

# DOMA: WHAT'S YOUR ACTION PLAN? JULY 25, 2013

Presented By:

Mark S. Thomas, Partner, Williams Mullen

D. Earl Baggett, Partner, Williams Mullen

Brydon M. DeWitt, Partner, Williams Mullen



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# TODAY'S PRESENTERS

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**Mark S. Thomas,**  
**Partner, ERISA, Employee Benefits Litigation**  
Williams Mullen – Raleigh, North Carolina  
919.981.4025  
mthomas@williamsmullen.com



**D. Earl Baggett**  
**Partner, Labor and Employment**  
Williams Mullen - Richmond, Virginia  
804.420.6478  
ebaggett@williamsmullen.com



**Brydon M. DeWitt**  
**Partner, Employee Benefits and Executive Compensation**  
Williams Mullen – Richmond, Virginia  
804.420.6917  
bdewitt@williamsmullen.com

# TODAY'S AGENDA

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- > Introduction to *United States v. Windsor*
- > Employment & Immigration Issues Post *Windsor*
- > Issues Affecting Benefit Plans Post *Windsor*
- > Issues Affecting ERISA-Regulated Pension and Retirement Plans After *Windsor*
- > Your Questions
- > Next Steps in your Action Plan

# INTRODUCTION TO *UNITED STATES V. WINDSOR*

Presented by  
Mark Thomas  
July 25, 2013



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## HISTORY OF DOMA

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The Defense of Marriage Act (“DOMA”) was enacted by Congress in 1996. It had three sections:

1. Section 1, which only stated its title.
2. Section 2, which reserved certain rights to the States regarding the recognition of same-sex marriages.
3. Section 3, which defined “marriage” and “spouse” for purposes of *Federal* laws.

## HISTORY OF DOMA

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DOMA's Section 3 was short, and stated the following:

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

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DOMA's Section 2 was even shorter, and stated the following:

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.

## HOW *WINDSOR* AFFECTED DOMA

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What the U. S. Supreme Court's decision in *United States v. Windsor*, June 26, 2013, did and did not do:

1. The Court ruled that DOMA's Section 3 is unconstitutional.
2. The Court did not review Section 2. Section 2 of DOMA is still in full force and effect.
3. *Windsor* decided nothing as to civil unions or domestic partnerships. They were not an issue.

## HOW *WINDSOR* AFFECTED DOMA

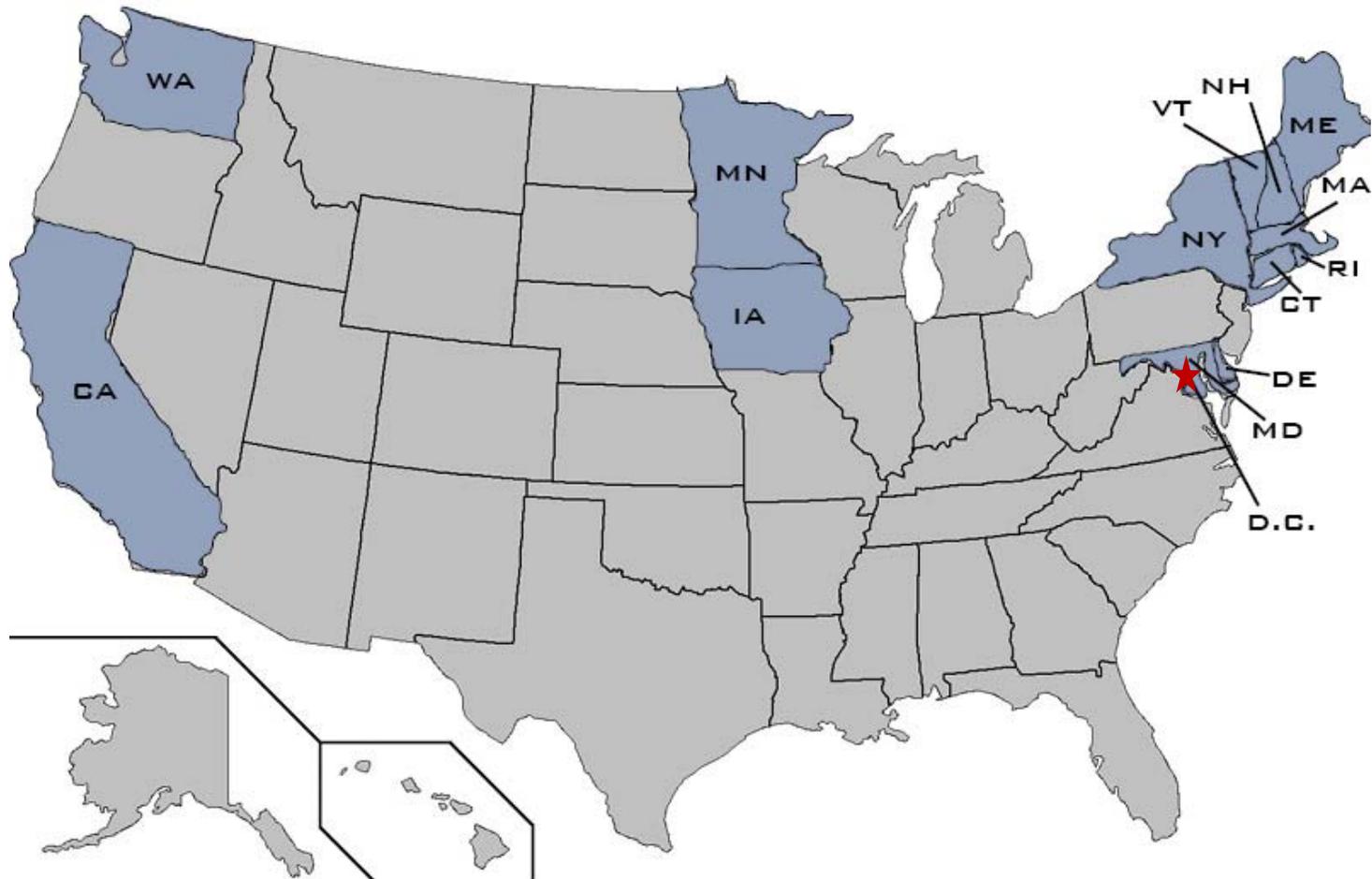
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What the U. S. Supreme Court's decision in *United States v. Windsor*, June 26, 2013, did and did not do – continued:

