

## Employee Benefits and Executive Compensation Alert

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### AUTHORS

Thora A. Johnson

Jean Y. Yu

Chana E. Ickowitz

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## IRS Issues Additional Guidance on the Application of *Windsor* to Cafeteria Plans, FSAs, and HSAs

On Monday, IRS issued Notice 2014-1, providing additional guidance on the effects of the Supreme Court's *Windsor* decision on (1) cafeteria plans; (2) medical flexible spending accounts (Medical FSAs); (3) health savings accounts (HSAs); and (4) dependent care flexible spending accounts (Dependent Care FSAs).

In particular, the IRS clarified the following:

### Cafeteria Plans

- If a same-sex couple was lawfully married at the time of the *Windsor* decision (June 26, 2013), a cafeteria plan may treat the employee as if he or she experienced a change in legal marital status and permit the employee to add coverage for his or her same-sex spouse on a pre-tax basis.
- The election change must be filed during the cafeteria plan year that includes June 26, 2013, or December 16, 2013 (the date of IRS Notice 2014-1).
- Going forward, a legal marriage between same-sex spouses may be treated as a qualifying event, which allows a participant to make mid-year election changes under a cafeteria plan.

### Medical FSAs

- If a cafeteria plan includes a Medical FSA, the plan can permit a participant to be reimbursed for covered expenses incurred by the participant's same-sex spouse or the same-sex spouse's dependent.
- The reimbursements may be permitted if the expenses were incurred in a time period no earlier than (a) the beginning of the cafeteria plan year that includes the date of the *Windsor* decision; or (b) the date of marriage, if later.
- For example, a cafeteria with a calendar year plan may permit a participant's FSA to reimburse covered expenses of the participant's same-sex spouse or dependent that were incurred during a period beginning on any date that is on or after January 1, 2013 (or the participant's date of marriage, if later).

### HSAs

- The joint annual contribution limit for HSA contributions is the same for legally married same-sex couples as it is for opposite-sex couples.
- For 2013, the annual HSA contribution limit is \$6,450.
- If the combined HSA contributions elected by a same-sex couple exceed the applicable HSA contribution limit for a married couple, contributions for one or both of the spouses may be reduced for the remaining portion of the tax year in order to avoid exceeding the applicable contribution limit. Alternatively, any excess may be distributed from the HSAs to one or both spouses no later than the tax return due date for the spouses, as permitted under Section 223 (f)(3) of the Internal Revenue Code.

### Dependent Care FSAs

- The limit for contributions to a dependent care FSA applies to married same-sex couples to the same extent as married opposite-sex couples.
- The maximum contribution limit in a taxable year to one or more dependent care FSAs for a married couple is \$5,000.
- If same-sex spouses make contributions to a dependent care FSA separately and the combined total exceeds the applicable contribution limit for a married couple, the excess can be corrected by reducing contributions for one or both of the spouses for the rest of the taxable year so that the

couple will not exceed the contribution limit.

- If the contributions to the dependent care FSA exceed the contribution limit for a married couple, the excess will be included in the couple's gross income for that year.

#### **Next Steps for Employers**

- For employers that would like to permit such election changes, the written cafeteria plan must be amended to permit such election changes, if it does not already, on or before the last day of the first plan year beginning on or after December 16, 2013. Such an amendment may be effective retroactively to the first day of the plan year including December 16, 2013.
- Employers may wish to notify employees of how the HSA and Dependent Care FSA limits apply to same-sex spouses.

The attorneys in Venable's **Employee Benefits and Executive Compensation Group** are available to help plan sponsors and other interested parties planning for and complying with the changes under the *Windsor* decision.