

HICKS NOTES

NH HICKS Experience Counts
Legal and Pension Consultants
(800) 310-4975 | www.nhhicks.com

August 2013

By Tom Hicks, Attorney At Law

U.S. SUPREME COURT DOMA RULING AFFECTS RETIREMENT PLANS

On June 26, 2013, in the case of U.S. v. Windsor, the U.S. Supreme Court ruled in two areas of the Defense of Marriage Act (DOMA). First Section 3 states, in part, “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 and wife.” This was declared unconstitutional.

The second ruling was that Section 2 shall remain in force. It says, “No State, territory, 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, ... tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, ... tribe, or a right or claim arising from such relationship.”

In the 14 States that have same-sex marriage laws, Federal Law shall recognize those marriages for pension purposes under ERISA. For our clients in California and Washington, the new rules must be followed. Oregon, Nevada and other states that have domestic partnerships or civil unions may choose to follow the new rules, however are not required to do so.

In order to treat same-sex and opposite-sex spouses equally under ERISA, the following operational changes need to be enacted by the plan:

1. A same-sex spouse is entitled to a participant’s death benefit.
2. In defined benefit and Cash Balance plans, a same-sex spouse is entitled to a qualified joint and survivor annuity (QJSA) or a qualified preretirement survivor annuity (QPSA).
3. A same-sex spouse is deemed the default beneficiary and must consent to any other person designated as the primary beneficiary.
4. A same-sex spouse now qualifies as an alternate payee under a qualified domestic relations order (QDRO).
5. Plan participants can receive hardship distributions for same-sex spouse’s medical, tuition or funeral expenses.
6. Same-sex spousal consent is required for loans and other distributions.
7. Rollover rules for IRA distributions now extend to same-sex spouses. For more on rollover rules, click [here](#).

* * * * *

If you would like to unsubscribe to this newsletter, click [here](#).

Plan Sponsors need to identify employees who have same-sex marriages. Those participants should update their beneficiary designation forms. Employee handbooks, Summary Plan Descriptions, documents, forms and files that reference the DOMA language should be reviewed and the appropriate changes made. Be sure to obtain the spousal consent when processing distributions from your plans.

As is typical, there are numerous areas that will need further clarification from the IRS, DOL and other State and Federal agencies regarding application of this ruling. Some of the issues involved are:

1. Presumably the effective date is June 26, 2013, or is it retroactive? If so, to when? How much time will plans be given time to comply?
2. What about people living or working in different states from the employer? Which rule do they use?
3. How will States with domestic partnerships or civil unions apply these rules? These States have the option to choose to follow the new rules or not. Can a plan sponsor just decide what law to use for plan purposes?

My biggest concern has to do with compliance testing in our 401(k) plans. Family Attribution Rules apply when determining “Key” and “Highly Compensated” employees as well as Controlled Groups. These definitions are a critical part of the Top Heavy and discrimination tests. By being forced to bring in a same-sex spouse into these tests, a plan can quickly become out of compliance. While future guidance will clarify these issues, everyone will need to identify same-sex spouses to see if this may be an issue for your plan.

Getting spousal consent of any kind is often an issue. With these new rules, it potentially complicates the process that much more.

I have just touched on the basics of this ruling. We will keep you informed as updated guidance is released. We will be sending our annual questionnaire addressing this issue. However, if you are an owner in this type of marriage, a proactive course of action could save you headaches down the road. Need help or want further clarification, please call or email us today.

Call or email us with any questions or pension administration needs.