

New IRS Guidance Regarding Same-Sex Spouses: Employer Action Needed

Background

On June 26, 2013, the U.S. Supreme Court, in the landmark case, *United States v. Windsor*, found the provisions of that portion of the "Defense of Marriage Act" ("DOMA") which provided that only opposite-sex individuals could be treated as lawfully married and a husband and wife for federal law purposes was unconstitutional (the "Windsor Decision"). Thus, following the Windsor Decision, federal law requires recognition under federal law of otherwise valid same-sex marriages.

The Windsor Decision, however, raised a number of questions concerning (i) how an individual's marital status will be determined for federal tax purposes (because marital status is generally a state law-based determination), (ii) how and when same-sex spousal status will apply under qualified retirement plans, and (iii) what amendments to such plans will be required and what is the timing for the adoption of such amendments. Previous IRS guidance addressed the question described in clause (i) above. Recently issued IRS guidance responds to other open questions, namely: as of what date will the Windsor Decision apply under qualified retirement plans, when are retirement plan amendments required to comply with the Windsor Decision, and if amendments are required, by what date must such amendments be adopted. This Alert describes briefly the earlier IRS *Windsor* guidance and provides a detailed discussion of the new IRS *Windsor* guidance and its impact on qualified retirement plans. For more information concerning the Windsor Decision, please see our prior [Alert](#).

Prior IRS Guidance

In August 2013, the IRS issued Revenue Ruling 2013-17 which provides, effective as of September 16, 2013, that for federal tax purposes the following rules apply:

- The terms "spouse," "husband and wife," and "marriage" include an individual married to a person of the same sex if the individuals are lawfully married under state law. Thus, for instance, a qualified plan participant's same-sex spouse will be entitled to certain rights and benefits, such as (i) mandated survivor death benefits, (ii) consent rights to eliminate spousal survivor death benefits, (iii) advantageous rights with respect to minimum required distributions, (iv) greater flexibility with respect to the rollover of benefit distributions, and (v) rights associated with the distribution of plan benefits pursuant to a qualified domestic relations order.
- IRS adopts a general rule that recognizes a marriage between same-sex individuals that is validly entered into in a state (which includes for this purpose territories and possessions of the U.S. and foreign jurisdictions) whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages. This is often referred to as the "**state of celebration**" rule.
- The terms "spouse," "husband and wife," and "marriage" do **not** include individuals (whether of opposite or same-sex) who have entered into a registered domestic partnership, civil union, or similar formal relationship recognized under state law that is not denominated as a marriage under such state law. For a further discussion of IRS Revenue Ruling 2013-17, please see our prior [Alert](#).

Importantly, and consistent with the IRS's approach, the U.S. Department of Labor ("DOL") in a Technical Release (Technical Release 2013-04, issued on September 18, 2013) adopted a "state of celebration" rule for purposes of applying spousal rights and benefits under the Employee Retirement Income Security Act ("ERISA") and any provisions of the Internal Revenue Code (the "Code") that are subject to the DOL's interpretive authority (e.g., prohibited transaction rules).

Revenue Ruling 2013-17, however, expressly deferred offering guidance regarding the retroactive application of the Windsor Decision and the state of celebration rule.

New IRS Guidance - Notice 2014-19

IRS Notice 2014-19 addresses important previously unresolved issues concerning the effective date for applying the Windsor Decision and Revenue Ruling 2013-17 to qualified retirement plans, as well as the timing for the adoption of any necessary plan amendments to implement these *Windsor*-related changes. Accordingly, the Notice provides the following guidance:

- Retirement plan qualification requirements that are applicable to a spouse or that are based on marital status must be applied with respect to a participant who is married to an individual of the same sex. For instance, a participant in a qualified plan that is subject to certain spousal death benefit rights and who has a same-sex spouse must obtain the spouse's consent if the death benefits are to be paid to someone other than the spouse or, in some cases, in other than the form of a qualified joint and survivor annuity.
- Qualified retirement plan operations must reflect the Windsor Decision as of June 26, 2013 (*i.e.*, the date of the Supreme Court's decision in *Windsor*). A retirement plan will not be disqualified merely because it did not recognize a participant's same-sex spouse prior to June 26, 2013.

