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## Attorneys at Law

CLIENT ALERT:

Labor and Employment Law

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### **What Employers Need to Know About the DOMA Ruling**

Earlier this year the United States Supreme Court, in United States v. Windsor, 570 U.S. \_\_\_, 133 S.Ct. 2675 (2013), declared a major provision of the Defense of Marriage Act (known as "DOMA") unconstitutional. Although much of the discussion surrounding Windsor has focused on how the decision will affect the state of marriage in the United States, the more immediate effects of the Decision will fall on employers and those effects might not be obvious.

At heart, Windsor was a tax case. The defendant had been lawfully married to a person of the same sex in a jurisdiction that recognized same-sex marriage. Her spouse died while they were domiciled in New York, which did not recognize same-sex marriages. The IRS treated her as unmarried for purposes of imposition of death taxes. The Supreme Court ruled that it was unconstitutional for the IRS to do so. (The Constitutional reasons which underlie the Court's Decision are beyond the purview of this Client Alert.)

Windsor will profoundly affect employers and many same-sex couples. Both the IRS and the United States Department of Labor have issued proposed regulations or interpretive guidance that set forth how those agencies will respond to Windsor. The IRS recently issued Revenue Ruling 2013-17 which takes effect on September 16, 2013. This ruling announces three positions which the IRS will adhere to for all federal taxation purposes:

1. The terms "spouse," "husband and wife," "husband." and "wife" will include an individual married to a person of the same sex if the individuals were lawfully married under state law, and the term "marriage" will include a marriage between individuals of the same sex. (There are over 200 references to these terms in the Tax Code and Treasury Regulations.)

2. Same-sex individuals that were validly married in a state which recognizes same-sex marriage as a lawful marriage, will be deem married for all federal tax purposes even if the couple moves to and is domiciled in a state that does not recognize same-sex marriage.

3. The terms "spouse," "husband and wife," "husband" and "wife" do not include individuals, whether of the same or opposite sex, who have entered into a registered domestic partnership, civil union or other similar relationship even if the relationship is recognized under state law if that relationship is not denominated a "marriage" under the

laws of that state and the term "marriage" does not include such relationships.

Employers might see employees adjusting the number of "dependants" they claim for withholding purposes and might have to adjust or reinterpret definitional and substantive provisions of benefit plans if they have employees which have a same-sex spouse and the marriage occurred in a jurisdiction where same-sex marriages are recognized.

Employees in same-sex marriages also must be concerned with these changes. Especially important will be named beneficiaries under employer sponsored benefit plans. If a plan provides that, in the absence of a beneficiary designation, death benefits go to a "spouse" but the employee's Will or state intestate laws provide otherwise confusion might arise. Employees in same-sex marriages in states that recognize the marriage as such should be certain that their intentions are made clear in all necessary documents. The same concern arises in the case of employers who will recognize same-sex marriages for benefit plan purposes regardless of state law.

The IRS ruling also means that those in a same-sex marriage recognized as such in the state where the marriage took place (and regardless of where they are living) must be aware of their filing status as federal taxpayers, as well as claiming personal and dependency exemptions. Other issues that can arise include tax-advantaged treatment of benefit plans, IRA contribution limitations, gift and estate tax credits and marital deductions. State tax laws also might be implicated. Filing as a married couple can produce both tax advantages and what is referred to as the "marriage penalty." Under the IRS ruling, same-sex married couples whose marriage is regarded as such by the IRS will no longer be able to file as a single taxpayer but will have to file as married - either filing jointly or separately- but as married. An entirely new estate plan might be called for, depending on circumstances.

The IRS ruling will apply to the 2013 tax year. Accordingly, same-sex married couples should begin to think now about tax planning for this year as well as longer term estate planning.

Employers also should be aware of anti-discrimination laws that prohibit discrimination based on marital status. Here too, reference to the laws of the applicable state(s) will be necessary. For example, under the Family and Medical Leave Act employers must provide to qualified employees up to 12 weeks unpaid leave to, among other things, care for the employee's "spouse." The DOL takes the position post-Windsor that the term "spouse" means a husband or wife as defined or recognized under the laws of the state where the employee resides. (As so interpreted, "spouse" would include the spouse of a common law marriage if common law marriage is recognized under the laws of the state where the employee resides.)

Employers should note the subtle, but important, distinction between the IRS's interpretation of "spouse" and "marriage" and that of the DOL. For IRS purposes, it is sufficient that a same-sex couple was lawfully married in a state whose laws recognized same-sex marriage. Becoming domiciled in a state that does not will have no impact for IRS purposes. Under the DOL's interpretation, the laws of the state of residency control. Accordingly, a same-sex couple that was lawfully married in a state recognizing same-sex marriage, might lose that status for employment purposes if they move to a state that neither recognizes same-sex marriage nor accords full faith and credit to a state that does. In such circumstances, for example, a same-sex partner might not be considered a "spouse"

for FMLA or benefit plan purposes even though the couple was lawfully married in a state that recognizes same-sex marriage.

Aside from strict application of the law, employers also will have to give due consideration to the "politics" of how they apply FMLA in such situations.

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If you have a question concerning an employment matter or if you would like additional information on the subject of this Client Alert, please contact:

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