4. *Windsor* does not require a plan to offer health benefits to spouses. Those plans that do not offer health benefits to spouses now are not required to offer them in the future.

But that still leaves plans potentially affected in other ways.

# STATES THAT RECOGNIZE SAME-SEX MARRIAGE



**EMPLOYMENT AND  
IMMIGRATION ISSUES  
POST *WINDSOR***

Presented by  
Earl Baggett  
July 25, 2013



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## FAMILY AND MEDICAL LEAVE ACT (FMLA)

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- > In striking down Section 3 of DOMA, the U.S. Supreme Court increased the number of individuals that are covered under the FMLA.

## FAMILY AND MEDICAL LEAVE ACT (FMLA)

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### > Overview – “Medical”

- FMLA entitles eligible employees of covered employers to take 12 weeks of unpaid, job-protected leave for specific family and medical reasons.
  - Birth of child, adoption, or foster care.
  - SHC that makes the employee unable to perform the essential functions of the position.
  - To care for employee’s spouse, child, or parent who has a SHC.

## FAMILY AND MEDICAL LEAVE ACT (FMLA)

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### > Overview – “Military”

- 12 weeks of leave for any qualifying exigency arising out of the fact employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty”.
- 26 workweeks of leave during a 12 month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent or next of kin.

# DEFINITION OF SPOUSE

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- > FMLA regulations define “spouse” as a husband or wife as defined by State law where the employee resides.
  - Not where the employer is located
  - Not where the employee works
  - Not where the marriage occurred

# CALCULATING FMLA LEAVE

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- > Employer can only designate leave that qualifies under the FMLA.
- > Cannot reduce the employee's FMLA leave allotment for leave that does not qualify.
- > Need to look to the employee's state of residence to determine whether that state recognizes same-sex marriages.

# PRACTICAL CONSIDERATIONS

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## > Two General Options for FMLA leave

- Evaluate each request for FMLA leave of a same-sex spouse employee on a case by case basis to ascertain whether employee resides in a state where SSM is recognized, and if so, grant and designate the leave as FMLA leave and deduct leave from 12-week allotment.
- Treat all marriages equally (thus eliminating the case by case analysis) which will potentially result in a same-sex spouse residing in a non-SSM state receiving more than 12 weeks of leave.

