary must be enrolled in the plan prior to the qualifying event – such as termination of employment, divorce, or death – in order to be eligible for continuation coverage. Thus, a group health plan could theoretically exclude same-sex spouses from coverage and thereby avoid the requirement to provide continuation coverage. As discussed above in Section V.D, such an exclusion could expose the plan to Title VII claims.

An ERISA-governed health plan is not required to provide continuation coverage to domestic partners, even if it provides regular coverage to domestic partners. Nothing precludes a plan from providing continuation coverage to persons who are not qualified beneficiaries, however, including domestic partners.

2. State Law.

In states that recognize same-sex marriage and/or domestic partnerships, state insurance law may mandate continuation coverage for same-sex spouses or domestic partners.

B. Mandated Benefits (or Options to Provide Benefits) Under Insurance Law.


As noted above, states are free to regulate insured ERISA plans through regulations of insurance. California’s Insurance Equality Act (“IEA”), for example, requires that “health care service plans” (HMOs) and insurance policies provide coverage for registered domestic partners under the state’s Domestic Partner Rights and Responsibilities Act (“DPRRA”) that is equal to any coverage provided for spouses. Cal. Health & Safety Code § 1374.58(a); Cal. Ins. Code §§ 381.5(a), 10121.7(a). IEA was effective January 2005. As a result, an insured employer health plan in California must provide benefits to registered domestic partners if, and to the extent that, it provides benefits for married spouses. However, an ERISA-governed health plan in California that is not funded through the purchase of insurance – that is “self-funded” – need not provide benefits to registered domestic partners.

In 2011, California’s Insurance Nondiscrimination Act amended the relevant statutes to close a perceived loophole in the IEA by providing that the IEA applies
to health insurance policies and health care service plans that are marketed, issued, or delivered to a resident of California, regardless of the situs of the contract or the master group policyholder. See Cal. Ins. Code §§ 10112.5, 10121.7; Cal. Health & Safety Code §§ 1374.58, 1367.30.

Other states have also enacted legislation mandating that insured benefits be extended to same-sex spouses and domestic partners to the same extent as opposite-sex spouses, or mandating that insurance policies offer such benefits. In addition, some state insurance commissioners have also mandated that insurers provide spousal benefits to same-sex spouses. See State of Connecticut Ins. Dep’t, Bulletin IC-21 (rev. July 10, 2009), available at http://www.ct.gov/cid/lib/cid/BullIC21rev.pdf (“[T]he term ‘spouse’ as used in existing insurance policies will now be interpreted to include a same sex spouse, pursuant to a legal marriage entered into in Connecticut or another state which recognizes same sex marriage.”); State of New York Ins. Dep’t, Circular Letter No. 27 (2008), available at http://www.ins.state.ny.us/circltr/2008/cl08_27.htm.


There is no requirement under ERISA that ERISA-governed group health plans provide benefits to any spouses, opposite- or same-sex. The federal government regulates insurance, however, including qualified health plans offered through Affordable Insurance Exchanges (as part of the Patient Protection and Affordable Care Act). On March 14, 2014, the Centers for Medicare & Medicaid Services (of the Department of Health & Human Services) issued guidance to clarify the regulations’ prohibition against discrimination based on sexual orientation. See CMS, Frequently Asked Question on Coverage of Same-Sex Spouses (Mar. 14, 2014), at
http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/frequently-asked-questions-on-coverage-of-same-sex-spouses.pdf. The regulations preclude a health insurance issuer in the group or individual market who offers coverage of an opposite-sex spouse from refusing to offer coverage of a same-sex spouse. The regulations do not require a group health plan “to provide coverage that is inconsistent with the terms of eligibility for coverage under the plan, or otherwise interfere with the ability of a dependent spouse for purposes of eligibility of coverage under the plan.” See id. at 1-2. Rather, the regulations prohibit an issuer from choosing to decline to offer to a plan sponsor (or individual in the individual market) the option to cover same-sex spouses under the coverage on the same terms and conditions as opposite-sex spouses. Id. at 2.


