

The Changing Definition of Marriage

How the Supreme Court's Decision on DOMA Will
Affect Employers and Individuals

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Overview

- History of DOMA
- *United States v. Windsor*
- Effect on Health and Welfare Plans
- Effect on Qualified Retirement Plans
- FMLA
- Title VII of the Civil Rights Act of 1964
- Estate Planning Issues
- Income Tax Issues

History of the Federal Defense of Marriage Act (“DOMA”)

History of DOMA

- DOMA Approved in 1996
 - Enacted as Pub. L. No. 104-199 on September 21, 1996
 - Approved by 85-14 in the Senate and 342-67 in the House of Representatives
 - Signed by President Clinton

History of DOMA

- Contains two substantive sections
 - Section 2 says "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."
 - Section 3 says that "In determining the meaning of any 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."

History of DOMA

- Reaction in part to developments in Hawaii that could legalize same-sex marriage
 - Hawaii State Supreme Court decision in *Baehr v. Miike*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993), held that prohibiting same-sex marriages might violate Hawaii's constitution
- Concern that the Full Faith & Credit Clause of the Constitution, and general comity principles, might require other states to honor same-sex marriages performed in Hawaii or elsewhere

History of DOMA

- Judiciary Committee report explains that "If Hawaii or some other State eventually recognizes homosexual 'marriage,' Section 3 will mean simply that that 'marriage' will not be recognized as a 'marriage' for purposes of federal law. H.R. Rep. No. 104-664 (1996).
- When DOMA was enacted, no states expressly permitted same-sex marriage.
- Today, 13 states plus D.C. expressly permit same-sex marriage.

History of DOMA

- California (since June 17, 2008)
- Connecticut (since April 16, 2009)
- Delaware (since July 1, 2013)
- DC (since March 3, 2010)
- Iowa (generally since April 27, 2009, but a few before that date)
- Maine (since November 6, 2012)
- Maryland (since January 1, 2013)
- Massachusetts (since May 17, 2004)
- Minnesota (beginning August 1, 2013)
- New Hampshire (since January 1, 2010)
- New York (since July 24, 2011)
- Rhode Island (beginning August 1, 2013)
- Vermont (since September 1, 2009)
- Washington (since December 6, 2012)

United States v. Windsor

United States v. Windsor

- In 2007, Edith "Edie" Windsor and Thea Spyer, residents of New York, married in Ontario after 40 years of romantic partnership.
- Spyer died in 2009, at which time New York legally recognized same-sex marriages performed in other jurisdictions.
 - After Spyer's death, Windsor was required to pay \$363,053 in federal estate taxes on her inheritance of her wife's estate
 - If federal law had accorded their marriage the same status as different-sex marriages recognized by their state, Windsor would have qualified for an unlimited spousal deduction, and paid no federal estate taxes.

United States v. Windsor

- Windsor sued in federal court as executor of Spyer's estate.
- On February 23, 2011, Attorney General Eric Holder released a statement, explaining that the Obama administration had determined that it would no longer defend the constitutionality of DOMA's Section 3.
 - Bipartisan Legal Advisory Group of the U.S. House intervened in the suit "for the limited purpose of defending the constitutionality" of Section 3 of DOMA.

United States v. Windsor

- On June 6, 2012, Southern District of New York ruled that Section 3 of DOMA was unconstitutional as it violated plaintiff's rights under the equal protection guarantees of the Fifth Amendment and ordered Windsor receive the tax refund due her.
- The Justice Department filed a notice of appeal to facilitate the U.S. House's defense of the statute.
- On October 18, 2012, the Second Circuit Court of Appeals upheld the lower court's ruling that Section 3 of DOMA is unconstitutional.

United States v. Windsor

- U.S. Supreme Court- 5-4 holding (Kennedy, J.)
 - Section 3 of DOMA was "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."
- The Court based its holding on the equal protection element of due process guaranteed by that amendment.
- The Court expressly limited its holding to Section 3, and to the application of Section 3 to same-sex marriages validly formed under state law.