# PRACTICAL CONSIDERATIONS

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- > Do not forget to review applicable state laws regarding leave.
- > Also need to remain cognizant of local laws and statutes (San Francisco)
- > Wait for regulations and be prepared to adapt, if necessary. The DOL should soon be promulgating regulations that address same-sex spouse issues under the FMLA.

# IMMIGRATION CONSEQUENCES

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- > Same-sex spouses entitled to the same immigration benefits as opposite-sex spouses under Federal law.
- > Whether a couple is “married” for immigration purposes, look to the place of marriage (not place of residence).
  - Marriages that lawfully occurred in a state in the U.S. that recognizes SSM.
  - Marriages that lawfully occurred in a foreign country that recognizes SSM (e.g., Canada, UK).

# IMMIGRATION BENEFITS

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- > Same-sex spouses of U.S. citizens can apply for lawful permanent resident status (green cards).
  
- > Employment-based green card cases
  - Same-sex spouses of employment-based green-card sponsored employees can obtain green cards as immediate relatives.
  
- > Non-immigrant Visas (H-1B, TN, L-1, L-2, E-1, E-2, etc.)
  - Same-sex spouses of foreign nationals who obtain work visas to enter and work in the U.S. can obtain a visa to accompany spouse.
  - Fiancé / fiancée visas.

# ISSUES AFFECTING BENEFIT PLANS AFTER *WINDSOR*

Presented by  
Brydon DeWitt  
July 25, 2013



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# SAME-SEX SPOUSE / DOMESTIC PARTNER BENEFITS BEFORE WINDSOR

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## > Plan Design Issue

- No federal law requirement to offer any same-sex spouse or domestic partner benefits
- Some state insurance laws required coverage
- Plan document terms have force of law under ERISA

## > Tax Issues

- Benefits purchased after-tax
- Benefits subject to federal income, FICA and FUTA taxes unless the individual was the employee's dependent

# ISSUES AFFECTING BENEFIT PLANS AFTER WINDSOR

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- > Is the plan required by law to recognize a same-sex spouse as a spouse?
- > Do plan terms still reflect the plan sponsor's intent?
- > How must plan administration change?
- > Are there plan design opportunities?

# GROUP HEALTH PLANS

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## > Insured Plans

- State law may require coverage of same-sex spouses
- Such coverage now receives same federal tax treatment as coverage provided to opposite-sex spouses

## > Self-Insured Plans

- Self-insured plans have more discretion
  - Not providing coverage may expose plan sponsor to litigation
  - Employee relations issues
  - Plan design changes?
    - Continue domestic partner benefits?
  - Change in tax treatment

# GROUP HEALTH PLANS

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## > HIPAA Special Enrollment Rights

- Special enrollment rights upon marriage and birth or adoption of a child

## > Cafeteria Plans and Flexible Spending Arrangements

- Same-sex spouses may purchase coverage on a pre-tax basis
- Health FSAs may reimburse health expenses of same-sex spouses
- Changes in status include same-sex marriage and divorce

# GROUP HEALTH PLANS

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## > COBRA

- Same-sex spouses may be qualified beneficiaries
- Same-sex divorce and legal separation is a qualifying event

## > Affordable Care Act

- Plans are not required to provide coverage to spouses

**ISSUES AFFECTING ERISA-  
REGULATED PENSION AND  
RETIREMENT PLANS AFTER  
*WINDSOR***

Presented by  
Mark Thomas  
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## RETIREMENT BENEFIT PLANS

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*Windsor* raises the following issues for all ERISA-regulated pension and retirement plans:

- > In those States where same-sex marriages are recognized as lawful, the general rule must be applied to both opposite-sex and same-sex spouses.
- > However, *Windsor* did not strike down DOMA's Section 2.
- > Federal guidance is needed: which State laws will control for purposes of Federal employee benefits law?

# IMPACT FOR PENSION AND RETIREMENT PLAN PROVISIONS

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- > Spousal consent for designating non-spousal beneficiaries
- > Qualified Joint and Survivor Annuities and Qualified Pre-Retirement Survivor Annuities
- > Plan Loans
- > QDRO's
- > Hardship Withdrawals
- > Rollover Distributions to Spouses
- > Minimum Required Distributions

## SPOUSAL CONSENT TO DESIGNATION OF NON-SPOUSE BENEFICIARIES

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General rule for defined benefit pension plans and defined contribution retirement plans governed by ERISA:

- > A plan will require the consent of participant 's spouse to the participant's designation of a beneficiary who is other than the spouse. Otherwise, the designation is invalid.

