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The End of Defense of Marriage Act (DOMA): What it Means for Employee Benefits

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On June 26, 2013, the U.S. Supreme Court in *U.S. v. Windsor* held unconstitutional the 1**996 Defense of Marriage Act** (**DOMA**) provision that only persons of the opposite sex could be recognized as "spouses" and "married" for purposes of federal law (e.g., IRC, ERISA, COBRA, FMLA, ACA). Currently, 13 states and the District of Columbia issue same-sex marriage licenses, and eight other states provide some spousal-type benefits through civil unions.

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However, the *Windsor* case did not address the DOMA provision that permits states to decline to recognize the validity of same-sex marriages that were legally performed in other states. Because this DOMA provision remains effective, many issues remain unresolved.

Impact on Qualified Retirement Plans

There are various ERISA-required provisions for spouses. For example, for plans that provide joint and survivor benefits, a same-sex spouse is now entitled to the survivor annuity protection unless waived by such spouse. For defined contribution plans (i.e., 401(k) plans), the same-sex spouse must be the named beneficiary unless the spouse consents to another beneficiary. For rollovers from qualified plans, a same-sex spouse can transfer the distribution to his/her own IRA. (Previously, the direct rollover by a same-sex spouse was limited to an inherited IRA). A same-sex spouse may obtain a qualified domestic relations order (QDRO) if the state recognizes the rights of the same-sex spouse.

The *Windsor* case also affects the required minimum distribution rules. The special provision that expands the minimum distribution time period when a participant's spouse is the sole beneficiary and more than 10 years younger than the participant now applies to same-sex spouses. In addition, a surviving same-sex spouse may now elect to delay the commencement of required minimum distributions until the end of the year in which the participant would have attained age 70½.

Also, there are a few rules that may now adversely affect the same-sex spouse in a qualified plan. If both spouses work for the same employer, spousal attribution rules can skew the determination of highly compensated employees and key employees and adversely impact discrimination testing. In addition, the determination whether multiple entities constitute a controlled group for purposes of coverage testing may be altered by the inclusion of same-sex couples.

Impact on Health and Welfare Plans

The *Windsor* decision causes a change in the assessment of taxes. If an employer-sponsored health plan previously covered same-sex spouses, the employer was required to impute taxable income equal to value of the coverage. Employers are no longer required to do so. For flexible benefit plans, employees may now use pre-tax dollars to pay for various unreimbursed medical expenses of their same-sex spouse without imputation of income.

Another significant benefit is that same-sex spouse will receive full COBRA rights in event of a participant's termination of employment or divorce. Previously, a health plan specifically had to provide for this benefit. Now, if a spouse loses coverage under another health plan, the same-sex spouse may be immediately added to the employee's coverage. Similarly, a change-in-status of a same-sex spouse may enable a plan participant to change elections under a cafeteria plan.

HR Recordkeeping

Employers should now separately gather same-sex marriage (and domestic partner) information in their HR systems. Depending on the state of residence, same-sex spouses and domestic partners may be subject to different tax treatment under federal and state law. An employer's income tax withholding and employment tax payroll practices may need revision.

IRS Guidance: Rev. Rul. 2013-17

On August 29, 2013, the IRS in Rev. Rul. 2013-17 announced that same-sex marriages that were validly entered in a state or jurisdiction that recognizes the marriage will be treated as married for all federal tax purposes, even if the married couple is domiciled in a state that does not recognize same-sex marriages. Couples in domestic partnerships and civil unions that are not denominated as a marriage under the laws of that state will not be recognized as married for federal tax purposes.

Rev. Rul. 2013-17 is effective as of September 16, 2013. Taxpayers may file amended returns with claims for any overpayment of tax provided the applicable limitations periods for such filing have not expired (generally the past three years are open). These amended return filings can include claims for credit or refund of an overpayment of tax involving employment tax and income tax with respect to employer-provided health coverage benefits or certain fringe benefits excludable from income based on an individual's marital status.

Open Issues

One key issue remains open: when must plans be amended to reflect the new law? This question cannot be answered until further guidance is provided. And the questions don't stop there…

If the employee continues to work for the same employer, do benefits change merely because the new state no longer recognizes the same-sex marriage? Would state law be violated if a plan sponsor recognized same-sex marriages regardless of where the employer is located or the plan participant resides? Can health plans limit coverage only to spouses of the opposite sex? Can participants who are receiving minimum distributions change their payout period? For plans subject to joint and survivor distribution requirements, can *Windsor* be applied retroactively to change the distribution election?

The IRS currently does not require that preapproved prototype or volume submitter documents have language that defines the term "spouse." Instead, if there is no document definition, the determination is left to the plan administrator. Will plans now be required to define the term "spouse?"

Conclusion

Due to the *Windsor* case, many retirement and welfare benefit plan issues must be reviewed, and various documents, including summary plan descriptions, must be revised. Additional guidance from the IRS is planned as well as guidance on non-tax issues from other federal agencies. Undoubtedly, plan amendments will be required and administrative forms and processes must be revised. Therefore, plan sponsors should not begin this process until further guidance is issued.