

EMPLOYEE BENEFITS UPDATE

April 2014

IRS and CMS Issue New Guidance for Treatment of Same-Sex Spouses Under Employee Benefit Plans

Executive Summary

- The Supreme Court's June 26, 2013 decision in United States v. Windsor invalidated the provision in the Defense of Marriage Act that defined marriage as between a man and a woman. Recently, the IRS issued additional guidance with respect to steps that retirement plans should take in order to comply with Windsor, and the Centers for Medicare & Medicaid Services issued health-plan related guidance for insurance carriers.

What You Should Do

- Review your retirement plans to determine if you need or want to make any plan amendments or changes to plan operations to reflect this new guidance; prepare any necessary plan amendments by the appropriate deadline (December 31, 2014, in many circumstances); distribute any required Summary of Material Modifications; and implement any operational or administrative changes with your third-party administrators or recordkeepers, especially as it relates to distribution procedures.
- If you have not already done so, consider preparing a communication to employees that encourages them to review and update their beneficiary designations.

NEW GUIDANCE FOR EMPLOYERS ON QUALIFIED RETIREMENT PLANS

As you know from our prior Employee Benefits Updates¹, the IRS and DOL previously issued guidance to employers about the impact of the United States v. Windsor decision on their employee benefit plans.

Previously, the IRS ruled that, effective September 16, 2013, for all Federal tax purposes the term “spouse” will include same-sex spouses who are married in a jurisdiction that permitted same-sex marriage (the “state of celebration” rule), regardless of where they live or work. On April 4, 2014, the IRS released Notice 2014-19 and posted a series of new Frequently Asked Questions on its website

¹ [“The Impact of the Supreme Court’s DOMA Decision On Your Employee Benefit Plans and Policies”](#) (July 2013) and [“New Guidance About the Impact of Same-Sex Marriage On Your Employee Benefit Plans”](#) (October 2013).

providing additional guidance with respect to additional steps that qualified retirement plans may need to take in order to provide the same benefits, rights and features to both same-sex and opposite-sex spouses. The recent guidance does not have any impact on domestic partnerships or civil unions.

Features of Qualified Plans That Are Impacted

The new rules impact a number of common features under qualified retirement plans, including the following:

- **Beneficiary Designation** – Same-sex spouses must consent to the participant’s designation of any non-spouse beneficiary who will receive the participant’s death benefits.
- **Annuity Distribution Options** – For plans that provide for annuity forms of payment (such as traditional pension plans, money purchase pension plans, and some profit-sharing plans), same-sex spouses must be eligible for annuity options such as Qualified Pre-Retirement Survivor Annuities, Qualified Joint & Survivor Annuities and Qualified Optional Survivor Annuities. In addition, if the participant wants to waive these annuity options in favor of other alternative payment options that might be available under the plan, such as lump-sum distributions or a stream of installment payments, the same-sex spouse will be required to provide consent before that waiver can take effect.
- **Required Minimum Distributions** – A participant’s required minimum distributions from a qualified plan can be based on the joint life expectancies of the participant and same-sex spouse, if the same-sex spouse is designated as the participant’s beneficiary. If the participant dies before starting benefits, the same-sex spouse must have the right to defer the start of the RMDs until the year in which the participant would have turned 70-1/2.
- **Qualified Domestic Relations Orders** – QDROs must be recognized on the dissolution of legal same-sex marriages.
- **Hardships** – Hardship distributions for the medical, tuition and funeral expenses of a same-sex spouse must be permitted if they are allowed for opposite-sex spouses.
- **Loans** – Plans that require spousal consent for loans and other distributions must extend this requirement to same-sex spouses. (Not all plans impose this requirement.)
- **Rollovers** – Same-sex spouses must be able to roll over eligible distributions from a qualified retirement plan to their own IRAs or another qualified plan.
- **Choice of Law** – Plans cannot have a choice of law provision that does not recognize the same-sex spouse of a participant, after June 26, 2013 (although for the brief period between June 26, 2013 and September 15, 2013, it can limit the term “spouse” to a spouse recognized in the state of the participant’s domicile, regardless of where the participant’s marriage was celebrated).

Effective Date of Changes

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Beginning September 16, 2013	Each qualified plan is required to use the law of the state of celebration to determine whether a participant and his/her same-sex spouse are legally married.
June 26, 2013 – September 15, 2013	Qualified plans are permitted, but not required, to use the law of the employee’s state of domicile (instead of the state of celebration) to determine whether a participant was legally married during this period.
Prior to June 26, 2013	Qualified plans are permitted, but not required, to retroactively provide same-sex spouses with identical benefits as opposite-sex spouses. However, retroactive implementation is likely to raise administrative complexities.

Is A Plan Amendment Required?

The need for a formal amendment to your qualified retirement plan will vary, depending on each plan’s specific facts and circumstances, and the terms of the existing plan document. If you determine that you would like to (or are required to) amend your qualified retirement plan to reflect the Windsor decision and the recent IRS and DOL guidance, then the deadline to adopt an amendment is generally the end of the 2014 plan year (subject to limited extensions in certain circumstances).

Amendment Required	
	If plan terms define “spouse”, “married”, “husband” or “wife” by reference to DOMA or a state law that does not recognize same-sex marriage.
	If a plan wants to extend benefits to same-sex spouses prior to June 26, 2013 – for instance, permitting a same-sex couple who had previously elected to receive qualified plan benefits in the form of a single life annuity since their marriage was not previously recognized, to now elect a qualified joint and survivor annuity for any future benefit payments. Note that any such amendment would have to be nondiscriminatory and comply with other plan qualification requirements.
Amendment Not Required	
	If plan terms are already neutral or consistent with providing benefits to same-sex spouses on the same terms as opposite-sex spouses – for instance, using terms such as “spouse” or “legally married” without any distinction between same-sex and opposite-sex spouses.

CMS REQUIREMENTS FOR INSURERS REGARDING SAME-SEX SPOUSE COVERAGE

The Centers for Medicare & Medicaid Services (“CMS”) also recently released a Frequently Asked Question with respect to insurers’ coverage of same-sex spouses, clarifying a non-discrimination provision in final regulations published earlier. The FAQ provides that if an insurance company offers coverage to an opposite-sex spouse in the group or individual insurance market, then the insurance company must also offer same-sex spousal coverage on the same terms and conditions.

The CMS guidance does not alter an employer’s ability to set plan eligibility rules and does not require a particular definition of spouse. However, it clarifies that insurance companies offering coverage to spouses must offer coverage to same-sex spouses on the same terms and conditions that apply to opposite-sex spouses.

If you have questions with respect to the latest IRS and CMS guidance, or if we can assist in analyzing how your plans may be impacted and helping you to develop an effective communication and project management strategy for your organization, please contact us.

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