Retroactive Impact

- A retirement plan will not be disqualified merely because the plan, **prior to September 16, 2013** (*i.e.*, effective date of the guidance in Revenue Ruling 2013-17), recognized a participant's same-sex spouse only if the participant was domiciled in a state that recognized the validity of same-sex marriages (referred to as a "**state of domicile**" rule).
- A retirement plan may apply the Windsor Decision for some or all purposes under the plan for periods prior to June 26, 2013, so long as such application of the Windsor Decision complies with applicable qualified plan requirements (e.g., nondiscrimination in benefits and plan rights and features). The IRS notes that applying the Windsor Decision before June 26, 2013, could raise some plan compliance issues.

Plan Amendments

- Whether a plan must be amended to reflect the Windsor Decision, and Revenue Ruling 2013-17 and Notice 2014-19 (collectively, the "Windsor Guidance"), will depend on the terms of the plan in question.
- If the plan's terms define spouse or marriage per DOMA or are otherwise inconsistent with the Windsor Decision or Windsor Guidance, then a plan amendment to reflect the Windsor Decision and Windsor Guidance will be required.

- If plan's terms are not inconsistent with the Windsor Decision and Windsor Guidance, then no plan amendment is generally required. The IRS offers as an example of plan language that would not generally be viewed as inconsistent with the Windsor Decision and Windsor Guidance, and therefore not require a plan amendment, the use of the terms "spouse," "legally married spouse," or "spouse under Federal Law" without any distinction between a same-sex and different-sex spouse. However, the IRS suggests that, while not required, in such cases a clarifying amendment may be helpful for purposes of plan administration, as the plan's terms must be administered in operation in accordance with the Windsor Decision and Windsor Guidance.
- If a plan sponsor, in its discretion, applies the Windsor Decision for periods **prior** to June 26, 2013, then a plan amendment may be necessary that reflects the time period and plan benefit purposes for which the *Windsor*-related rules are to be applied.
- Pursuant to additional IRS guidance (Notice 2014-37), a retirement plan that is intended to constitute a "safe harbor plan" under Code Section 401(k) or 401(m) (*i.e.*, a plan that is treated as satisfying certain nondiscrimination testing rules if it meets certain contribution and other legal requirements) will be permitted to be amended during the plan year in order to comply with the Windsor Decision and Windsor Guidance. Normally, such safe harbor plans may not be amended mid-plan year.

Timing of Plan Amendments

- Plan amendments to be made to reflect the Windsor Decision and Windsor Guidance, as described above (referred to as the "Windsor Amendments"), must be adopted by the later of (i) December 31, 2014, or (ii) the later of (A) the end of the plan year in which the amendment is first effective or (B) the due date (including applicable extensions) for the employer's tax return for the employer's tax year in which the amendment is first effective.
- Governmental plans will have until the end of their first regular legislative session of the legislative body with plan amendment authority that ends after December 31, 2014, to adopt appropriate Windsor Amendments.

Thus, for nongovernmental plans that have a calendar year plan year and whose plan sponsor has a calendar year tax year, the Windsor Amendments must be adopted by December 31, 2014.

- For Windsor Amendments to a single employer defined benefit pension plan that take effect on June 26, 2013, such amendments, even if they have the effect of increasing benefit liabilities, will not be treated as an amendment to which certain plan funding-based benefit restrictions apply (*i.e.*, rules that prohibit certain plan amendments that would increase benefit liabilities if the plan's actuarially determined adjusted funding target attainment percentage is below certain levels). However, Windsor Amendments to a defined benefit pension plan that take effect prior to June 26, 2013, will be subject to the funding-based benefit restriction rules.

IRS FAQs Regarding Windsor

In conjunction with the issuance of Notice 2014-19, the IRS issued a set of Frequently Asked Questions ("FAQs") that provide additional guidance concerning the Windsor Decision and Windsor Guidance. The FAQs provide the following additional guidance:

- If a participant is married to a same-sex spouse and dies on or after June 26, 2013, the participant's benefit must be paid to the surviving same-sex spouse in accordance with the spousal survivor death benefit rules regardless of any conflicting plan terms or any prior beneficiary designations to which the same-sex spouse has not consented

(except as may otherwise be provided in an outstanding qualified domestic relations order). The FAQs reiterate that a retirement plan will not be disqualified merely because it determines a same-sex spouse's status based on a state of domicile rule for periods before September 16, 2013, however.

