Employee Benefits Report

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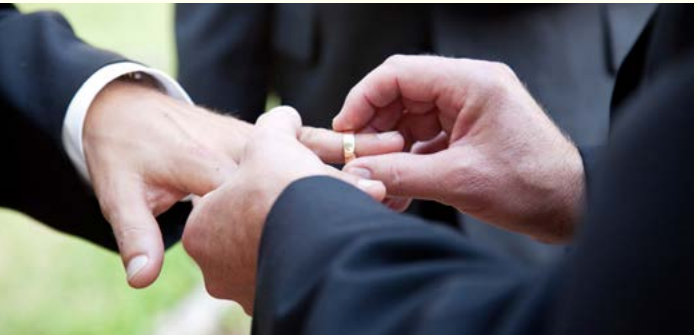
How the DOMA Decision Affects Your Benefits

On June 26, the U.S. Supreme Court ruled on *United States v. Windsor*, finding Section 3 of the Defense of Marriage Act (DOMA) unconstitutional. What does this mean for employers?

Edith Windsor, plaintiff, married Thea Spyer in Ontario, Canada in 2007. When Spyer died and left her estate to Windsor, Windsor sought a refund of estate taxes, which an opposite-sex spouse would not have paid. The Internal Revenue Service denied Windsor's refund request, citing Section 3 of DOMA. Section 3 defines marriage for the purpose of any federal law, rule or regulation, as only "a legal union between one man and one woman as husband and wife" and limits the definition of "spouse" to "a person of the opposite sex who is a husband [or] wife."



Windsor sued on the grounds that DOMA violated the equal protection clause of the Fifth Amendment.

The Supreme Court agreed, ruling Section 3 of DOMA unconstitutional. However, it left intact Section 2, which preserves the states' rights to govern marriage and gives states the right to not recognize

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On July 2, the U.S. Department of the Treasury announced that it will delay the start of mandatory Affordable Care Act (ACA) employer and insurer reporting requirements for one year, until January 1, 2015. The ACA requires employers with 50 or more full-time-equivalent employees to report the health coverage offered to their full-time employees.

In a statement, Assistant Secretary for Tax Policy Mark J. Mazur said, "We have heard concerns about the complexity of the requirements and the need for more time to implement them effectively." Therefore, the Obama administration is delaying the reporting requirements, which "…will make it impractical to determine which employers owe shared responsibility payments (under section 4980H) for

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Perry Ruling Affects California Employers Only

The U.S. Supreme Court also ruled on another same-sex marriage case, *Hollingsworth v. Perry,* in June. *Perry* challenged the constitutionality of California's Proposition 8, which amended the state's constitution to define "only marriage between a man and a woman [as] valid or recognized in California."

Officials named as defendants elected not to defend or appeal. Instead, petitioners—original advocates for Prop. 8—defended the law. When both the district court and the Ninth District Court of Appeals ruled Prop. 8 unconstitutional, petitioners took the case to the U.S. Supreme Court.

Rather than deciding the constitutionality of Prop. 8, the Supreme Court limited its considerations to determining whether the petitioners had legal standing to defend it. Article III of the Constitution confines federal courts to deciding actual "cases" or "controversies," where the litigant seeks remedy for personal and tangible harm. The court said petitioners had standing against California officials responsible for enforcing Prop. 8. But once the District Court issued its order, respondents no longer had any injury to redress. The court held that vindicating the constitutionality of a generally applicable law was a "generalized grievance" and insufficient to confer standing.

The finding restores legal same-sex marriage to California, making it one of 13 states that recognize same-sex marriage. The others are Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington, plus the District of Columbia. ■

same-sex marriages performed elsewhere.

The *Windsor* decision will effectively extend the following benefits to same-sex spouses in states that recognize same-sex marriage:

