Keenan & Associates

BRIEFING

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UNITED STATES SUPREME COURT ISSUES RULINGS ON DOMA AND PROPOSITION 8 CASES

On June 26, 2013, the United States Supreme Court issued decisions in two cases affecting the legal definition of marriage. The decisions in *Hollingsworth v. Perry* and *U.S. v. Windsor* will have an impact on California employers and employee benefit plans. Following are the highlights of these two rulings.

OVERVIEW

Hollingsworth v. Perry

- This case challenged the constitutionality of California's Proposition 8.
- The U.S. Supreme Court ruled that the proponents of Proposition 8 did not have standing to appeal the District Court's order.
- This ruling sends the case back to the Ninth Circuit to dismiss the appeal for lack of jurisdiction. The result is that the previous decision from U.S. District Court stands; that Proposition 8 violated both the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.
- The Ninth Circuit has initially indicated that they will wait at least 25 days to dismiss the appeal, which allows for further legal challenges from Proposition 8 proponents. Notwithstanding the potential for continued litigation, the Court's ruling was widely seen as paving the way for legalized same-sex marriage in California.
- The impact of *Hollingsworth v. Perry* on California employers will not be immediate. It is also affected by the Supreme Court's ruling in *U.S. v. Windsor*.

U.S. v. Windsor

- The parties in *U.S. v. Windsor* asked the Supreme Court to decide whether the definitions of "marriage" and "spouse" within the Defense of Marriage Act (DOMA), violate the Fifth Amendment's guarantee of equal protection of the laws with regard to same-sex marriages in states where those marriages are legal.
- The Court held that the section of DOMA that contains these definitions violates the Fifth Amendment and is therefore unconstitutional.
- Overall, the ruling means that, in states where same-sex marriages are legal, all Federal benefits that are provided to opposite-sex marriages will now be extended to all same-sex marriages.

The following pages of this *Briefing* provide more details on the *Hollingsworth v. Perry* and *U.S. v. Windsor* decisions, and how they will likely impact employers.

HOLLINGSWORTH V. PERRY

Hollingsworth v. Perry challenged the constitutionality of California's Proposition 8. Because of the Court's decision in this case, it is helpful to understand the background and history of the case.

In 2008, the California Supreme Court held that the state statute limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California constitution. Based on that ruling, counties in California began issuing marriage licenses to same-sex partners, and some 18,000 same-sex couples were legally wed under California law in 2008. In November of that year, California voters passed Proposition 8, which amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. In a subsequent challenge to the validity of Proposition 8, the California Supreme Court held that while Proposition 8 was valid, it did not invalidate the same-sex marriages legally entered into earlier that year. At the same time, several same-sex couples challenged the validity of Proposition 8 under the U.S. Constitution in federal court. Plaintiffs in the federal case sued California's Governor and other state and local officials responsible for enforcing California's marriage laws. Those officials refused to defend Proposition 8, so the proponents of Proposition 8 intervened in the case to defend the law.

After a 12-day bench trial, U.S. District Court Judge Vaughn Walker ruled that Proposition 8 violated both the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution. He ruled Proposition 8 was invalid, and ordered the public official defendants not to enforce it. Those officials did not appeal the Judge's order, but the proponents of Proposition 8 did appeal to the Ninth Circuit. On appeal, the Ninth Circuit affirmed the decision below. Proposition 8 opponents then appealed to the U.S. Supreme Court.

The Supreme Court asked the parties to argue two questions in this case:

1. Whether California violated the Equal Protection Clause of the Fourteenth Amendment by defining marriage solely as the union of a man and a woman; and

2. Whether the official proponents of a state ballot initiative have "standing" to appeal a judgment invalidating that initiative. A person is said to have "standing" if he or she has a sufficient and protectable interest in the outcome of a case. Put another way, it is not enough just to be personally opposed to the enforcement of a particular statute or court order; a litigant must show that he or she has actually undergone a tangible harm or the threat of such injury because of the enforcement of a law or court order.

In its decision, the U.S. Supreme Court only addressed the second question, ruling that the proponents of Proposition 8 did not have standing to appeal the District Court's order. The Court sent the case back to the Ninth Circuit to dismiss the appeal for lack of jurisdiction. Once the Ninth Circuit dismisses, the effect of the Supreme Court's ruling will be to leave in force the District Court's ruling that Proposition 8 is a violation of the Equal Protection and Due Process clauses of the 14th Amendment.

In response to the Supreme Court's decision, Governor Brown announced to county officials that they should prepare to issue marriage licenses to same-sex couples once the Ninth Circuit lifts its stay of the District Court's order. However, the author of Proposition 8 vowed to continue to seek its enforcement "until such time as there is a binding statewide order that renders [Proposition] 8 unenforceable." Therefore, it is conceivable that further litigation will be necessary to establish the scope of the District Court's ruling. The impact of

Hollingsworth v. Perry on California employers will therefore not be immediate. It is also very much affected by the Supreme Court's ruling in *U.S. v. Windsor*.

U.S. v. Windsor

Enacted in 1996, the Defense of Marriage Act (DOMA) defines "marriage" for all purposes under federal law as "only a legal union between one man and one woman as husband and wife." It similarly defines the term "spouse" as "a person of the opposite sex who is a husband or a wife." The parties in *U.S. v. Windsor* asked the Supreme Court to decide whether these definitions of marriage and spouse violate the Fifth Amendment's guarantee of equal protection of the laws with regard to same-sex marriages in states where those marriages are legal. In a 5-4 decision, the Court held that the section of DOMA that contains these definitions violates the Fifth Amendment and is therefore unconstitutional.