Effect of *United States v. Windsor*

- The decision will have an immediate effect on the application of federal laws that use "marriage" or similar terms to "persons who are joined in same-sex marriages made lawful by the State."
 - There are more than 1,100 places in federal law where a protection or responsibility is based on marital status. A few key examples include access to Social Security survivors' benefits; the option to use family medical leave to care for a spouse; the opportunity to sponsor a foreign-born spouse for citizenship; and access to veterans' spousal benefits.

Effect of *United States v. Windsor*

- Legally married same-sex couples living in a state that does not respect their marriages may right away have access to *some* federal rights and benefits, but not to many others.
 - Federal agencies have different approaches regarding which state's laws they look to in order to determine if a marriage is valid for federal purposes. Some, including the IRS and Social Security, have looked to the laws of the state where a couple lives (*place of domicile/residence*).
 - Others, including immigration agencies, look to where a couple got married (*place of celebration*).

Section 2 of DOMA Survives

- "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship."
- Article IV, Section 1 of the U.S. Constitution:
 - "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

DOMA Checklist for Employers and Employer-Sponsored Plans

Health and Welfare Plans

- Effect on Health and Welfare Plans
 - Federal taxation
 - HIPAA special enrollment
 - Change in status events
 - COBRA
 - Health savings accounts (HSAs)
 - Dependent care assistance programs (DCAPs)

Federal Taxation

- Background
 - Employer-sponsored health coverage and reimbursements obtained thereunder are generally excluded from an employee's gross income
 - Employer contributions toward employer-sponsored health coverage are generally excluded from an employee's gross income
- Pre-*Windsor* tax treatment for employees in same-sex marriages
 - Employee
 - Value of employer-sponsored coverage provided to same-sex spouse was included in employee's gross income ("imputed income") and was subject to FICA taxes
 - Employee could only pay for employer-sponsored coverage provided to same-sex spouse on an after-tax basis
 - Employer
 - Value of employer-sponsored coverage provided to same-sex spouse was subject to Social Security and Medicare (FICA) and Federal Unemployment (FUTA) taxes

Federal Taxation

- Post-*Windsor* tax treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - Employee
 - Value of employer-sponsored coverage provided to same-sex spouse will not be included in employee's gross income ("imputed") and will not be subject to FICA taxes
 - Employees can pay premiums for employer-sponsored health coverage provided to same-sex spouse on a before-tax basis
 - Employer
 - Value of employer-sponsored coverage provided to same-sex spouse will not be subject to FICA and FUTA taxes
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

HIPAA Special Enrollment

- Background
 - Special enrollment allows individuals who previously declined health coverage to enroll for coverage
 - Special enrollment rights arise regardless of a plan's open enrollment period
- *Pre-Windsor* treatment for employees in same-sex marriages
 - Special enrollment was optional for the same-sex spouse of an employee who is eligible for coverage under a health plan
- *Post-Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - Special enrollment is required for the same-sex spouse of an employee who is eligible for coverage under a health plan
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Changes in Status

- Background
 - Cafeteria plan may allow an employee to make an election change during a plan year in certain circumstances, including a change in: (1) marital status; (2) number of dependents; (3) employment status of a spouse or dependent; (4) residence of a spouse or dependent; and (5) dependent eligibility under terms of plan
- *Pre-Windsor* treatment for employees in same-sex marriages
 - Employer may extend change in status rules to those events which affect an employee's same-sex spouse (and their children)
- *Post-Windsor* treatment for employees in same-sex marriages
 - No change (same as *pre-Windsor* treatment)

COBRA

- Background
 - COBRA provides certain former employees, retirees, spouses, former spouses, and dependent children (“qualified beneficiaries”) the right to temporary continuation of their health coverage at group rates when such coverage is lost upon the occurrence of certain events (“qualifying events”)
- Pre-*Windsor* treatment for employees in same-sex marriages
 - Employers were not required to offer COBRA to an employee’s same-sex spouse (and their children) who was enrolled in coverage under the group health plan
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - Employers are required to offer an employee’s same-sex spouse (and their children) independent COBRA election rights to continue coverage under the group health plan
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Health Savings Accounts (HSAs)

