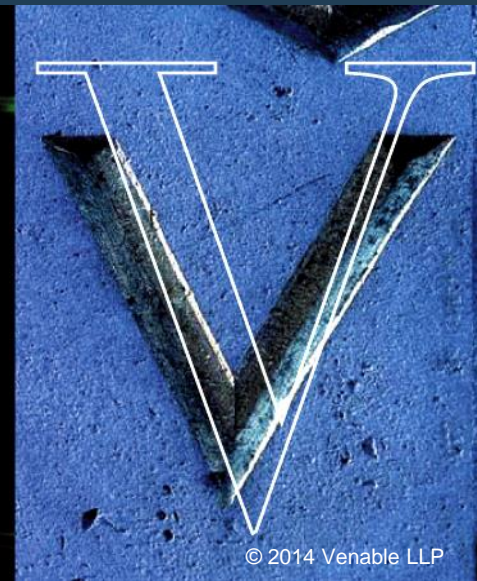


The Impact of IRS Recognition of All Legal Same-Sex Marriages on Nonprofit Organizations' Employee Benefit Plans

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United States v. Windsor

June 16, 2013

- Provision of the Defense of Marriage Act defining “marriage” for federal law purposes as between one man and one woman is unconstitutional.
- Provision of the Defense of Marriage Act allowing each state to decide whether to honor same-sex marriages performed in other states is not affected by the ruling.



United States v. Windsor (cont'd.)

June 2013

- Because *Windsor* does not require all states to honor a same-sex marriage that was valid where performed, a fundamental question remains:
 - What is the status, in a state that does not recognize same-sex marriage, of a same-sex couple that was validly married in another state?



State Laws

- Same-sex marriage is legal in: CA, CT, DE, HI, IA, IL (7/1/14), ME, MA, MD, MN, NJ, NH, NM, NY, RI, VT, WA, and the District of Columbia
- Same-sex marriages is still prohibited in: AL, AK, AZ, AR, FL, GA, ID, IN, KS, KY, LA, MI, MS, MO, MT, NE, NC, ND, OH, OK, PA, SC, SD, TN, TX, UT, VA, WV, WY

As of 2/27/14



Scope of Change

- There are more than 200 Internal Revenue Code provisions and regulations that include the term “spouse,” “marriage,” “husband,” and/or “wife.”
- Many other federal laws including Medicare are also implicated.
 - HHS has already ruled that same-sex spouses will have spouse access to nursing home coverage (August 29, 2013 HHS press release).



IRS Revenue Ruling 2013-17

For federal tax purposes:

- **The State of Celebration Rule** - A same-sex marriage sanctioned under the laws of the state or territory in which it was performed will be recognized, even if the married couple lives in a state that does not recognize same-sex marriage.
- A same-sex (or opposite-sex) couple is not considered married by virtue of entering into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law (but not classified as a marriage under the laws of that state).



IRS Revenue Ruling 2013-17 (cont'd)

- “Marriage” includes two individuals of the same sex, provided those individuals are lawfully married under state law (or the laws of a territory or foreign jurisdiction).
- The terms spouse, husband and wife do not include individuals in a registered domestic partnership, civil union or other relationship not denominated as a marriage under state law.



IRS Revenue Ruling 2013-17 (cont'd)

- More to come on retroactivity

Revenue Ruling 2013-17 states that the Service intends to issue further guidance on the retroactive application of *Windsor* to other employee benefits after consideration of the impact on all taxpayers involved.

Future guidance will provide sufficient time for plan amendments and corrections.



IRS FAQs

Issued with Rev. Rul. 2013-17 – Health Insurance

- Health insurance coverage for same-sex spouse is no longer taxable.
 - Continue to impute federal income to the employee for health coverage provided to an (unmarried) domestic partner.
- Employee may file amended Form 1040 to claim refunds for “open” years under the statute of limitations.



IRS Notice 2014-1

- IRS Notice 2014-1 – guidance and transitional relief for cafeteria plans, FSAs and HSAs, including:
 - Transitional relief for cafeteria plans that allowed election changes due to *Windsor*.
 - Requires cafeteria plans that provide benefits to same-sex spouses to treat such benefits as pre-tax within a reasonable time after December 16, 2013.
 - FSA can reimburse same-sex spouse expenses beginning with the plan year in which the *Windsor* decision was rendered.