1. Eligibility for FSAs, HSAs, or HRAs.
Under DOMA, domestic partners and same-sex spouses who were not tax dependents could not receive benefits under a Flexible Spending Account, Health Reimbursement Arrangement, or Health Savings Account. See Rev. Rul. 2006-36. Now, same-sex spouses will be eligible for such benefits, but domestic partners will not. In addition, employers that sponsor cafeteria plans may permit employees in same-sex marriages to change their elections mid-year so long as they were married as of June 26, 2013, because the Windsor decision itself constituted a change in legal marital status. IRS Notice 2014-1.

2. Whether Employer Contributions Are Includible in Gross Income.

Employer contributions for medical or life insurance benefits for an employee’s spouse are not includible in the employee’s taxable income for federal tax purposes, and the employee may make contributions toward such benefits on a pre-tax basis. IRC §§ 105(b), 106(a); Treas. Reg. § 1.106-1. Under DOMA, for a non-dependent domestic partner or same-sex spouse, however, employer contributions were taxable to the employee, and employee contributions were required to be made on an after-tax basis. Priv. Ltr. Rul. 9717018 (Apr. 25, 1997).

The unequal tax treatment of welfare plan benefits for same-sex spouses, as well as the administrative burden on employers of compliance with the requirement to impute income to employees, were a focus of the court in Massachusetts v. United States Dep’t of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010), aff’d, 682 F.3d 1 (1st Cir. 2012), cert. denied, 133 S. Ct. 2887. Assessing the state’s standing to challenge the application of DOMA § 3, the court agreed that the state had been injured by DOMA in several ways, including payment of increased Medicare taxes for state employees due to imputed income on health benefits for same-sex spouses. The state presented evidence that it had spent $47,000 to develop and implement systems to identify employees who enrolled same-sex spouses in its health plan and to calculate imputed income for each employee, and continued to incur costs on an ongoing basis to comply with these tax requirements.

Numerous states have enacted legislation excluding the value of coverage for a non-dependent domestic partner from gross income for state tax purposes and permitting employees to make contributions for such coverage on a pre-tax basis for state tax purposes. See, e.g., Oregon Dep’t of Revenue, Registered Domestic Partners in Oregon, available at http://www.oregon.gov/dor/pertax/pages/rdp.aspx.

In an effort to ameliorate the tax inequality, some employers have “grossed up” employees’ earnings to cover the federal tax on employer contributions for same-sex spouses (prior to DOMA) and domestic partner benefits. See “For Gay Employees, an Equalizer,” The New York Times, May 21, 2011. In October 2013, California enacted legislation making an employer’s “gross-up” payment non-
taxable at the state level. Cal. Rev. & Tax Code § 17141(a).

Revenue Ruling 2013-17 ends federal taxation of imputed income for benefits for same-sex spouses, including authorizing refund claims by employees and employers. However, the imputed income issue persists for non-tax-dependent domestic partners.

VIII. Pension Plan Issues.

A. Division of Qualified Plan Benefits on Dissolution.

ERISA preempts state marital property law and, furthermore, prohibits alienation or assignment of pension plan benefits. See Boggs v. Boggs, 520 U.S. 833 (1997); Egelhoff v. Egelhoff, 532 U.S. 141 (2001); ERISA § 206, 29 U.S.C. § 1056. To fill the void left by preemption of state law, Congress enacted the Retirement Equity Act of 1984 (“REA”), which amends ERISA’s anti-alienation provision to provide for the division of pension benefits upon termination of a marriage. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). Specifically, the statute provides that the prohibition on alienation or assignment of benefits does not apply to “the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order” (“DRO”), if the DRO is determined by the plan administrator to meet the requirements for a qualified domestic relations order (“QDRO”). ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

ERISA defines a DRO to include only a judgment, decree, or order that “relates to the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant.” ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B). Under DOMA, “spouse” could not include a domestic partner or same-sex spouse. Thus, it appeared that a judgment, decree, or order entered by a state court in connection with the dissolution of a domestic partnership or same-sex marriage would not be a DRO – and therefore could not be determined to be a QDRO – unless it related to a tax-dependent domestic partner or same-sex spouse. A plan administrator that qualified a DRO arising out of such a dissolution while DOMA was in effect risked violating the anti-alienation provision.

