

EMPLOYEE BENEFITS

IRS ISSUES ADDITIONAL GUIDANCE ON THE TREATMENT OF SAME-SEX SPOUSES FOR RETIREMENT PLAN PURPOSES

by Eric W. Gregory

IRS Notice 2014-19 provides long-awaited guidance on the application of the decision in *United States v. Windsor* to retirement plans qualified under Internal Revenue Code ("IRC") Section 401(a). For tax-qualification purposes, plans must generally recognize the *Windsor* decision as of the date of the decision.

Background

Until the decision of the Supreme Court in *Windsor* found it unconstitutional, section 3 of the Defense of Marriage Act ("DOMA") prohibited the recognition of same-sex spouses for purposes of Federal tax law. The *Windsor* decision, issued by the Supreme Court on June 26, 2013, held that section 3 of DOMA is unconstitutional because it violates Fifth Amendment principles.

In Revenue Ruling 2013-17 issued in August 2013, the IRS ruled that for Federal tax purposes the terms "spouse," "husband and wife," "husband," and "wife" include an individual married to a person of the same sex if the individuals are lawfully married in a jurisdiction that permits same-sex marriages to be performed.

Plan Amendments May be Necessary

In Notice 2014-19, the IRS ruled that all qualified retirement plans must be operated in accordance with *Windsor* as of June 26, 2013. Depending on the terms of the plan, an amendment may need to be adopted. For most plans, the deadline to adopt a necessary amendment is December 31, 2014.

- Plans that define a marital relationship by reference to section 3 of DOMA or contain terms that are otherwise inconsistent with the terms of *Windsor* must be amended.
- Plans that employ the use of the terms "spouse," "legally married spouse" or "spouse under Federal law," without distinction between a same-sex spouse and an opposite-sex spouse do not need to be amended. Notice 2014-19 suggests, however, that a clarifying amendment may be useful for purposes of plan administration.
- Plans that do not contain a definition of "spouse" do not need to be amended, although it may be useful for such plans to add a definition of spouse to avoid any ambiguity and to aid in plan administration.

Scope of Application

Numerous tax code sections provide special rules with respect to married participants in qualified plans, including, but not limited to:

- In all qualified retirement plans, a spouse is automatically the participant's beneficiary unless the spouse permissibly waives beneficiary status.
- Under Section 401(a)(11), certain retirement plans must provide a qualified joint and survivor annuity ("QJSA") upon retirement to married participants, and generally must provide a qualified preretirement survivor annuity ("QPSA") to the surviving spouse of a married participant who dies before retirement.
- Under the required minimum distribution rules of Section 401(a)(9) and the rollover rules of Section 402(c), additional alternatives are provided for surviving spouses that are not available to non-spousal beneficiaries.
- Under tax code Section 401(a)(13)(B), a spouse may have a right to receive all or a portion of the benefits payable to a participant under a qualified domestic relations order ("QDRO").
- Under numerous tax code provisions, spouses are treated as owning shares of stock owned by the other spouse for various purposes. For instance, ownership is attributed in determining highly compensated employees, key employees and whether corporations are members of a controlled group.

Application Prior to June 26, 2013

While the IRS ruling does not require retroactive application of the *Windsor* decision prior to June 26, 2013, plan sponsors may choose to apply the rules in a manner that reflects the outcome of *Windsor* for a period prior to that date. If a plan chooses to do so, it must adopt an amendment prior to the required date as discussed above.

Recognizing same-sex spouses for all purposes under a plan prior to June 26, 2013 may trigger requirements that are difficult to implement and may create unintended consequences. For instance, stock may be attributed between same-sex spouses causing the composition of highly compensated employees to change. Additionally, a plan may have already paid a benefit to a different person or in a different form.

As such, it is advisable that plan sponsors carefully consider the effects of implementing these rules prior to June 26, 2013 before taking action. For instance, it is possible for a plan sponsor to amend the plan to reflect the *Windsor* ruling only with respect to the QJSA and QPSA requirements, and, for those purposes, solely with respect to participants with annuity starting dates or dates of death on or after specified dates.

Unanswered Questions

This guidance from the IRS relates only to the qualified status of retirement plans. It remains to be seen whether courts will permit additional claims for benefits under ERISA. For example, it is not clear if a surviving same-sex spouse of an employee who died prior to June 26, 2013 is entitled to surviving spouse benefits.

Dickinson Wright's employee benefits practice team will continue to follow developments in this area. Please contact the author of this Alert, any member of the employee benefits practice team or your regular Dickinson Wright attorney for guidance.

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