The greatest impact of this ruling will be felt in states where same-sex marriage is legal. Since 2008 there have been some 18,000 legally married same-sex couples in California, and, as noted above, the state appears poised to resume issuing marriage licenses to same-sex couples. For most California employers, the practical impact of DOMA has been the difficulties it presented for benefits administration and family leaves for those legally married couples. The Internal Revenue Service (IRS) and other federal agencies will be looking at existing rules and determining what, if anything, needs to be changed in light of the Supreme Court's decision. It is still early and few federal agencies have publicly reacted to the Court's decision. According to the Court, there are more than 1,000 federal laws that were affected by DOMA's restriction on the definitions of "marriage" and "spouse" and it may take some time before the impact of the Court's decision is felt. However, it is likely that the following will be affected by the Court's ruling.

Tax Treatment of Group Health Insurance

Under federal law, an employer's contribution to health insurance premium for an employee, the employee's spouse and dependent children is not taxable income to the employee. Moreover, under a Section 125 plan, an employee can make pre-tax contributions to health insurance premiums. However, because of DOMA, an employee's contribution to health insurance premiums for the employee's same-sex spouse had to be made on an after-tax basis. Likewise, the employer's contribution to pay for the premium for the same-sex spouse (or the actuarial equivalent under a self-insured plan) was considered taxable income to the employee under the IRS Code. Adding to the complexity of this rule, under California law, employer contributions to health insurance for a same-sex spouse have not been taxable. The separate accounting for same-sex versus opposite sex spouses and federal taxes versus state taxes has long been an administrative burden for employers. The Supreme Court's ruling should mean that salary reduction and employer contributions for health insurance will be treated the same, regardless of whether the employee has a same-sex or opposite-sex spouse.

Mid-Year Election Changes in Group Health Plans

Under both Section 125 and the Health Insurance Portability and Accountability Act (HIPAA), certain changes in an employee's life may trigger a right to change their elections under a group health plan outside the normal open enrollment period. These life events include getting married, losing a spouse through death or divorce, or the change in employment status of an employee's spouse. Under DOMA, HIPAA special enrollment rights and the mid-year election changes allowed under Section 125 did not apply to life events involving same-sex spouses. That should change under the Supreme Court's ruling.

FSAs, HSAs, and HRAs

Under DOMA, domestic partners and same-sex spouses who are not tax dependents could not receive benefits under a health Flexible Spending Arrangement (FSA), Health Reimbursement Arrangement (HRA), or Health Savings Account (HSA.) Because of the Court's ruling, employees may now be able to use their benefits under those plans to pay for medical expenses for their same-sex spouses.

COBRA

Under federal COBRA rules, a "qualified beneficiary" could be a covered employee, spouse or dependent child of the covered employee. Because of the DOMA definition of "spouse", same sex partners could not be considered qualified beneficiaries entitled to an independent COBRA election. Although an employee qualifying for COBRA could elect continuation coverage for a same-sex spouse or domestic partner, the spouse or domestic partner would not have the right to elect continuation coverage independent of the employee's election. Due to the Court's ruling on DOMA, same-sex spouses should be able to be "qualified beneficiaries" entitled to independent COBRA election.

Pension and Retirement Benefits

Federal pension laws vest spouses with certain rights that apply to all defined benefit and some defined contribution retirement plans. A retiree's spouse has a right to a Qualified Joint and Survivor Annuity (QJSA), unless the spouse consents in writing to the employee's election to name someone else as the beneficiary of the retirement plan. Upon dissolution of a marriage, a spouse can obtain from the court a Qualified Domestic Relations Order (QDRO) instructing the plan to give the non-retiree spouse a share of the pension benefits. Under DOMA, these rules have not applied to same-sex spouses. The effect of this ruling should be to give same-sex spouses the same rights with regard to employee pension plans as opposite-sex spouses.

Family Leave Laws

The effect of the Court's ruling on family leave will be minimal in California. Under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) a qualifying employee is allowed to take leave to care for the employee's spouse, son, daughter or parent with a serious health condition. CFRA also allows a qualifying employee to take leave to care for a same-sex spouse or domestic partner. Because of DOMA, federal FMLA leave was not available for same sex partners/spouses, but under state law, CFRA leave was. Therefore, the fact the FMLA definition of "spouse" will now include legally-married same-sex couples will not give substantial additional rights to those spouses.

The effect of the Court's ruling could be more significant in the case of the FMLA's military leave provisions. Under the FMLA, eligible employees are entitled to up to 12 weeks of leave for any qualifying exigency arising because the employee's reservist or National Guard member spouse (or son, daughter or parent) is on active military duty, or has been notified of an impending call to active duty in support of a contingency operation. CFRA does not have a corresponding provision. The FMLA also provides for up to 26 weeks of leave for an employee to care for a covered service member who is ill or injured in the line of duty on active duty. This extended leave provision to care for covered service members applies to spouses, parents, children and next of kin under federal law. The maximum amount of time that CFRA allows to care for an injured or ill spouse is 12

weeks. The Court's decision in DOMA should result in the extension of a right to qualifying exigency leave and extended covered service member leave to employees with same-sex spouses.

Effect on Registered Domestic Partners

California's statutorily-established status for same-sex registered domestic partners was unaffected by either of the Supreme Court's decisions. Registered domestic partners are still legal in California, but nothing in the Court's rulings require the Federal government to treat registered domestic partners as spouses under Federal law.

With so many rights and obligations of federal and state law based in part on a person's marriage status, it will take some time to determine all of the ways in which these cases will change existing law and practices. Keenan is following the matter closely, and will continue to update employers on the impact these decisions will have on California employers and employee benefit plans.

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