After DOMA and Technical Release 2013-04, these barriers to qualification of a DRO no longer exist for DROs issued in dissolutions of same-sex marriages, but continue to exist for dissolutions of domestic partnerships.

A second question arises as to the requirement that a DRO “relate[] to . . . marital property rights.” It is possible that a DRO relating to marital property rights of a domestic partner could meet this requirement. See Owens v. Automotive Machinists Pension Trust, 551 F.3d 1138 (9th Cir. 2009) (holding that a state court order related to “marital property rights” when it directed payment of pension benefits to a tax dependent who had lived for 30 years in a “quasi-marital” opposite-sex relationship with the employee; DOMA did not control the meaning of “marital
property” in ERISA § 206). Since 2010, the IRS has recognized the community property obligations of same-sex married couples and domestic partners in community property states, and requires that they file their federal income tax returns accordingly, supporting the argument that the meaning of “marital property” is a question of state law. See IRS Chief Counsel Advisory 201021050.

B. Taxation of Distributions to an Alternate Payee.

When a qualified retirement plan makes a distribution to an alternate payee who is the spouse or former spouse of the plan participant, the alternate payee is treated as the distributee. IRC § 402(e)(1). However, where an alternate payee is not a spouse or former spouse, the distribution is reported as income to the plan participant. Thus, the distribution will be reported on a Form 1099-R issued to the participant. See Internal Revenue Service, 2012 Instructions for Forms 1099-R and 5498.

For alternate payees in dissolutions of same-sex marriages, issuance of a 1099-R to the alternate payee is authorized by the Code after Rev. Rul. 2013-17. However, the reporting issue still obtains as to domestic partnership dissolutions.

C. Survivor Benefits.

REA also protects spousal interests in pension benefits by requiring that the default benefit for a married participant in a defined benefit plan be a qualified joint and survivor annuity and that plans provide a qualified preretirement survivor annuity for the surviving spouse of a married participant who dies before retiring. ERISA § 205, 29 U.S.C. § 1055. While DOMA was in effect, these requirements likely did not extend to a participant in a domestic partnership or a same-sex marriage – although, as noted, IRS recognized community property rights of same-sex spouses and domestic partners in community property states.

However, plans have always been free to provide survivor benefits to same-sex spouses and domestic partners, although such survivor benefits would not have been qualified joint and survivor annuities (QJSAs) or qualified pre-retirement survivor annuities (QPSAs) while DOMA was in effect (now, such benefits are qualified for same-sex spouses but not domestic partners). As the United States wrote in a case challenging the constitutionality of DOMA, “Section 3 of DOMA imposes no blanket prohibition against a private retirement plan’s provision of benefits to the same-sex spouse of a plan participant.” Brief of the United States Regarding the Constitutionality of DOMA Section 3, Cozen O’Connor, P.C. v. Tobits, No. 2:11-cv-00045, Dkt. No. 97, p. 2.

Survivor benefits provided to a domestic partner may carry different tax consequences for the beneficiary than survivor benefits paid to a spouse. For example, the “5-year rule” and the “life expectancy rule,” which relate to required
timing of distributions of benefits under qualified plans, include a special rule for distributions to the surviving spouse of an employee, which allows a surviving spouse to postpone receiving distributions until the end of the year in which the participant would have attained age 70½. IRC § 401(a)(9)(B)(iv). Because a domestic partner is not a federally recognized spouse, he or she may not have this option. Prior to Windsor and subsequent guidance, many plans also treated same-sex spouses as ineligible for these forms of distribution.

After Windsor and subsequent agency guidance, qualified defined benefit plans are required to provide QJSAs and QPSAs to participants in same-sex marriages, but not to domestic partners. In addition, as noted above, retired participants and surviving same-sex spouses may have retroactive claims for these benefits.

D. Rollovers.

Prior to January 1, 2007, non-spouses designated as beneficiaries under defined contribution pension plans (such as 401(k) plans) were required to take the benefits as a cash distribution subject to income tax. However, the Pension Protection Act of 2006 (“PPA”) for the first time authorized rollover distributions to non-spouse beneficiaries. IRC § 402(c)(11). The resulting IRA is treated as an inherited IRA, and therefore does not offer the full range of benefits extended to surviving spouses, but it does offer non-spouse beneficiaries, including domestic partners, the opportunity to shelter such benefits from taxation.