- Background
 - HSAs allow individuals covered by high-deductible health plans (HDHPs) who have no other first-dollar coverage to receive preferential tax treatment on money saved for medical expenses
- Pre-*Windsor* treatment for employees in same-sex marriages
 - Same-sex spouses were treated as two separate individuals, allowing each individual to contribute up to the HSA family maximum if both had family HDHP coverage
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - Same-sex spouses are treated as spouses for federal tax purposes, which means that they must share the HSA family contribution limit (\$6,450 for 2013)
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Dependent Care Assistance Programs (DCAP)

- Background
 - DCAPs allow employees to reduce their pay on a pre-tax basis to pay for eligible dependent care expenses
- Pre-*Windsor* treatment for employees in same-sex marriages
 - Payments could be made to a caregiver who was the employee's same-sex spouse
 - Expenses for the care of a same-sex spouse's child were not eligible for reimbursement
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - Payments cannot be made to a caregiver who is the employee's same-sex spouse
 - Expenses for the care of a same-sex spouse's child are eligible for reimbursement
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rule

Qualified Retirement Plans

- Effect on Qualified Retirement Plans
 - Survivor benefits
 - Qualified domestic relations orders (QDROs)
 - Required minimum distributions (RMDs)
 - Rollovers
 - Hardship distributions

Survivor Benefits

- Background
 - Qualified Joint and Survivor Annuity (QJSA)
 - Default form of payment for married participants in a defined benefit pension plan is a QJSA
 - Spousal consent is required to waive QJSA
 - Qualified Optional Survivor Annuity (QOSA)
 - Defined benefit plans must offer a QOSA to a married participant
 - Qualified Preretirement Survivor Annuity (QPSA)
 - Surviving spouse of a participant in a defined benefit pension plan must be offered a QPSA
 - Spousal consent is required to waive QPSA

Survivor Benefits

- Pre-*Windsor* treatment for employees in same-sex marriages
 - QJSA, QOSA and QPSA did not have to be offered to a participant in a same-sex marriage
 - Consent of a same-sex spouse was not required to waive QJSA or QPSA (to the extent they were available)
 - Plan participant in a same-sex marriage could designate a non-spouse beneficiary without obtaining spousal consent
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - QJSA, QOSA and QPSA must be offered to a participant in a same-sex marriage
 - Consent of a same-sex spouse is required to waive QJSA or QPSA
 - Plan participant in a same-sex marriage can designate a non-spouse beneficiary only upon obtaining spousal consent
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Qualified Domestic Relations Orders (QDROs)

- Background
 - Qualified plans may not permit a participant to assign or alienate the participant's interest in a retirement plan (“anti-assignment and alienation” rules)
 - QDROs provide an exception to the anti-assignment and alienation rules
- Pre-*Windsor* treatment for employees in same-sex marriages
 - QDROs were generally not available to a former same-sex spouse
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - QDROs are available to a former same-sex spouse
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Required Minimum Distributions (RMDs)

- Background
 - A surviving spouse may defer benefits under a qualified plan until the date that the participant would have reached age 70.5
 - Non-spouse beneficiary must begin to receive benefits within 1 year of participant's death or receive entire interest within 5 years of participant's death
- Pre-*Windsor* treatment for employees in same-sex marriages
 - Less favorable distribution rules applied to a surviving same-sex spouse because he/she was treated as a non-spouse beneficiary
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - More favorable distribution rules will apply because a same-sex surviving spouse will be treated the same as an opposite-sex surviving spouse
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Rollovers

- Background
 - Spousal beneficiaries may roll over eligible distributions directly or indirectly to another retirement plan or individual retirement account (IRA)
 - Non-spouse beneficiaries may only roll over eligible distributions indirectly to an inherited IRA
- Pre-*Windsor* treatment for employees in same-sex marriages
 - Less favorable rollover rules applied to a surviving same-sex spouse because he/she was treated as a non-spouse beneficiary
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - More favorable rollover rules will apply because a same-sex surviving spouse will be treated the same as an opposite-sex surviving spouse
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Hardship Distributions

