REID AND RIEGE P.C.
COUNSELLORS AT LAW

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DOMA, *Windsor* and the Same-Sex Employee Benefits Landscape

The Supreme Court, in *U.S. v. Windsor*, recently declared Section 3 of the Defense of Marriage Act ("DOMA") to be unconstitutional. Consequently, to the extent any federal law, regulation, ruling or interpretation defines "marriage" only as a union between a man and a woman, or "spouse" as an individual of the opposite sex, it is unlawful. Among the many federal laws and regulations impacted by this recent decision are the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974, which govern retirement and welfare benefit plans.

As a result of the Court's decision, several important questions about retirement and welfare plan governance and administration will need to be addressed. For example, what law determines the status of a same-sex couple? Is it the law of the state of the couple's residence or the law of the state in which the marriage ceremony was performed? What is the result if a couple weds in a state that recognizes same-sex marriage but relocates to a state that does not recognize same-sex marriage, or vice versa? Is the *Windsor* decision to be applied retroactively? If so, to what extent? These and other questions will need to be addressed in the future by regulatory guidance or litigation in federal and state courts.

What Should A Plan Sponsor Do Now?

The immediate result of the Court's decision is that a sponsor of a tax-qualified retirement or welfare benefit plan should scrutinize all plan documents, participant communications and administrative practices to determine what, if any, changes will need to be made in order to comply with the Court's ruling. Among the provisions to which a plan sponsor should pay particular attention are those that reference "spouse" or "married." These include, but are not limited to, plan provisions or communications regarding:

- spousal consent requirements with respect to beneficiary designations and forms of benefit payment (such as a qualified joint and survivor annuity);
- qualified pre-retirement survivor annuity distribution provisions;
- qualified domestic relations orders;
- required minimum distribution rules;
- hardship distributions;
- COBRA continuation coverage;

- federal taxation of health benefits for a same-sex spouse;

- availability of benefits under a health savings account; and

- benefit elections under a Code Section 125 cafeteria plan.

As a result of *Windsor*, it will be necessary for plan administrators to make changes in their operational procedures. While particular circumstances may dictate otherwise, we generally are recommending that plan sponsors delay the adoption of any formal plan amendments until regulatory guidance is issued.

If you have any questions concerning how to proceed with respect to the Windsor decision, please contact us.

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This edition of the Employee Benefits & Executive Compensation Alert highlights the Supreme Court's recent decision in U.S. v. Windsor concerning the constitutionality of Section 3 of DOMA. The Alert was written by Devin M. Karas, a member of the Employee Benefits & Pension Practice Area at Reid and Riege, P.C. The Practice Area works closely with clients to design and draft tax-qualified and nonqualified retirement plans. For information or additional copies of this Alert, or to be placed on our mailing list, please contact Devin (tel. 860-240-1063) (e-mail dkaras@rrlawpc.com) or another member of the Practice Area, John J. Jacobson, Chair (tel. 860-240-1006) (e-mail jjacobson@rrlawpc.com), John V. Galiette (tel. 860-240-1009) (e-mail jgaliette@rrlawpc.com), Ronald J. Koniuta (tel. 860-240-1034) (e-mail rkoniuta@rrlawpc.com), or Erek M. Sharp (tel. 860-240-1074) (e-mail esharp@rrlawpc.com), or the Reid and Riege attorney with whom you regularly work.

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