The PPA left some confusion as to whether a rollover was available to a non-spouse beneficiary where not provided for by the plan terms. The Worker, Retiree, and Employer Recovery Act of 2008, effective for plan years beginning after December 31, 2009, clarifies that qualified plans are required to permit rollovers by nonspouse beneficiaries. IRC § 402(f)(2)(A).

After Windsor and related agency guidance, same-sex spouse beneficiaries can avail themselves of the full range of distribution options provided to opposite-sex spouses, and participants and surviving spouses may have claims for retroactive benefits. However, domestic partners remain ineligible for spousal treatment under federal tax law.

E. Social Security Offsets Pursuant to Plan Terms.

An issue in pension plan administration that could arise post-DOMA concerns Social Security offsets from pension benefits. Many plan terms provide for coordination of benefits with Social Security benefits. The Social Security Administration has not determined whether it will recognize for purposes of an application for benefits same-sex marriages where the couple were married in a state that permits same-sex marriage, but the number holder is domiciled in a state
that does not recognize the marriage. This means that although all same-sex marriages must now be recognized for federal tax purposes and for benefits mandated by the ERISA, the IRC, and related regulations, an employee in a same-sex marriage who lives in a state that does not recognize the marriage might not be considered married for purposes of receiving Social Security benefits.

IX. Government Employee Benefits Issues.

A. State Employees.

1. Generally.

As noted above, ERISA does not govern benefits provided by state or local governments to their employees. Accordingly, state and local governments are generally free to provide benefits to the same-sex domestic partners and same-sex spouses of their employees, and may be required by state law to do so. However, state and local governments have faced litigation over their provision of such benefits, particularly in states with constitutional amendments banning same-sex marriage. See National Pride at Work, Inc. v. Governor of Mich., 481 Mich. 86 (2008).

9 The Social Security Act provides that a marriage will be recognized for purposes of an application for benefits if the courts of the state in which the insured individual is domiciled at the time of the application or, if the insured individual is dead, in which he or she was domiciled at the time of death, would find that the applicant and the insured individual were validly married at the time the application is filed or at the time of death. 42 U.S.C. § 416(h)(1)(A)(i). However, an applicant may also be recognized as a spouse even if the courts would not have recognized the marriage as valid, but under the laws applied by such courts, the applicant would have the same status as a spouse with regard to intestate personal property. 42 U.S.C. § 416(h)(1)(A)(ii). Consistent with subsection (i), Social Security has issued post-Windsor guidance allowing “for payment of claims [for spousal benefits] when the [number holder] . . . was married in a state that permits same-sex marriage; and . . . is domiciled at the time of application, or while the claim is pending a final determination, in a state that recognizes same-sex marriage.” Where the couple were married in a state that permits same-sex marriage, but the number holder is domiciled – both at the time of application and while the application is pending – in a state that does not recognize the marriage, SSA will hold the claim pending issuance of additional instructions. Finally, the duration of the marriage will be determined without regard to the date of Windsor. Social Security Administration, POMS GN 00210.100, Same-Sex Marriage – Benefits for Aged Spouses (Sept. 17, 2013), at http://policy.ssa.gov/poms.nsf/lnx/0200210100; see also Social Security Administration, POMS GN 00210.400, Same-Sex Marriage – Benefits for Surviving Spouses (Dec. 31, 2013), at https://secure.ssa.gov/poms.nsf/lnx/0200210400.

Post-DOMA Employee Benefits Issues
(state’s constitutional amendment banning same-sex marriage precludes public employers from providing same-sex domestic partner benefits); *Knight v. Superior Ct.*, 128 Cal. App. 4th 14 (2005) (state’s domestic partnership law did not violate constitutional amendment banning same-sex marriage); *S.D. Myers, Inc. v. City & County of S.F.*, 336 F.3d 1174 (9th Cir. 2003) (city’s requirement that city contractors provide domestic partner benefits not preempted by state’s domestic partnership law); see also *Irizarry v. Board of Educ. of City of Chicago*, 251 F.3d 604 (7th Cir. 2001) (no equal protection or due process violation in extending benefits to same-sex but not opposite-sex domestic partners); see also *Validity of governmental domestic partnership enactment*, 74 A.L.R. 5th 439 (2009) (collecting cases).