- Background
 - A retirement plan may (but is not required to) allow participants to receive hardship distributions. A hardship distribution can only be made if the distribution is (1) because of an immediate and heavy financial need, and (2) limited to the amount necessary to satisfy that financial need
- Pre-*Windsor* treatment for employees in same-sex marriages
 - Hardship distribution was only available to pay for a same-sex spouse's expenses if the employee, subject to plan rules, specifically designated that same-sex spouse as the employee's designated beneficiary
- Post-*Windsor* treatment for employees in same-sex marriages
 - State recognizes same-sex marriage
 - Hardship distribution may be available to pay for expenses of a same-sex spouse in the same way they are available to pay for expenses of an opposite-sex spouse
 - State does not recognize same-sex marriage
 - Until further guidance is issued....same as old rules

Next Steps for Employers

Next Steps for Employers

- Determine whether your employer-sponsored benefit lineup offered to your employees complies with *Windsor* decision
 - Many potential issues for multistate employers
 - Affects plans other than H&W and qualified retirement plans (*e.g.*, stock plans)
- Review your plan documentation
 - Definitions, applicable plan provisions, benefit summaries, beneficiary designation forms, waiver forms, notices, pension funding obligations
- Review your tax withholding practices
 - Employer refunds for FICA taxes?
- Evaluate your employee communication strategies
 - Communicate now? Communicate at open enrollment? Both?
- Stay tuned for further guidance from Obama administration
 - How will ruling affect individuals in same-sex marriages in states that do not recognize same-sex marriage?
 - Retroactivity?

Next Steps for Employers

- Questions to think about
 - What does the *Windsor* decision mean for ERISA plans?
 - How does the *Windsor* decision affect governing law provisions in plan documents?
 - Changes in Status
 - How will individuals who are in a same-sex marriage that occurred in a prior year be treated for mid-year changes in status?
 - COBRA
 - What will happen in situations where former employees elected COBRA but such coverage was not made available to their same-sex spouse (or child thereof)?
 - Survivor Benefits & QDROs
 - What will happen in situations where participants accrue a benefit in multiple states, one or more of which recognizes same-sex marriage while one or more of which does not?

Labor & Employment Issues: The Family and Medical Leave Act

FMLA

FMLA

- A federal law that applies to employers with 50 or more employees and provides unpaid leave to eligible employees for various reasons.
- Some reasons are tied to “spouses”, some are tied to “husband” or “wife” status, and some are tied to “mother” or “father” status.
- The DOMA issue only pertains to FMLA rights involving a “spouse,” “husband” or “wife.”
- Same-sex couples, married or not, can be entitled to FMLA leave involving children because the right depends on parental or “in loco parentis” relationships to the child, not marital relationships with the partner.

FMLA

FMLA regulations expressly define spouse:

- “*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.” §§ 825.102; 825.122(b) (emphasis added)
- DOMA rendered the FMLA regulation “spouse” definition inoperable. Under DOMA, same-sex marriages were not recognized for purposes of FMLA, regardless of state law.
- After *Windsor*, the FMLA regulation “spouse” definition is again operable.

Challenge: State laws on “spouses” vary.

1. Some states permit marriage of same-sex couples, others do not.
2. Some states permit same-sex civil unions or domestic partnerships, but not same-sex marriages.
3. Some states recognize same-sex marriages performed in other places, others do not.

An employee in a same-sex relationship will have different rights depending on where he/she resides, not where he/she works.

FMLA – Same-sex Spousal Rights

An employee in a same-sex relationship residing in a state that permits marriage of same-sex couples and/or recognizes a same-sex marriage that is valid in another state, and who therefore is recognized as married in that state, will have ALMOST ALL of the FMLA rights afforded an opposite-sex married couple, specifically:

- To care for his/her spouse's serious health condition
- To deal with a qualifying exigency arising from his/her spouse's military service
- To care for his/her spouse who is a covered servicemember

FMLA – Same-sex Spousal Rights

- A female employee may NOT be entitled to FMLA leave to care for her incapacitated female spouse during her spouse's prenatal care or post-partum period because the employee is not a "husband" as required by §825.120(a)(5)
- The employer may NOT be able to combine the FMLA leaves of the same-sex married couple who both work for the employer because although married, they are not a "husband and wife" as required by §§825.120(a)(3) and 825.121(a)(3).

FMLA – Practical Questions

Question: What if your employee in a same-sex relationship resides in one state but works in another state?

Answer: Your FMLA analysis is based on the state in which the employee resides.

Question: What if your employee is in a committed same-sex relationship, but was not married under the law of any state?