DOL Technical Release 2013-04

- Echoes IRS Rev. Rul. 2013-17- marriage includes any same-sex marriage legally recognized as a marriage under any state law under Title I of ERISA.
- Applies same principles to ERISA-governed 403(b) plans
- Opens up participant rights to sue for benefits.



Other Health and Welfare Benefit Implications

- Special enrollment and status change rights under cafeteria plans
- COBRA - independent spousal election rights/qualified beneficiary status
- Qualified tuition reduction for spouses - Sec. 117(d)
- Dependent care expenses
 - Higher dollar limits for married couples
 - Care of spouse's child qualifies
- Medical flexible spending accounts – coverage of spouse claims/tax-free reimbursement
- Tax-free health plan coverage – no more imputed income



Retirement Plan Implications

- Right to survivor annuities including preretirement survivor benefits
- Spousal consent rights
- Spousal rollover rights
- QDRO rights
- Delay of required minimum distribution until deceased participant would have been 70 ½
- Safe harbor hardship withdrawals for unreimbursed medical, post-secondary education, and funeral expenses



IRS FAQs

Issued with Rev. Rul. 2013-17 – Retirement Plans

- As of 9/16/2013, same-sex married spouse must be treated as a spouse for qualified plan purposes:
 - QJSA/QPSA rights
 - Surviving spouse rights (when QJSA/QPSA inapplicable)
 - Hardship distributions
- Guidance not yet issued for pre-9/16/2013 periods
 - Retroactive benefit claims are at issue



IRS Notice 2013-61

Correction of employment tax overpayments for health and other fringe benefits

Special Administrative Procedure – 2013

- For 2013 – In the 4th quarter of 2013, repay employee the excess FICA and income tax withholding amounts, and net out the amounts on the 4th quarter Form 941; OR
- For 2013 – After 2013, repay employee the excess FICA (but not income tax), and file one Form 941-X to correct FICA (but not income tax) for all of 2013.
 - Employees must provide written statements that they will not otherwise claim FICA refunds. Employees recoup excess income tax withholding through regular Form 1040 channel.



IRS Notice 2013-61 (cont'd.)

Correction of employment tax overpayments for health and other fringe benefits

Special Administrative Procedure – Before 2013

- For pre-2013 years still “open” under the SOL. Applies to FICA only, not income tax.
- Repay employee the excess FICA (but not income tax), and file a Form 941-X for the fourth quarter of the earlier year to correct FICA for the earlier year.
- Employer must issue corrected Form W-2 (i.e., Form W-2c).
- Employees certify that they will not otherwise claim FICA refund.
- Employees recoup excess income tax withholding through filing amended Form 1040 (i.e., Form 1040-X).



Correction of Employment Tax Overpayments for Health and Other Fringe Benefits

- An employer is not obligated to pursue a refund of overpaid FICA for earlier years.
- If an employer does not pursue a refund for FICA overpayments for earlier years, an employee can file a refund claim on IRS Form 843.



Family and Medical Leave Act (FMLA)

The State of Residence Rule

- The FMLA provides certain leave rights to eligible employees, permitting them to attend to family matters (e.g., qualifying events related to a spouse's military leave) and serious health conditions (e.g., to care for a spouse with a serious health condition).
- Following the *Windsor* decision, the DOL issued guidance defining a "spouse" for FMLA purposes as "a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage."



Family and Medical Leave Act (cont'd.)

The State of Residence Rule

- Therefore, when considering leave requests and FMLA rights related to, for example, the serious health condition of an employee's same-sex spouse, employers must consider whether the employee is:
 - Legally married to a same-sex spouse; and
 - Residing in a state that recognizes same-sex marriage (this is known as the “state of residence” rule, versus the “state of celebration” rule).



Action Items

- Check plan documents and SPDs to see if definition of spouse needs to be amended.
- No requirement to seek out information about employee's marital status, but consider sending a reminder of need to keep personnel records and beneficiary designations current.
- Check open enrollment materials for needed changes.



Action Items Continued ...

- Stop imputing income where same-sex marriage is known.
 - Response to claim for benefits
 - Review handbooks – no references to DOMA and check references to spouse
- Check FMLA policy to ensure that it is not outdated (e.g., remove any DOMA references)
- Develop or confirm the existence of your FMLA approval process, and make certain that this process does not discriminate against same-sex couples by placing any extra burdens on them.



Questions?

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