2. **Federal Tax Issues for Governmental Welfare Benefit Plans.**

State and local government employees will face the same issues with taxation of welfare benefits as do private-sector employees. Such benefits are no longer taxable for same-sex married employees, but are taxable for employees with domestic partners.

In addition, prior to *Windsor*, the Internal Revenue Code specifically denied tax-qualified status to state-sponsored long-term care plans that covered same-sex domestic partners or same-sex spouses. IRC § 7702B(f). As a result, states have carved their long-term care plans out of requirements that state government provide benefits to same-sex domestic partners. See Cal. Fam. Code § 297.5(g). States that recognize same-sex marriage will presumably remove these exclusions as to spouses, but not domestic partners, in the wake of *Windsor* and Rev. Rul. 2013-17.

3. **Tax Qualification Issues for Governmental Pension Plans.**

While governmental pension plans are not subject to ERISA, they are subject to the Internal Revenue Code. Thus, issues such as tax reporting of distributions to non-DOMA-spouse alternate payees applied equally to governmental pension plans.

Shortly after the enactment of California’s Domestic Partner Rights and Responsibilities Act, the IRS ruled that a county’s IRC § 457(b) deferred compensation plan will fail tax qualification requirements if it interprets the term “spouse” in the plan to include domestic partners. Priv. Ltr. Ruls. 200524016, 200524017 (June 17, 2005). However, it does not appear that tax qualification would be jeopardized if the plan were amended to extend benefits to domestic partners by its terms rather than by interpretation of the term “spouse.” See *Helgeland v. Wisc. Municipalities*, 307 Wis. 2d 1 (2008).

Where domestic-partner benefits rights of state employees have expanded over time through successive enactments, issues have arisen regarding the notice, if any, to be provided to state employees regarding these expansions. For example, in California, state employees gained the right to domestic partner health benefits at the time that the state’s domestic partner registry was established in 2000. See former Cal. Gov. Code §§ 22867-877. However, it was not until January 1, 2005, that state employees gained the right to designate their registered domestic partners to receive surviving spouse benefits under the state’s pension plan. See Cal. Fam. Code § 297.5(a); Cal. Gov. Code § 21451. Because state employees were required to take the affirmative step of designating their previously-registered domestic partners to receive spousal pension benefits, issues have arisen as to the type of notice of the new right required to be provided to state employees and retirees. See In the Matter of the Statement of Issues of: Linda L. Doyle, Case No. 8431, OAH No. 200804100 (Cal. Public Employees’ Retirement Sys., Sept. 29, 2009 (ordering CalPERS to provide survivor pension and health benefits to surviving registered domestic partner of CalPERS retiree who failed to designate domestic partner as beneficiary following change in law allowing her to do so).

Similarly, in Gerritsen v. City of Los Angeles, Case No. BC403760 (Cal. Super. Ct., County of Los Angeles, Sept. 15, 2009), the court held that the city was equitably estopped from denying survivorship benefits to a surviving domestic partner where the city had failed to notify the employee of additional requirements for designating a domestic partner beneficiary that did not apply to spouses, including requirement that proof of domestic partnership be submitted during the lifetimes of both partners.

B. Federal Employees.

Interpretation of the term “spouse” or “marriage” in federal law to extend benefits to the same-sex domestic partners or same-sex spouses of federal employees was precluded by DOMA before Windsor. On June 19, 2009, President Obama signed an executive memorandum extending certain benefits to domestic partners of federal employees. However, the statutes governing the primary federal employee benefits programs, the Federal Employees Health Benefits Program (FEHBP) and Federal Employees Retirement System (FERS) both limit benefits to spouses. See 5 U.S.C. Chs. 84, 89. Thus, DOMA § 3 restricted these spousal benefits to opposite-sex spouses.