Answer: Unless the relationship is recognized as a common law marriage under the law of the state of residence, your employee has no spouse for purposes of FMLA.

FMLA – Practical Questions

Question: What if your employee entered into a same-sex marriage in another country?

Answer: If the foreign marriage is recognized as a marriage under the law of the state of residence, your employee has a spouse for purposes of FMLA.

Question: What if I want to simply offer FMLA leave to all employees in committed relationships?

Answer: You can. But you need to follow through. You may be equitably estopped from later arguing they were not covered. Also, you cannot count leave weeks against the FMLA allotment for those who technically are not “spouses” covered by FMLA.

FMLA – Practical Questions

Question: Are the rules the same if I am a public as opposed to private employer?

Answer: Maybe not. Section 2 of DOMA permits a state to refuse to recognize the marriage laws of another state. So if the employee's state of residence recognizes same-sex marriage but the employer is a state that does not, DOMA may permit the state employer to deny FMLA leave to the same-sex couple.

FMLA – Practical Difficulties

- FMLA leave for “spousal” reasons should be evaluated on an employee-by-employee basis.
 - Employers need to determine:
 - Whether the state of residence laws will recognize this employee’s marriage as valid
 - Thus, they must know:
 - The employee’s state of residence
 - The employee’s state of celebration
 - What the marriage recognition laws are in the employee’s state of residence

FMLA – Practical Difficulties

- FMLA is only the federal analysis, and the employee may have additional leave rights under state leave laws.
- The “spouse” analysis and result under FMLA does not control the analysis and result under state leave law.
- The state leave law may have its own definition of “spouse” and/or may rely on the state of celebration, the state of residence, or the state of employment.

Labor & Employment Issues: Title VII of the Civil Rights Act of 1964

Title VII

- Title VII protects employees from discrimination on the basis of statutorily created protected classes: race, color, religion, sex and national origin
- Sexual orientation, transgender status and gender identity are not protected classes *per se*, but
 - EEOC and several courts have found that discrimination resulting from sexual stereotyping is a form of sex discrimination
 - EEOC recently determined that transgender or gender identity discrimination is sex discrimination

Title VII

- Marital status is not a protected class *per se*, but
 - If a distinction is made between opposite-sex and same-sex marriages, is the distinction based on sex? (disparate treatment)
 - If a distinction is made between married couples and non-married couples, and same-sex couples cannot be married, is there a disparate impact from this neutral policy as applied to committed same-sex couples? And is that impact sex-based?

Labor & Employment Issues: Likely Legal Developments

Likely Legal Developments

- New DOL regulations on the definition of spouse for FMLA
- FMLA lawsuits against public employers who rely on Section 2 of DOMA
- EEOC and courts may treat marital status discrimination (same-sex or otherwise) as sex discrimination under Title VII
- Congress may pass the Employment Non-Discrimination Act, expressly protecting discrimination on the basis of sexual orientation and gender identity
 - Senate Committee on Health, Education, Labor and Pensions voted 15 to 7 to pass the Senate Bill yesterday, July 10, 2013, and referred it to the Senate floor

Likely Legal Developments

- Public employees may sue public employers who deny employment rights, privileges or benefits on the basis of marital status, whether same-sex marital status (disparate treatment) or simply marital status (disparate impact since same-sex couples cannot marry in 38 states), asserting violation of constitutional rights

Labor & Employment Issues: Next Steps for Employers

Next Steps for Employers

- Train your FMLA administrator on this change in the law and how to administer it.
- Review your FMLA policy and consider defining or re-defining “spouse” in your FMLA policy to help manage employee expectations.
- If you currently offer FMLA-equivalent benefits to same-sex couples, revise those policies to eliminate double coverage for those employees whose state of residence recognizes them as spouses (which gives them coverage under FMLA).

Next Steps for Employers

- If you do not currently offer FMLA-equivalent benefits to same-sex couples who would not be covered by FMLA, consider designing such a policy to treat all employees similarly.
 - Careful drafting can reduce the equivalent leave available by the amount of any FMLA leave used to help mitigate long periods of leave use.

