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## **EMPLOYEE BENEFITS and WELFARE BENEFITS AND ERISA LITIGATION ALERT**

### ***U.S. Agencies' Guidance Recognizing Same-Sex Marriages has Significant Impact on Employers and the Administration of Retirement and Health Benefit Plans***

Section 3 of the Defense of Marriage Act ("DOMA"), enacted in 1996, provided that, for the purposes of federal law, the words "marriage" and "spouse" refer to legal unions between one man and one woman. On June 26, 2013, the United States Supreme Court (the "Court") held in *U.S. v. Windsor*, 570 U.S. 12 (2013), that Section 3 of DOMA is unconstitutional. As a result of the ruling, marriages recognized under controlling state law will be recognized by federal law, and spouses in those marriages will have the same rights and obligations under federal laws as spouses in opposite-sex marriages. The Windsor decision, however, does not require individual states to allow or to recognize same-sex marriages.

With the purpose of clarifying the application of the Windsor case, the United States Internal Revenue Service (the "IRS") issued [Revenue Ruling 2013-17](#) on August 29, 2013, announcing that, effective September 16, 2013, same-sex couples legally married in jurisdictions that recognize their marriages will be treated as validly married for federal tax purposes regardless of whether the couple lives in a state that does not recognize same-sex marriages. This means that the IRS will recognize legally entered same-sex marriages for income, estate, employee benefits and other federal tax purposes, even if the couple does not live or work in a state that recognizes the marriage.

To provide uniformity in the application of the holding in the Windsor case, the U.S. Department of Labor ("DOL") further issued on September 18, 2013, the [Technical Release 2013-04](#), specifically ruling that where the Secretary of the DOL has authority to issue regulations, rulings, opinions and exemptions under Title I of the Employee Retirement Income Security Act of 1974 ("ERISA") and the U.S. Internal Revenue Code ("US Code"), the term "spouse" will be read to refer to any individual who is married under the law of any state or foreign jurisdiction, including an individual married to a person of the same sex, but who is domiciled in a state that does not recognize such marriage. Similarly, the term "marriage" will be read to include a same-sex marriage that is legally recognized as a marriage under any state or foreign jurisdiction.

Puerto Rico is a jurisdiction that does not allow or recognize same-sex marriages. Under the Puerto Rico Internal Revenue Code (“PR Code”), the terms “marriage” and “spouse” refer only to the legal marriage of opposite-sex couples. Same-sex couples are specifically excluded from such terms. Qualified employee benefit plans that cover Puerto Rico resident employees must comply with the provisions of the PR Code, the provisions of Title I of ERISA and with many of the rules and regulations issued by the US Treasury under the US Code (e.g., requirements of a joint and survivor annuity and a preretirement survivor annuity) which apply by virtue of the parallel provisions of ERISA over which US Treasury has regulatory authority. The different treatment of “marriage” and “spouse” under the federal and local tax statutes may result in administrative burdens to the employers in their attempt to apply these conflicting statutory regimes.

Until further local and federal government guidance is issued on the application of the Windsor case to Puerto Rico employee benefit plans, plan sponsors of qualified retirement plans subject to the provisions of ERISA Title I, and established for the benefit of Puerto Rico resident employees, should review and evaluate their employee benefit plan documents (including Summary Plan Descriptions) to ascertain whether: 1) the terms “marriage” and “spouse” in the plan documents must be modified/amended to be in compliance with the general guidance issued by the IRS and the DOL; 2) the change in the law will likely impact the management/administration of provisions regarding rollover distributions, beneficiary designations, survivor annuity provisions, among others; 3) spousal consent forms should be reviewed to ensure that same-sex marriages are incorporated; and 4) plan procedures, such as distribution and loan procedures, should be revised.

Likewise, plan sponsors and administrators of ERISA-covered health and welfare benefit plans should revise the terms “marriage” and “spouse” used in the plan documents, Summary Plan Descriptions and insurance policies of their welfare plans, pursuant to the DOL Technical Release. In addition, same-sex spouses participating in group health plans will now have continuation of coverage rights under the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”); portability and special enrollment rights under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), and non-discrimination protections under HIPAA and the Genetic Information Nondiscrimination Act of 2008 (“GINA”).

If you have any questions or comments regarding the above and retirement plans, you may contact any of the attorneys listed below, members of our Employee Benefits Practice Team:

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