

IRS Issues Guidance on Same-Sex Marriages for Qualified Plans

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Practices: Employment, Labor & Benefits

At long last, on April 4, 2014, nearly 10 months after the U.S. Supreme Court decision in *United States v. Windsor*, the IRS has released guidance on the effective date by which qualified plans must recognize same-sex marriages for purposes of benefits under the plans. The Guidance is found in Notice 2014 19 and the FAQs posted on the IRS's website.

Background:

In the *Windsor* decision, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act ("DOMA"). Section 3 of DOMA specifically prohibited the recognition of same-sex marriages for all federal law purposes. As a consequence, prior to *Windsor*, same-sex spouses were denied many of the tax benefits provided to opposite sex spouses, including those under qualified plans, even if the couple was married and residing in a state which otherwise recognized same-sex marriages for state law purposes. As a result of *Windsor*, plans are now required to extend benefits to same-sex spouses.

Previously, the IRS issued Revenue Ruling 2013-17 relating to *Windsor*. Under Revenue Ruling 2013-17, the IRS stated that, effective September 16, 2013, the IRS would recognize same-sex marriages based upon the state of celebration (that is: the state in which the marriage ceremony occurred), rather than the state of the same-sex couple's domicile. Therefore, for federal tax purposes, a couple is recognized as married for federal tax purposes if they are married in a state in which same-sex marriage is recognized, regardless of where the couple resides.

The IRS further stated that domestic partnerships, civil unions and similar formalized relationships which are not accorded the same treatment as a marriage under state law would not be recognized for federal tax purposes. For purposes of qualified plans, what this means is that any spousal rights or benefits that are mandated under the Internal Revenue Code must be provided to same-sex spouses such as:

- Rules relating to qualified joint and survivor annuity ("QJSA") and qualified preretirement survivor annuity ("QPSA") rules, applicable QJSA and QPSA waiver rules.
- Special minimum distribution rules and rollover rules.
- Attribution, constructive ownership for purposes of controlled group affiliation and for purposes of determining key employee status.
- Qualified domestic relations orders and treatment of a spouse or former spouse alternate payee.

Notice 2014 19 and the FAQs provide further guidance on how and when qualified plans must comply with the new same-sex spousal rules and requirements.

The New Guidance:

Under IRS Notice 2014-19, the IRS stated:

- For qualification purposes, a plan must operate in compliance with *Windsor* as of June 26, 2013, the date of the *Windsor* decision. What this means is plans must comply with *Windsor* as June 26, 2013, but the failure to recognize a same-sex marriage prior to that date will not adversely affect the tax qualified status of the plan.
- Because there was uncertainty, until the issuance of Revenue Ruling 2013-17, on whether the state of celebration or the state of domicile would control the determination of the validity of a marriage, the IRS has also made clear that if the plan applied the state of domicile rule prior to September 16, 2013, the date on which the IRS announced the state of celebration rule, it will not affect the tax-qualified status of the plan.
- The IRS further clarified if and when plans need to be amended to reflect *Windsor*. The IRS has stated that a plan need only be amended to reflect *Windsor* if the language and the provisions of the plan are inconsistent with the recognition of same-sex marriage. The IRS stated, by way of example, that if the plan defines "marriage" or "spouse" by reference to DOMA, then the plan will require amendment. In contrast, if the term used in the plan is simply "spouse", "legally married spouse" or "spouse under federal law" without any distinction between same-sex or opposite-sex, then no amendment is required. To the extent an amendment is required, the deadline to adopt a plan amendment will be the later of the applicable deadline under Revenue Procedure 2007-44, or its successor or December 31, 2014. For most plans, this is December 31, 2014.
- The IRS also made clear that plans could voluntarily implement *Windsor* prior to June 26, 2013, and may choose to apply it for some provisions and not all provisions. However, caution must be exercised to ensure that it is able to meet the retroactive amendment restrictions in operational and administrative hurdles.

It is important to note that the IRS only addresses tax qualification issues. What this means is that the guidance will not necessarily provide relief from individual claims that a same-sex spouse may assert against the plan seeking to obtain benefits prior to the *Windsor* decision or based upon the Notice.

For further information, plan sponsors should review Revenue Ruling 2013-17 and the FAQs posted by the IRS.