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Defense of Marriage Act and Changes Necessary for Retirement & Health Benefits

The IRS recently issued a notice that provides some long-awaited guidance related to retirement plan administration—especially regarding the treatment of same-sex marriages after the 2013 Supreme Court ruling in *United States v. Windsor* that declared part of the Defense of Marriage Act (DOMA) unconstitutional.

Recap of the DOMA Ruling

The Supreme Court ruled on June 26, 2013 that same-sex couples could be recognized as “spouses” and “married” for purposes of federal law.

However, the Supreme Court left intact the DOMA provision permitting a state *not* to recognize same-sex marriages performed in other states.

Effect on Retirement Plans

[Notice 2014-19](http://www.irs.gov/pub/irs-drop/n-14-19.pdf) <http://www.irs.gov/pub/irs-drop/n-14-19.pdf> released in April clears up some of the issues related to the timing requirements for qualified retirement plans.

Some key points from this note:

1. Plans are not required to recognize same-sex marriages prior to June 26, 2013.
2. Plans are not required to have adopted the celebration rule until September 16, 2013. Plans that used the domicile rule prior to that will not be penalized. (The celebration rule pertains to the state in which the same-sex couple was married, while the domicile rule recognizes the couple based on their place of residence.)
3. Plans are permitted to choose to recognize same-sex marriage prior to June 26, 2013, and can choose the purposes for which same-sex marriages are recognized for periods prior to that date.
4. Plans with terms that are inconsistent with the DOMA decision must be amended by the later of (i) the date the plan otherwise would have to be amended for changes in applicable law or (ii) Dec. 31, 2014.

(Source: Employee Benefit Adviser <http://eba.benefitnews.com/news/irs-releases-guidance-on-same-sex-marriage-and-retirement-plan-rollovers-2740954-1.html>)

DOMA Effect on Employers Offering Health Insurance

As reported by ETC in October, the DOMA ruling will affect federal income taxes in that employers will need to extend the same tax-free treatment to a same-sex spouse (i.e. HRAs, HSAs, FSAs) that is provided for other spouses—but this does *not* mean employers, in states other than the “States of Celebration,” must expand their major medical health benefits to cover same-sex spouses as dependents.

According to IRS guidance (*Ruling 2013-17* on Aug. 29, 2013, effective Sept. 16, 2013), individuals of the same sex will be considered to be lawfully married as long as they are married in a state whose laws authorize the marriage of two individuals of the same sex—even if the spouses currently live in a state that does not recognize same-sex marriage. This definition applies where marriage is a factor including gift and estate taxes, tax filing status, claiming personal and dependency exemptions, taking the standard tax deduction, employee benefits, contributing to an IRA, and claiming the earned income tax credit or child tax credit. (For federal tax purposes, the term “spouse” will *not* include registered domestic partners, civil unions, or other similar formal relationships recognized under state laws.)

So—for example—a same-sex couple married in Connecticut but living in Louisiana will still be considered lawfully married by the federal government for federal tax purposes, which could affect HRAs, HSAs, FSAs, as well as estates, filing status, dependents, and child tax credits.

Changes for Health and Welfare Benefits

Below are the current benefits changes for employees and their same-sex spouses:

- **Pre-tax group health plan benefits under a cafeteria plan.** Under the previous DOMA law, if a same-sex spouse was covered under a health plan, an employee was required to pay federal taxes on the value of health and welfare benefits attributable to the same-sex spouse, unless their spouse was a dependent of the employee. Based on the IRS guidance, employers will no longer have to impute income for the value of same-sex spouse coverage. Employers will also receive tax savings on the value of same-sex spouse benefits since the benefits will no longer be subject to certain payroll taxes.
- **COBRA.** Same-sex spouses will have all COBRA rights as qualified beneficiaries. The following states are referred to as “states of celebration”: Delaware, Rhode Island, Minnesota, Washington, California, Iowa, New York, Maryland, Maine, Washington, D.C., New Hampshire Massachusetts and Connecticut.
- **Health flexible spending accounts (HFSA).** Employees can be reimbursed for eligible health care expenses for same-sex spouses and their children.
- **Dependent care flexible spending accounts (DCFSA).** Employees can be reimbursed for eligible daycare expenses for children of same-sex spouses. The earned income of same-sex spouse will now count for the dependent care flexible spending maximum limit. In order for dependent care expenses to be eligible, the same-sex spouse must be working, looking for work, a full-time student or incapable of self-care. Same-sex spouses caring for a dependent can no longer be paid for the care.
- **Qualifying status events.** Employees will be able to change certain benefits elections if they experience qualifying events—such as marriage to a same-sex spouse or a same-sex spouse losing health coverage—depending on the state in which the employee lives and whether the Employer Sponsored Plan affords coverage to same-sex spouses. HIPAA special enrollment rights will apply, as well.
- **HSAs.** Same-sex spouses' expenses are eligible for tax-free reimbursement, and the HSA maximum limits will apply to same-sex spouses.

For additional information regarding DOMA and what it means for your employer-sponsored health plan, as well as other employee benefits implications, see:

[http:// www.irs.gov/uac/Answers-to-Frequently- Asked-Questions-for-Registered- Domestic- Partners-and-Individuals-in- Civil-Unions](http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions)

Takeaway for Plan Sponsors

- Develop a policy regarding employee benefits issues for same-sex spouses in states that do not recognize same-sex marriages (i.e. Texas and New Mexico).
- Review plan documents for the definition of spouse and revise accordingly to the extent DOMA is referenced.
- If a plan sponsor offers an HRA, HSA or FSA, review the written materials to ensure compliance with the law as it stands today for federal tax treatment of such plans.

What This Means for Affordable Care Act Compliance

If you're in a state where there are constitutional and statutory restraints on same-sex marriages, it is not necessary (for now) for an employer with a fully insured plan to offer benefits to the employee's same-sex spouse.

But—pay careful attention to self-insured or self-funded plans which fall under the jurisdiction of the Employee Retirement Security Act of 1974 (ERISA) and the federal government: Failure of an employer to offer benefits may be deemed a violation of ERISA.

The final answer for this conflict between federal and state statutes is yet to be resolved. Litigators are warming up as we settle in for several rounds of different court challenges on this issue.

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