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Employee Benefits, and Particularly Government Employers, Further Affected by Same Sex Developments

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We previously explained that the *United States v. Windsor* decision and other developments required all employers, of every stripe, to evaluate and modify their benefit plans to recognize same sex marriages. *See our May 2014 Alert*. The legal landscape has been about 98% clear for about, perhaps, 80% of employers. Many of those plan sponsors already took action to avoid a number of potential problems with their plans (problems ranging from losing tax-qualified status, to adverse taxes for employees, to Department of Labor and/or participant litigation risks, to paying death benefits twice).

Most of the plans of state and local government employers particularly, and their school districts, agencies and associations, had to comply with some aspects of recognizing same sex marriages. However, unlike private employers, in Idaho (and in certain other states banning same sex marriages) government employers and plan sponsors were prohibited by law from fully recognizing same sex marriages for purposes of their plans. Since *Windsor* it was very tricky – for example, a same sex spouse was prohibited from being recognized as a spouse for death benefit beneficiary purposes, but such spouse must have had the right to roll over any death benefits that spouse received (and the required IRS tax notice should have informed the same sex spouse beneficiary of that right).

Plans of state and local governments and their agencies are profoundly affected by the October 15 Ninth Circuit action

As of October 15, 2014, those complexities in employee benefits law as affecting Idaho's government and certain other plans have now been eliminated. The Ninth Circuit Court of Appeals made clear that the Idaho state law prohibition on same sex marriages is unconstitutional, and therefore Idaho joins the host of other states mandating that Idaho allow gay couples to wed.

All plans of Idaho governments, whether they are health, retirement, 457, 403(b), 401(a), flex, cafeteria, 125, dependent care, et. al. must immediately be evaluated and in most cases modified to treat same sex spouses just like opposite sex spouses for all plan purposes. Operations must change, and plan documents must be revised (for example including plan amendments, summary plan descriptions, employee manuals and communications, and the various participant forms). In addition, tax withholdings must change, and some same sex couples likely are entitled to tax refunds.

Same sex marriages are <u>not</u> recognized the same way in all plans, for example health versus retirement plans

Many employers that are not governments have by now taken some steps to comply with these developments. Some have not, and some have only gone half-way. Now, and certainly before the end of 2014, to avoid tax-qualification failures and also meet Internal Revenue Service amendment deadlines, all employers should evaluate their compliance with these requirements. To do otherwise carries risks.

There is still not complete parity with these laws as applied to health plans versus retirement plans, nor as applied to public plans versus private plans. A plan's requirements will differ depending on the type of plan and the type of employer, and until the U.S. Supreme Court requires all states to recognize same sex marriages. And remember, domestic partners and civil unions are also treated differently.

Finally, any chance that these developments will be reversed is less likely to materialize than the Cubs will win the World Series.

Please contact Jeffery Mandell (jeff@erisalawgroup.com) or John C. Hughes (john@erisalawgroup.com) at 208-342-5522 or 866-ERISALAW if you wish to discuss your plan specifics.

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