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**LAMB & BARNOSKY, LLP**

ATTORNEYS AT LAW

## MEMORANDUM

**TO: OUR CLIENTS**

**FROM: LAMB & BARNOSKY, LLP**

**RE: THE IMPACT OF THE UNITED STATES SUPREME COURT DECISION  
IN *UNITED STATES v. WINDSOR***

**DATE: JULY 8, 2013**

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The federal Defense of Marriage Act (DOMA) defined marriage as being between a man and a woman. This statute prevented same-sex married couples from receiving many benefits which were available to opposite-sex married couples. On June 26, 2013, in *United States v. Windsor*, the United States Supreme Court found DOMA to be unconstitutional and ruled that same-sex marriage must, for purposes of federal law, be treated the same as opposite-sex marriage.<sup>1</sup> This memorandum addresses the impact of that decision on the availability of certain employment-related benefits.

### The Family and Medical Leave Act (FMLA)

The FMLA requires employers with 50 or more employees to allow their employees to take a job-protected leave of absence for up to 12 workweeks for specified family and medical reasons with continuation of health insurance coverage subject to the same terms and conditions as if the employee had not taken leave. Two of the specified reasons for which an employee may take FMLA leave are to care for a spouse with a serious health condition and the birth of a child.

DOMA prevented employees from taking FMLA leave to care for a same-sex spouse's serious health condition and/or for the birth of a child by a same-sex spouse. As a result of the Supreme Court's ruling, employees are now eligible for FMLA leave for these reasons.

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<sup>1</sup> Currently, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia recognize same-sex marriage. It is unclear how the Supreme Court's decision impacts those States which do not do so.

### The Consolidated Omnibus Budget Reconciliation Act (COBRA)

COBRA applies to employers which employ at least 20 employees. The statute provides “qualified beneficiaries” (*i.e.*, the employee, his/her spouse or dependent child) the right to temporary continuation of health insurance coverage when coverage is lost due to certain “qualifying events.” For an employee, a “qualifying event” is: (1) the employee’s termination for reasons other than gross misconduct; or (2) a reduction in the hours of employment. For a spouse, a “qualifying event” is: (1) the covered employee’s termination for reasons other than gross misconduct; (2) a reduction in the covered employee’s hours of employment; (3) the covered employee becoming eligible for Medicare; (4) divorce or legal separation of the covered employee; and (5) the covered employee’s death. For a dependent child, a “qualifying event” is the loss of dependent status pursuant to the health insurance plan’s rules.

Pursuant to DOMA, a same-sex spouse could not be deemed to be a qualified beneficiary unless he/she was the covered employee’s dependent for federal income tax purposes. In addition, a same-sex spouse that experienced a “qualifying event” was ineligible for continuation of coverage pursuant to COBRA.

As a result of the *Windsor* decision, a same-sex spouse will now be deemed a “qualified beneficiary,” regardless of his/her dependent status.<sup>2</sup> Qualifying events experienced by same-sex spouses will also trigger COBRA benefits.

### Cafeteria Plans and Flexible Spending Accounts (FSA)

Employer contributions to a cafeteria plan are usually made in accordance with a salary reduction program between the employer and the employee in which the employee agrees to contribute a portion of his/her salary on a pre-tax basis to pay for qualified benefits, such as accident or health coverage, group-term life insurance or coverage under a dependent care program. Pursuant to DOMA, pre-tax dollars could not be used to pay for coverage of a same-sex spouse. This will now change as a result of the *Windsor* decision.

A health flexible spending arrangement (FSA) is a form of cafeteria plan benefit funded by a voluntary salary reduction arrangement with pre-tax dollars. Qualified medical expenses are those incurred by, among other individuals, the employee and his/her opposite-sex spouse. As a result of DOMA, only opposite-sex married couples could use health FSA dollars for a spouse’s qualified medical expenses. In light of the *Windsor* decision, same-sex married couples can now use FSA dollars for qualified medical expenses of both spouses.

An employee may modify his/her cafeteria plan elections when a change in status occurs, such as an employee’s marriage or a change in employment status of an employee’s spouse. Therefore, a newly entered into same-sex marriage and/or a change in the employment status of a same-sex spouse will now trigger the employee’s right to make modifications. It is unclear

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<sup>2</sup> New York’s “mini-COBRA” statute requires that small employers (those with less than 20 employees) provide qualified beneficiaries who experience a qualifying event with the opportunity to continue coverage. Since the enactment of New York’s Marriage Equality Act on July 24, 2011, the term qualified beneficiary has included a same-sex spouse.

whether the right arises for employees in a same-sex marriage that was entered into prior to the *Windsor* decision.

#### Health Insurance: Federal Income Tax Implications

Before the *Windsor* decision, health insurance benefits provided to a same-sex spouse, who was not the employee's dependent for federal income tax purposes, were taxable to the employee. Same-sex spousal benefits will no longer be taxable.

#### Health Reimbursement Arrangements (HRA) and Health Savings Accounts (HSA)

An HRA is an employer-funded health benefit plan that reimburses employees, on a tax-free basis, for certain out-of-pocket medical expenses and health insurance premiums. Reimbursements may be made to current and former employees, spouses and dependents of employees (including deceased employees) and any person which the employee could have claimed as a dependent, subject to certain limitations, on a federal income tax return.

An HSA is a health savings account into which an employer and/or an employee who is enrolled in a high-deductible health insurance plan, is not enrolled in Medicare and is not claimed as a dependent on another taxpayer's return, may deposit funds. These funds, which are not subject to federal income tax at the time of deposit, may then be used to pay for or reimburse qualified medical expenses at any time without any federal tax liability. Like an HRA, qualified medical expenses include those incurred by the employee, his/her spouse and, subject to certain limitations, dependents.

Pursuant to the Supreme Court's ruling, a same-sex spouse will be eligible for reimbursement from an HRA and HSA funds may be used for his/her qualified medical expenses, regardless of whether the same-sex spouse is the employee's dependent.

#### The Health Insurance Portability and Accountability Act (HIPAA)

Among other things, HIPAA allows individuals who previously declined health insurance coverage to enroll in the employer's plan upon loss of eligibility for other coverage (or loss of employer contributions) or upon certain life events, regardless of the plan's open enrollment period. Special enrollment rights are triggered upon: (1) loss of eligibility for coverage (this includes an employee's spouse losing coverage through his/her own employer); (2) loss of eligibility for Medicaid; (3) birth of a child; (4) employee's marriage; (5) employee's adoption of a child; and (6) becoming eligible for Medicaid premium assistance. Pursuant to the *Windsor* decision, special enrollment rights are now extended to a same-sex spouse, who was previously ineligible unless he/she qualified as the employee's dependent.

As a result of the U.S. Supreme Court's ruling, employer policy manuals, cafeteria plan documentation, collective bargaining agreements and/or employment contracts may need to be updated.

Please contact us if you have any questions about the impact of *United States v. Windsor*.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.

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