

Same-Sex Marriage Decision's Effect on Stark Law

The Supreme Court decision in *United States v. Windsor* struck down the Federal Defense of Marriage Act ("DOMA"), holding that the controversial statute impressively "writes inequality into the entire United States Code." The historical decision has had an infinite ripple-effect into various aspects of state and Federal law, including the Federal physician self-referral law, commonly referred to as the "Stark Law."

The Stark Law prohibits physician referrals of "designated health services" (e.g., certain imaging services, laboratory service, etc.) to an entity with which the referring physician or an immediate family member has a financial relationship. Stark Law identifies the following individuals as members of a physician's immediate family:

- Husband or wife;
- Birth or adoptive parent, child or sibling;
- Stepparent, stepchild, stepbrother or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law or sister-in-law;
- Grandparent or grandchild; and
- Spouse of a grandparent or grandchild.

"Effective June 26, 2013, the date of the *Windsor* decision, the same-sex spouse of a physician and the family members that result from same-sex marriages meet the definition of 'immediate family member or member of a physician's immediate family' if the state or other jurisdiction, whether foreign or domestic, where the couple was married recognizes the marriage under its laws, or if the state(s) or other jurisdiction(s) where the couple lives recognizes the marriage as a legally valid marriage."

— Centers for Medicare & Medicaid Services ("CMS") guidance regarding the effect of the *Windsor* decision on the definition of immediate family member as it pertains to the Stark Law

It is clear from CMS' guidance that the *Windsor* decision expands the immediate family member definition not only to same-sex spouses in legally valid marriages, but also to resulting family members that are created from such unions. For instance, the parents and siblings of a same-sex spouse are now also considered immediate family members for the purposes of Stark analysis.

In addition to the Stark Law, physicians and certain other health care practitioners are subject to state physician self-referral laws, which also prohibit practitioner referrals to an entity in which an immediate family member has a financial relationship. As same-sex marriage jurisprudence develops on a state by state basis, it will be interesting to see how individual states will interpret their self-referrals laws as it pertains to referrals to entities in which an immediate family member has a financial relationship by virtue of a legally valid same sex marriage.

It is important for all practitioners to understand the nuances of self-referral prohibitions when arranging business relationships, particularly those involving family members.