As discussed above, OPM has issued guidance stating that all legally married same-sex spouses of federal employees will be eligible for benefits under these and other programs in the wake of Windsor. See Office of Personnel Management: “Benefits coverage is now available to a legally married same-sex spouse of a...
Federal employee or annuitant, regardless of the employee’s or annuitant’s state of residency.” OPM, Benefits Administration Letter, No. 13-203 (Jul. 3, 2013), available at http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf. As noted above, OPM recently granted a claim for retroactive survivor benefits under FERS for the widow of a federal employee in a same-sex marriage who died several years before Windsor. See § V.C.1, above.

OPM has noted that same-sex couples in a domestic partnership or form of relationship other than marriage will “remain ineligible for most Federal benefit programs.” Id. While domestic partners are not eligible for benefits under the relevant statute for the FEHB program and FERS, a Ninth Circuit panel awarded a former federal employee in a domestic partnership received back pay for the cost of health insurance for her partner on the basis that the former employee was subjected to sex discrimination. See In re Fonberg, 2013 WL 6153265, discussed in § V.E.4, above.

XI. Conclusion.

As described above, Windsor and the post-DOMA guidance from the IRS and Department of Labor have drastically changed the landscape of federal employee benefits law for individuals in same-sex marriages, domestic partnerships, and civil unions. While recent agency guidance creates uniformity at the federal level for individuals in same-sex marriages with respect to federal tax law and benefits mandated by ERISA, the IRC, and related regulations, certain open questions remain. As state and federal law continues to evolve, employee benefits issues concerning same-sex couples in marriages and spousal equivalent relationships will remain an important topic in employee benefits law.
Private Sector Enforcement Litigation

• EEOC v. Boh Bros. Constr. Co. LLC, 731 F.3d 444, 456-57 (5th Cir. 2013) (en banc) (gender-stereotyping evidence can be used to prove same-sex harassment; focus is on the “harasser’s subjective perception of the victim” and even employer’s “wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim” since “[w]e do not require a plaintiff to prop up his employer’s subjective discriminatory animus by proving that it was rooted in some objective truth”)

Private Sector Amicus Briefs

• Pacheco v. Freedom Buick (W.D. Tex. No. 7:10-cv-00116) (amicus brief submitted as attachment with motion for leave to file Oct. 17, 2011; district court denied motion for leave to file Nov. 1, 2011) (arguing disparate treatment of an employee because he or she is transgender is discrimination because of sex under Title VII)

  o See also Burnett v. City of Philadelphia-Free Library (E.D. Pa. No. 2:09-cv-04348) (Statement of Interest of United States filed Apr. 4, 2014) (arguing discrimination against a transgender individual because she does not conform to gender stereotypes is discrimination because of sex under Title VII)

• Chavez v. Credit Nation Auto Sales, LLC (N.D. Ga. No. 1:13-cv-0312) (amicus brief filed June 5, 2014) (arguing limitations period for plaintiff’s Title VII charge should be equitably tolled, both as a means of fairness to the plaintiff and as a means of securing enforcement of law, where EEOC had mistakenly refused to accept an otherwise timely charge proffered by the plaintiff alleging she was terminated because she is a transgender woman)
EEOC LGBT-Related Developments (con’t)

Private Sector Conciliation Agreement

- Don’s Valley Market (public conciliation agreement announced Sept. 2013) (Rapid City, S.D. supermarket agrees to pay $50,000, obtain professional anti-discrimination training annually for all its employees, and provide a letter of apology and neutral reference (among other relief) to a former employee who was fired for being transgender)

Federal Sector Cases Involving Transgender Individuals

- Macy v. Dep’t of Justice, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012) (decision by Commission holding that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and therefore violates Title VII)
  - Complainant v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014)

Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals

- Rosa v. Dep’t of Veterans Affairs, EEOC Appeal No. 0120091318, 2009 WL 2513955 (Aug. 3, 2009)


EEOC LGBT-Related Developments (con’t)

Federal Sector Cases Involving Lesbian, Gay, or Bisexual Individuals (con’t)

- Dupras v. Dep’t of Commerce, EEOC Request No. 0520110648, 2013 WL 1182329 (Mar. 15, 2013)
- Morris v. Dep’t of the Army, EEOC Appeal No. 0120130749, 2013 WL 2368686 (May 23, 2013)

Related Links

- Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status:
  - http://www.eeoc.gov/federal/otherprotections.cfm

- Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees
  - http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm