



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable John A. Cosgrove  
Member, Senate of Virginia  
Post Office Box 1548  
Chesapeake, Virginia 23328

Dear Senator Cosgrove:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire whether a document produced by the United States Department of Labor, Technical Release 2013-04, requires public sector health plan sponsors in Virginia to offer benefits to an employee's "same-sex spouse," where the employee and spouse entered into a marriage in a jurisdiction that recognizes "same-sex marriage;" and, if so, when must such benefits be made available.

## Response

Because there is pending litigation that touches on the issue you present,<sup>1</sup> the Office cannot provide an opinion on this matter.<sup>2</sup> Nonetheless, in light of the need of public entities to make benefit decisions, I offer legal commentary that may prove helpful to you pending the outcome of the current litigation.

## Background

You indicate that on September 18, 2013, the United States Department of Labor issued Technical Release 2013-04 entitled, "Guide to Employee Benefits Plans on the Definition of 'Spouse' and 'Marriage' under ERISA and the Supreme Court's decision in *United States v. Windsor*" ("Technical Release"). It is applicable not only to ERISA plans, but also to public sector health plans through the Public Health Service Act ("PHSA").<sup>3</sup> The Technical Release states that plans subject to PHSA should use a definition of spouse that includes "same-sex spouses" if the marriage took place in a jurisdiction

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<sup>1</sup> There now are two pending cases in Virginia that challenge the existing ban on "same-sex marriage" in the Commonwealth; the ability to access benefits clearly is implicated within the issues of this litigation. *See Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va.) and *Harris v. Rainey*, No. 5:13-cv-00077 (W.D. Va.).

<sup>2</sup> It is the longstanding policy of this Office to refrain from expressing an opinion about a matter currently in litigation, unless requested by the court before which the issue is pending. *See, e.g.*, 1977-78 Op. Va. Att'y Gen. 31.

<sup>3</sup> 42 U.S.C. § 201, *et seq.*

that recognizes “same-sex marriage.” It also purports to address issues raised by the recent Supreme Court finding that a section of the federal Defense of Marriage Act<sup>4</sup> (“DOMA”) is unconstitutional.

### Applicable Law and Discussion

On June 26, 2013, the Supreme Court of the United States ruled in *United States v. Windsor*,<sup>5</sup> that Section 3 of DOMA was unconstitutional. That provision defined marriage to mean a legal union between one man and one woman as a comprehensive definition for federal statutes and regulations. Although the Court struck down Section 3 of DOMA, it specifically did *not* limit a state’s authority to define marriage to prohibit “same-sex marriage” or dictate how state benefits could be paid.<sup>6</sup> In fact, Section 2 of DOMA remains valid law, and it provides that a state is not required to recognize a “same-sex marriage” performed in another state.<sup>7</sup> Accordingly, the Commonwealth of Virginia’s constitutional provision limiting recognition of “marriage” to unions between one man and one woman<sup>8</sup> remains in force under current law. I therefore conclude that the Technical Release is not consistent with the provisions of Section 2 of DOMA.

### Conclusion

Accordingly, subject to the outcome of litigation that may, or may not, change the status of current law, it is my conclusion that the Technical Release should not be considered as legally binding to the extent that it conflicts with Section 2 of DOMA and Article I, § 15-A of the *Constitution of Virginia*.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>4</sup> Defense of Marriage Act, 104 Pub. L. No. 199, 110 Stat. 2419 (codified as amended in scattered sections of 28 U.S.C.).

<sup>5</sup> 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

<sup>6</sup> *Id.*, 133 S. Ct. at 2682.

<sup>7</sup> See 28 U.S.C. § 1738C (providing that “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”).

<sup>8</sup> VA. CONST. art. I, § 15-A.