- A retirement plan will be disqualified if, pursuant to the plan's state of governing law provision, it does not recognize same-sex spouses in accordance with the Windsor Decision and Windsor Guidance. For instance, a retirement plan could be disqualified if the plan is operated pursuant to its governing state law provision and, in accordance with such state law, fails to apply a state of celebration rule for periods on and after September 16, 2013. Thus, retirement plans should be reviewed to ensure that their terms provide that their governing state law provision, if any, is preempted by applicable federal law.
- A retirement plan that is retroactively amended to be consistent with the Windsor Decision and Windsor Guidance will not be disqualified if the retroactive change in plan operations is implemented by applying the principles under the IRS's Employee Plans Compliance Resolution System ("EPCRS"). EPCRS provides IRS guidance for plan sponsors to voluntarily correct operational and plan document defects under their plans in order to maintain the plans' tax-qualified status. For instance, in the case of a plan that is retroactively amended to apply the spousal consent requirements with respect to rules requiring the provision of certain spousal death benefits, the plan may, in accordance with the correction principles under EPCRS, now obtain spousal consent to the form of retirement benefits paid or have the participant repay the benefit distribution to the plan and commence an appropriate qualified joint and survivor annuity.
- A retirement plan may be amended to provide new rights and benefits with respect to participants with same-sex spouses in light of the Windsor Decision. For example, it appears a plan could be amended to offer a participant who started his or her benefit before June 26, 2013, the opportunity to elect currently a qualified joint and survivor annuity that covers the same-sex spouse, provided any such additional benefits and rights opportunities otherwise comply with applicable qualified plan requirements (*e.g.*, nondiscriminatory benefit requirements).
- The Windsor Decision and Windsor Guidance apply to Code Section 403(b) plans. However, for a 403(b) plan that is not subject to ERISA (*i.e.*, most church plans, governmental plans, and some (but not all) salary deferral contribution-only plans), certain qualified plan requirements (*e.g.*, spousal consent/survivor death benefits) do not apply to such 403(b) plans, and therefore, to that extent, the Windsor Decision and Windsor Guidance would not impact those plans. In addition, the deadline for *Windsor*-related plan amendments, noted above, does not apply to 403(b) plans. Instead, *Windsor*-based amendments to a 403(b) plan must be adopted by a future date to be determined by the IRS in conjunction with its recently implemented plan document approval program for prototype and volume submitter 403(b) plans.
- In the case of a multi-employer defined benefit pension plan (*i.e.*, a pension plan maintained by two or more unrelated employers pursuant to a collective bargaining agreement) that is in endangered or critical underfunded status, generally a plan amendment effective as of June 26, 2013, to reflect the Windsor Decision and Windsor Guidance will be permitted notwithstanding the impact it may have on the plan's benefit liabilities and funded status.

Next Steps for Plan Sponsors

In light of the Windsor Decision and Windsor Guidance, employers and plan administrators should take immediate action to determine the impact that the *Windsor*-related changes will have on their employee benefit plans, with particular emphasis on their qualified retirement plans. Accordingly, we would recommend that the following steps be taken:

- Review the provisions of all plans and arrangements that refer to “spouse,” “husband and wife,” and “marriage” (including terms similar thereto) and determine if such provisions are consistent with the Windsor Decision and Windsor Guidance.
- Determine whether to apply the Windsor Decision and Windsor Guidance to periods before June 26, 2013. If so desired, analyze whether such retroactive application would raise compliance issues with respect to qualified plan requirements and administrative complexities.
- Assess the manner in which *Windsor*-based plan changes will be implemented pursuant to the principles outlined in the IRS’s EPCRS guidelines.
- Determine whether a “state of domicile,” instead of a “state of celebration,” rule has applied for the period prior to September 16, 2013.
- Review and, as appropriate, revise employee communication materials (e.g., summary plan descriptions) regarding plan terms to reflect *Windsor*-related changes.
- Develop procedures to confirm a participant’s same-sex marital status and to distinguish between same-sex marriages (that must be recognized under federal tax law) and domestic partnerships and civil unions (that do not create spousal or marital status benefit rights under federal tax law).
- Coordinate with plan vendors/recordkeepers to conform plan administration with *Windsor*-related changes.
- Prepare and timely adopt plan amendments to reflect appropriate *Windsor*-based plan changes.
- Be prepared to consider the potential impact of future DOL guidance on the retroactive impact of the Windsor Decision under ERISA, including for purposes of ERISA’s reporting, fiduciary duty/prohibited transaction, and civil enforcement rules. Hopefully, the DOL will take a position on the retroactivity of the Windsor Decision that is consistent with the position taken by the IRS in Notice 2014-19.

Should you have any questions concerning this Alert or would like assistance in understanding and implementing the Windsor Decision and Windsor Guidance, please contact any of the following attorneys or your regular Patterson Belknap contact.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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