- Tax advantages: Same-sex spouses can receive employer-provided health and dependent care benefits without having their value imputed to income.
- Health spending accounts: Same-sex spouses can use funds in health reimbursement arrangements (HRAs), flexible spending accounts (FSAs) and health savings accounts (HSAs) that cover spouses.
- Dependent care spending accounts: Employees will be able to use these funds to care for a same-sex spouse.
- Family and Medical Leave Act (FMLA): FMLA-eligible employees will have the right to take FMLA leave to care for a same-sex spouse.
- COBRA: Same-sex spouses will be able to claim COBRA health insurance continuation rights.
- HIPAA enrollment rights: Same-sex spouses will be entitled to the same special enrollment rights as opposite-sex spouses, including becoming eligible for spousal coverage immediately after marriage and after losing coverage under another group plan.
- Pension benefits: Same-sex spouses will be able to receive benefits, or a portion thereof, from an employee's retirement plan under a qualified domestic relations order (QDRO). Like same-sex spouses, they will be able to delay minimum distributions from a deceased spouse's employer retirement plan until age 70½ and roll plan funds into their own employer's retirement plan.
- Insured benefits: State laws generally govern insured benefits, including health, life and disability insurance. In states that recognize same-sex marriage, employers will have to offer same-sex spouses the same benefits they offer opposite-sex spouses. In states that do not recognize same-sex marriage, employers will not have to offer benefits to same-sex spouses if they choose not to.
- Self-insured benefits: ERISA, a federal law, regulates self-insured plans. ERISA has never required employers to provide spousal benefits or benefits for opposite-sex partners. However, the *Windsor* ruling will make self-insured employers that cover opposite-sex spouses but deny cover-

2014….These payments will not apply for 2014. Any employer shared responsibility payments will not apply until 2015."

The Treasury Department expects to publish proposed rules implementing the reporting provisions this summer.

The delay in employer reporting will cause the Treasury to lose approximately $4 billion in employer fines, based on an estimate by the non-partisan Congressional Budget Office.

The delay in reporting requirements does not affect employees' access to premium tax credits available under the ACA.

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age to same-sex spouses easy targets for discrimination lawsuits.

Immediate Action Steps for Employers

- Review your benefit plans, payroll policies and human resource policies to ensure definitions of "spouse" conform with the applicable definition.
- Employers can now deduct the cost of providing benefits to same-sex spouses as a business expense. Employers that have provided benefits to same-sex couples in the past may be eligible for a refund of applicable payroll tax withholdings—please consult your tax advisor for advice.

The *Windsor* ruling also eliminates the need to "gross up." Many employers that provide benefits to same-sex partners add an additional amount to the employee's pay to cover taxes on these benefits to create pay/benefit equity with employees who have opposite-sex spouses. The *Windsor* decision eliminates the need for this.

At this point, nobody knows whether the Windsor decision will apply retroactively or the exact extent of its effects. For specific questions, please contact an employment lawyer. How Windsor will affect benefits in states that do not recognize same-sex marriage is also unclear; however, expect to see more litigation as employees legally married in one state move to others.

We will attempt to keep you informed of major developments affecting your benefits plans—please contact us for more information.

Grandfathered Health Plans: Keeping them in the Family

The Patient Protection and Affordable Care Act (ACA) promised that Americans could keep their existing health plans if they liked them. To allow this, the ACA allowed employer plans that existed on March 23, 2010 to be "grandfathered," or exempt from some of the ACA's requirements.

More than half of U.S. employers that offered employee health insurance had at least one "grandfathered" plan in 2012. As plans renew, the number of grandfathered plans is dropping. If you have a grandfathered plan, how do you maintain this status?

To maintain grandfather status, plans cannot make "significant" changes in coverage or cost-sharing terms. The U.S. Departments of Health and Human Services and the Treasury identified these changes that will cause a health plan to lose grandfather status:

1. Eliminating all or substantially all benefits to diagnose or treat a particular condition.
2. Increasing a percentage cost-sharing requirement (e.g., raising coinsurance from 20 percent to 25 percent).
3. Increasing a deductible or out-of-pocket maximum by an amount that exceeds medical inflation plus 15 percentage points.
4. Increasing a copayment by an amount that exceeds medical inflation plus 15 percentage points (or, if greater, $5 plus medical inflation).
5. Decreasing an employer's contribution rate by more than 5 percentage points.
6. Imposing annual limits on the dollar value of all benefits below specified amounts.

Why Maintain Grandfather Status?

Plans that do not have to meet certain ACA requirements may cost less. Grandfathered plans DON'T have to:

- Cover preventive care for free
- Protect participants' choice of doctors and access to emergency care
- Be held accountable through rate review

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for excessive premium increases
- Guarantee participants' right to appeal.