Next Steps for Employers

- Review your other policies and procedures to identify all others that provide rights, benefits, and opportunities on the basis of marital status.
 - Consider whether you wish to continue offering rights, benefits and opportunities based on marital status.
 - If you do wish to do so, revise your policies and procedures to ensure that they provide equality regardless of the gender of the employee's spouse.
 - Broader definitions of “spouse” may reduce the likelihood of gender discrimination claims.

Next Steps for Employers

- Develop/avail yourself of tools to gather and analyze the information needed to make appropriate FMLA leave, state law leave, and employer policy leave determinations, and to track them.
 - Form to collect residence and marriage information
 - Spreadsheet identifying the relevant states of residence and their marriage laws
 - Spreadsheet identifying the relevant states of work and their leave laws
 - Decision tree for making leave decisions
 - Spreadsheet for tracking leave taken under appropriate policies

Next Steps for Employers

- If you are a public employer, consciously decide whether as a policy matter you will provide FMLA leave to same-sex spouses married in their state of residence, or whether you will accept the risk of suit and rely upon DOMA's Section 2 to deny coverage.
- Keep your eyes and ears open for further developments in this area.

Estate Planning Issues

Transfer tax benefits for married couples

- Federal Gift Tax:
 - Transfers between spouses are exempt from gift tax.
 - Spouses may “split” gifts, allowing each spouse’s annual and lifetime exclusion to be applied equally to a gift.
- Federal Estate Tax
 - Transfers to a surviving spouse are eligible for marital deduction, effectively postponing any tax until the death of the survivor.
 - “Portability”: Deceased spouse’s unused exemption can be preserved for surviving spouse.

Will married same-sex couples benefit?

- Current IRS practice looks to the law of the state where a couple resides to determine whether they are legally married.
 - Couples who reside in one of the 13 states that recognize same-sex marriages (or in the District of Columbia) will be eligible for favorable estate and gift tax treatment.
 - Couples who reside in one of the other 37 states currently would not be eligible.
- IRS guidance is expected on same-sex couples who were married in a state that permits same-sex marriage but reside in a state that does not recognize their marriage.

Open Questions

- What returns will the IRS permit taxpayers to amend?
 - Gift and Estate tax returns may be amended up to three years after the due date of the return, or three years after return actually filed (whichever is later).
- If the IRS continues to determine whether a same-sex couple is married based on their state of residence, what happens if the couple moves from a state that recognizes their marriage to a state that doesn't?
- What effect will the invalidation of DOMA have on states with a “decoupled” state death tax regime?

Next Steps

- For married same-sex couples:
 - Consider amending gift tax returns to split gifts between spouses, or to obtain the marital exemption for a gift to a spouse.
 - Revise estate planning documents to take advantage of any estate tax benefits.
 - Check beneficiary designations to ensure that undesirable default provisions do not take effect.
 - Consider filing claim for refund if any estate tax was paid on bequest to surviving spouse.
 - Consider filing Federal estate tax return for estate of deceased spouse to elect portability of “deceased spousal unused exemption amount”

Next Steps

- For everyone:
 - Consider clarifying estate planning documents vis-à-vis:
 - Whether a same-sex spouse will be included in the definition of “spouse” under the documents.
 - Whether the child of a beneficiary who is in a same-sex marriage will be considered a descendant of such beneficiary, regardless of whether the child can be adopted by him or her.

Income Tax Issues

Primary Change – Filing Status

- Same-sex couples in some states will be able to file as either:
 - Married Filing Jointly; or
 - Married Filing Separately.
- May mean more tax or less tax, depending on each taxpayer's circumstances.

Who can file as married?

- Married in state that recognizes same-sex marriage and resides in such a state?
 - Yes
- Married and resides in state that recognizes civil unions?
- Married in state that recognized same-sex marriage, but no longer resides in such a state?
 - Wait and see; Expecting some IRS guidance.

What does “married” filing status mean?

- Increased standard deduction
- Pooled income/deductions
 - Note state/local differences
- Tax-advantaged fringe benefits
- Increased exclusion for gain from sale of principal residence

What does this mean for divorce?

- Transfers of property become tax-free
- Alimony payments are deductible

What should I do now?

- Many taxpayers may want to consider filing protective claims for refund while determining whether they owe more or less tax as a result of the decision.

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