



UPDATE Employee Benefits and Compensation

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Defense of Marriage Act Ruled Unconstitutional by Federal Appeals Court

The U.S. Court of Appeals for the First Circuit handed down a landmark ruling in *Gill v. Office of Personnel Management*, No. 10-2207, and companion case, *Massachusetts v. Department of Health and Human Services*, No. 10-2204, declaring Section 3 of the Federal Defense of Marriage Act (DOMA) unconstitutional on May 31, 2012. The decision results in conflicting obligations throughout the country and has, therefore, been stayed pending appeal to the U.S. Supreme Court.

BACKGROUND

The U.S. District Court for the District of Massachusetts issued two decisions declaring Section 3 of DOMA unconstitutional on July 8, 2010. Section 3 of DOMA, which was enacted by Congress and signed by President Clinton in 1996, provides that the federal government defines marriage as the legal union between a man and a woman, and the term spouse refers to a person of the opposite sex who is a husband or wife. DOMA's Section 3 applies to more than 1,000 federal laws. While it does not directly outlaw same-sex marriage, it does deny access to such federal benefits as Social Security survivor benefits, health insurance for federal workers' spouses, and other medical benefits and it bars such couples from filing joint federal tax returns.

In *Gill*, the plaintiffs, legally married in Massachusetts, alleged that they had been denied certain federal marriage-based benefits as a result of DOMA and sought to enjoin federal agencies and officials from enforcing DOMA. The companion case to *Gill* - *Commonwealth of Massachusetts v. U.S. Department of Health and Human Services* - challenged the validity of DOMA by alleging that Congress overstepped its authority and undermined the states' efforts to recognize marriage between same sex couples by threatening to revoke federal funding for certain state programs that, as a result of DOMA, must be made available only to heterosexual couples (for example, burial of Massachusetts veterans and their spouses in state cemeteries for veterans, and participation in the Commonwealth's Medicaid program).

THE COURT'S RATIONALE

In a unanimous three-judge panel ruling, the Circuit Court took a cautious approach that was based on recent Supreme Court precedents outlawing discrimination against "historically disadvantaged or unpopular" minority groups. The Circuit Court said that it cannot use the easy-to-satisfy "rational basis" review, but rather it must examine more closely in each case the differing treatment, the burden imposed, and the failings in the justifications offered by lawmakers. Because gays and lesbians "have long been the subject of discrimination," the opinion concluded, there must be "a more careful assessment of the justifications."

The Circuit Court further rationalized its review of DOMA using federalism principles that defer to states' powers in areas traditionally reserved to state regulation (that is, domestic relations). Although Congress has an interest in who counts as married, the Circuit Court noted that the denial of federal benefits to same-sex couples burdens the choice of states to regulate marriage. The Circuit Court went on to examine, and to reject, the justifications put forward for Section 3, such as "preserving scarce government resources," "support child-rearing in the context of stable marriage," "moral disapproval of homosexuality," and a desire to "freeze" the issue pending changes in state marriage laws.

In closing, the Circuit Court ruled that the denial of federal benefits to lawfully married same-sex couples had not been adequately supported by any permissible federal interest and, consequently, affirmed the judgment of the U.S. District Court. Expecting the decision to be appealed and pursued to the Supreme Court, the Circuit Court ordered that the mandate be put on hold.

THE IMPACT

Gill marks the first time that a challenge to DOMA has been heard by a federal appeals court, though the same issue is now pending in the Ninth Circuit Court. The decision may soon lead to one or more appeals to the Supreme Court. If the Supreme Court denies certiorari and the Circuit Court's ruling stands, it would affect only same-sex couples within the First Circuit - Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico - but it could serve as a constitutional precedent for challenging other limits or bans on same-sex marriage in any state.

The decision has been stayed, so it is not effective at this point. However, employers may want to track the progress of this case and its impact on employee benefit plans and other employment policies. Repeal of DOMA may cause federal law to defer to state law determinations of otherwise valid marriages. Federal laws governing employee benefit plans then might require employers to treat employees' same-sex and opposite-sex spouses equally for benefits purposes. For example, in the retirement plan context, employers with pension and 401(k) plans might be required to recognize same-sex spouses for purposes of determining surviving spouse annuities or death benefits under their retirement plans.

Similarly, in the welfare plan context, items such as the federal income tax treatment of health coverage for an employee's same-sex spouse might change such that employees would no longer have to be taxed on the income imputed for the employer's contribution to the same-sex spouse's coverage, and offering COBRA continuation to same-sex spouses could be required. Employers might also be required to permit employees to take family and medical leave to care for a same-sex spouse in illness.

Pending a decision from the Supreme Court, these issues remain uncertain and of great

interest to all in the employment area.

If you have any questions about this case and its impact, please contact any of the following attorneys in Robinson & Cole's [Employee Benefits and Compensation Practice Group](#):

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