Still, grandfathered plans must comply with other ACA provisions that increase the cost of insurance, including:

- Imposing no lifetime limits on coverage
- Covering adult children up to age 26, regardless of student or marital status.

Other Scenarios

Wellness incentives: Group health plans can provide premium discounts or additional benefits to reward healthy behaviors without risking grandfather status. However, imposition of penalties (such as cost-sharing surcharges) may cause the loss of grandfather status.

Switching insurers: The original regulation allowed self-funded plans to change third-party administrators without necessarily losing grandfather status, while insured employer group plans would lose grandfather status by switching insurers. A recent amendment allows all group health plans to maintain grandfather status if they switch insurers, as long as benefits remain similar and the plan's structure doesn't violate rules for maintaining grandfather status.

Multiple benefit packages: The grandfather analysis applies on a benefit-package-by-benefit-package basis. Therefore, if an employer that offers multiple benefit packages—such as a PPO, a POS arrangement, and an HMO—changes the terms of the HMO, for example, and causes that plan to relinquish grandfather status, the other plans do not necessarily lose grandfather status.

Coverage tiers: A plan can structure coverage tiers in different ways: for example, self-only and family coverage, or self-plus-one, self-plus-two and self-plus-three, etc. If a plan changes the structure of its tiers, the employer can change its contribution rate by only 5 percent or the plan will lose grandfather status. This means an employer that formerly contributed 50 percent toward family coverage on March 23, 2010 must contribute at least 45 percent to any new tier other than self-only (i.e., self-plus-one, self-plus-two, etc.). If the plan adds tiers to cover classes of individuals it did not cover before (such as adding dependent coverage), the new tiers would not be subject to this provision.

Although a grandfathered plan might cost less than an ACA-compliant plan, maintaining that plan could have disadvantages. A different cost-sharing arrangement—for example, requiring employees to pay more for spousal coverage—might better meet your organization's needs. You might also face a competitive disadvantage if other employers in your area are offering ACA-compliant plans that cover preventive care with no cost-sharing.

We can help you evaluate your employee health benefit options. Please contact us for more information. ■

Protect Employees During Accident Season

Unum, an insurer that writes accident and disability coverage, reports that accident claims typically jump 20 percent during summer months.

Summer poses particular dangers for teens and children. The National Safety Council says, "The 100 deadliest days for teen drivers stretch from Memorial Day to Labor Day," with July 4 the single deadliest day for teen drivers. Drowning, the second-highest cause of accidental death among children, also occurs much more frequently during summer. However, all populations have a higher risk of auto accident, drowning and other accidental injuries during summer months.

Injury accidents can result in steep medical bills for anyone. Did you know that the average emergency room visit costs more—40 percent more—than the average month's rent? Yet many individuals, particularly younger, working-class people, don't have money saved for this type of emergency.

Among working people, accidents can also cause lost work time. Between 2004 and 2007, employed persons suffered an average

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of 15.7 million injuries per year. Half of these injuries resulted in time lost from work: 8 percent resulted in less than one day of time lost, 26 percent resulted in one to five lost days, and 16 percent resulted in more than six days lost. If an employee has an injury accident during the course of work, workers' compensation will cover his or her medical and lost-time costs. But if it occurs elsewhere else, any costs will come out of their pocket. That's where accident insurance can help.

The Different Types of Accident Insurance

Accident insurance pays insureds when a covered accident causes injury or loss of use of a limb or key sense. If an illness were to cause any of these serious consequences, a person would generally have some warning and time to prepare, both emotionally and financially. But when an accident occurs, it's sudden and unexpected, making the loss all the more traumatic.

Accident insurance differs from medical insurance in that it pays benefits directly to policyholders. Policyholders can use benefits to pay deductibles, copayments and other costs not covered by major medical plans. Two basic types of insurance will cover financial losses due to non-occupational accidents. Each covers different loss scenarios. Exact terms of coverage and exclusions vary by insurer and policy, but a brief overview follows.

Accidental Death & Dismemberment Insurance (AD&D): AD&D pays a benefit when an insured dies or loses use of a limb or key sense due to an accidental cause. AD&D policies pay a flat death benefit, for example, $250,000 or $500,000. They will also pay a portion of the death benefit if a covered accident causes loss of a limb or key sense, according to a schedule that depends on relative severity of the loss. For example, the policy might pay half the death benefit for loss of an eye or vision in one eye, but full benefits for loss of vision in both eyes.