## QUALIFIED JOINT AND SURVIVOR ANNUITY AND QUALIFIED PRE-RETIREMENT SURVIVOR ANNUITY

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### General Rules:

- > Defined benefit plans must provide a QJSA to every vested participant, and provide a QPSA to the surviving spouse of a vested participant. These are mandatory forms of benefits unless the spouse consents in writing to a waiver of them.
- > The married participant in such a plan must also obtain the spouse's written consent to a payment option that does not give the spouse at least half of the benefits for life.

# SPOUSAL CONSENT REQUIRED FOR PLAN LOANS

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## General Rules:

This applies to plans subject to the qualified survivor annuity requirement, such as all pension plans and 401(k) plans and profit sharing plans containing qualified annuity provisions:

- > Such plans must require the written consent of a participant's spouse before any part of the participant's accrued benefit may be used as security for a loan from the participant's plan account,  
*or*
- > the spouse must consent in writing within the 90 day period ending the day that the security becomes effective.

## QUALIFIED DOMESTIC RELATIONS ORDER (QDRO)

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### General Rule:

- > If a properly worded QDRO is signed by the court, a divorced spouse is entitled to receive a portion of a participant's benefit in a qualified retirement plan.

# HARDSHIP WITHDRAWALS FROM A PLAN ACCOUNT

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## General Rules:

- > Employers are not required to provide this option. But they can offer this under certain plans, such as 401(k) plans.
- > Under a plan that offers it, a participant who satisfies the IRS rules can withdraw from the participant's own elective contributions, but only the amount needed for the hardship.
- > Does the plan offer hardship withdrawals? If so, does it require spousal consent? (Generally, the plan will.)

# ROLLOVER OF DISTRIBUTIONS TO THE SPOUSES

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## General Rule:

- > A spouse of a deceased participant can roll over a distribution attributable to the participant from a qualified trust under a qualified plan, the same as if the spouse were the participant.

# MINIMUM REQUIRED DISTRIBUTIONS

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## General Rules:

- > For qualified individual account plans, such as qualified 401(k) plans, the Code requires a minimum amount of distribution from a participant's plan account by not later than the later of:
  1. The year the participant retires; or
  2. April 1 of the year following the year the participant reaches age 70 and one-half.

# MINIMUM REQUIRED DISTRIBUTIONS

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## The Issues Now:

- > The calculation of the minimum required distribution is affected by whether the participant's sole designated beneficiary is the participant's spouse.
- > If the plan miscalculates the minimum required distribution, that mistake could disqualify the plan.
- > This raises the question: if the participant has a same-sex partner, is that partner the participant's "spouse"?

## PENSION AND RETIREMENT PLAN ACTION ITEM FOR PLAN FIDUCIARIES

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- > Look for Federal guidance to determine whether the “State of Celebration” or “State of Domicile” decides the status of a participant’s same-sex partner as a “spouse”.
- > That guidance will determine whether the partner is a spouse who must be taken into account to determine the application of the above-mentioned statutory and regulatory rules.

# OPEN QUESTIONS

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## > Retroactivity

- When must (or must have) qualified pension plans recognize same-sex spouses as spouses?
  - As of when must plans be amended?
  - Must distributions be corrected?

## > Marriage valid where celebrated but not where the couple resides?

## > Impact of Civil Rights Laws

- Gender discrimination risk?

## > Taxes

- Were taxes over-withheld?
- Must tax withholding be corrected?

# NEXT STEPS IN YOUR ACTION PLAN

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- > Review plan documents and summary plan descriptions
- > Amend plan documents and summary plan descriptions
- > Revise election forms, notices and other employee communications
- > Ensure that plan administration complies with the law
- > Update payroll processes and confirm proper tax treatment of salary reduction contributions and plan benefits
- > Review domestic partner policies
- > Review family medical leave policy to ensure you do not define "spouse" as opposite sex only

# QUESTIONS

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Please submit your questions using the chat feature on your computer.

If you have any difficulties, email your question to Patty Sager at [psager@williamsmullen.com](mailto:psager@williamsmullen.com).

# THANK YOU FOR YOUR TIME

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**Mark S. Thomas,**  
**Partner, ERISA, Employee Benefits Litigation**  
Williams Mullen – Raleigh, North Carolina  
919.981.4025  
mthomas@williamsmullen.com



**D. Earl Baggett**  
**Partner, Labor and Employment**  
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ebaggett@williamsmullen.com



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