Insurers offer standalone AD&D policies, but often individuals will buy AD&D coverage through a rider, or addition, to their life insurance policies. A life insurance policy with an AD&D rider will pay a "double indemnity," or two times the death benefit, if the policyholder dies due to a covered accident.

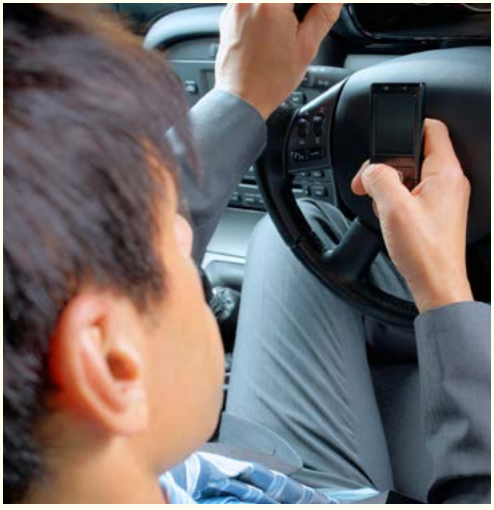
Accident Indemnity Insurance: You might find this type of coverage under a different name, such as "personal accident insurance" or simply "accident insurance." Like an AD&D policy, accidental indemnity insurance covers the insured for accidental injury. And like an AD&D policy, it pays benefits according to a schedule. Although this type of policy frequently does not provide a death benefit, it covers a broader range of events, paying a scheduled benefit for many types of accidental injuries, such as fractures, burns and dislocations.

Many policies also pay a specific benefit when an insured incurs medical expenses to treat accidental injuries. They typically pay a flat amount per accident or per incident, such as $100 per ambulance service, $150 per emergency room visit and $1,000 per hospitalization, when an insured person requires these services due to an accidental injury.

Limitations and Advantages of Accident Coverage

Both types of accident coverage strictly limit benefits to death or injuries stemming from accidental causes only. They specifically exclude claims for death, dismemberment or injury due to sickness. They usually also exclude accidental injury or death resulting from the medical or surgical treatment of a sickness, cosmetic surgery or dental treatments, and "uninsurable" events, such as war and nuclear event.

In many cases, a time period also applies.



That is, death or injury must occur within a specified time period after a covered accident for the policy to pay.

As with most insurance, accident insurance excludes claims for self-inflicted injuries or suicide and claims that occur while using illegal drugs, while intoxicated or while en-

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gaged in illegal activities. Accident insurance or AD&D premiums might rise over time.

Accident insurance and AD&D have several features that make them excellent supplements to your medical plan:

- They have no deductibles or copayments.
- Insureds can use whatever providers they want.
- They pay regardless of any other coverage that might exist.
- They pay benefits directly to insureds, who can use them however they choose.

Although they cannot replace a major medical policy, accident insurance and AD&D provide low-cost peace of mind. Although premiums vary by the insured's location and age and the coverage terms selected, you might find this insurance surprisingly affordable. Particularly on the group market, you can find coverage for less than $200 per insured per year. Employers can also offer accident insurance or AD&D as a voluntary benefit, giving employees the advantages of lower group rates and convenient payroll deduction payment.

For more information, please contact us. ■

New Employee Coverage Notice Deadline: October 1

Beginning on October 1, 2013, individuals and employees of small businesses will be able to enroll in health insurance plans offered by the health insurance exchanges created by the Affordable Care Act (ACA). Section 1512 of the Affordable Care Act amends the Fair Labor Standards Act (FLSA) to require employers to provide notice to employees of coverage options available through the exchanges.

The notice requirement applies to employers to which the FLSA applies. In general, the FLSA applies to employers that employ one or more employees who are engaged in, or produce goods for, interstate commerce. For most firms, this means they must have an annual dollar volume of business of at least $500,000. The FLSA also specifically covers the following entities: hospitals; institutions primarily engaged in the care of the sick, the aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools, and institutions of higher education; and federal, state and local government agencies.

Originally employers had until March 1 to comply with the notice requirement; however, the Department of Labor has given affected employers until October 1 to comply. If the FLSA applies to your organization, you can find more information about the notice requirement at http://www.dol.gov/ebsa/newsroom/tr13-02.html. ■

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