insights

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Impact of the Windsor Decision on Benefit Plan –

Untying the Knots

Just as men's fashion has moved away from suits and neckties in the business setting, the Supreme Court of the United States reintroduced the *Windsor* knot in an entirely different way. In July 2013, in *United States v. Windsor*, the United States Supreme Court determined that Section 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. Prior to this, federal law had prohibited employers from recognizing a same-sex spouse as a "spouse" for purposes of employee benefit plans. Although the *Windsor* decision upended the long-standing framework created by DOMA, which barred employers from recognizing same-sex spouses for federal tax and employee benefits purposes, it left open many questions concerning marriage equality and employee benefits. In the 15 months since the *Windsor* case was decided, employers and their advisors have been learning more about the *Windsor* knots and how this decision affects employee retirement plans and group medical plans. In particular, the Supreme Court decision in *Windsor* has been followed by several rounds of guidance from the Internal Revenue Service ("IRS") and the Department of Labor ("DOL") on how same-sex spouses should be treated under employee benefit plans.

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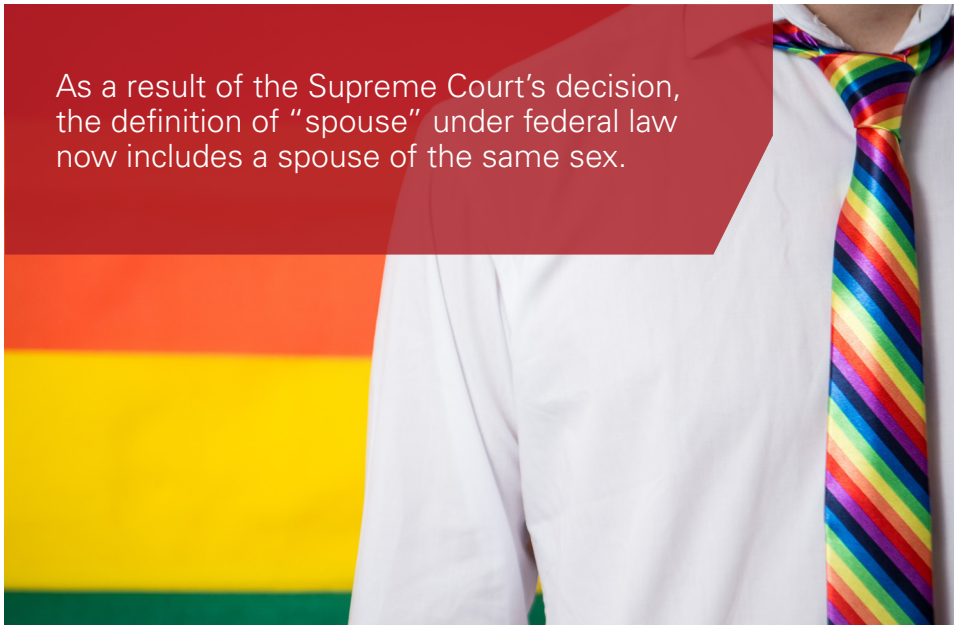

The Basics of the *Windsor* Decision

As a result of the Supreme Court's decision, the definition of "spouse" under federal law now includes a spouse of the same sex. DOMA laws no longer prevent a same sex couple from claiming all of the benefits of marriage under federal tax and benefits law. In IRS Rev. Ruling 2013-17, which became effective on September 16, 2013, the IRS confirmed that the terms "spouse" and "husband" and "wife" include persons who entered into a legal marriage in any jurisdiction that recognizes same-sex marriage, even if the couple does not live or work in that jurisdiction, and even if their employers are located in a state which applies its own DOMA statute to bar same-sex marriages. In DOL Technical Release 2013-4, the DOL reached the same conclusion concerning

the definition of "spouse," and now recognizes any same-sex marriage that is legally recognized as a valid marriage under the laws of the state, territory or federal jurisdiction in which the marriage ceremony was performed.

Retirement Plan Implications

In Rev. Ruling 2013-17, the IRS held that for plan qualification purposes, a qualified retirement plan under Internal Revenue Code § 401(a), including the common 401(k) savings plans as well as defined benefit pension plans, must treat an employee's same-sex spouse who is lawfully married to the employee in any U.S. state or territory that authorizes same-sex marriages as the employee's spouse for purposes of any tax law requirements related to the treatment of spouses. As a result, after September 16, 2013, an employee's same-sex spouse with a valid marriage from a state that recognizes same–sex marriages must be offered all of the same spousal protections available to opposite-sex marriages, including the rules requiring a spouse's consent to payout or to beneficiary designations. Failure to recognize a same-sex spouse as a spouse under the terms of a qualified retirement plan after September 16, 2013 would create a qualification failure for that retirement plan.

What to consider in 2014

The IRS guidance in Rev. Ruling 2013-17 followed by clarifying guidance in IRS Notice 2014-19 to assist employers and other plan sponsors in determining if an amendment to the terms of the retirement plan was required by the *Windsor* decision or subsequent IRS guidance.

If a retirement plan has previously defined a marital relationship by reference to the federal law (including but not limited to a reference to Section 3 of the DOMA) or if its terms are otherwise inconsistent with the ruling of *Windsor* or IRS guidance, that retirement plan must be amended to remove the inconsistency. However, a plan does not need an amendment if the plan's terms are already consistent with *Windsor* and the subsequent guidance. For example, a plan that defines the term "spouse" as a person legally or lawfully married to a plan participant should not require a plan amendment.

IRS Notice 2014-19 further provided that if an amendment is required to conform the retirement plan to *Windsor* and the IRS guidance, the deadline to adopt such an amendment is December 31, 2014, for calendar year plans (later in certain circumstances for non-calendar year plans). Governmental plans that must adopt an amendment should do so before the close of the first regular legislative session of the legislative lobby with authority to amend the plan that ends after September 31, 2014. If an amendment is required, the effective date generally must be June 26, 2013. However, a plan would not be treated as having a qualification failure if it only recognized same-sex spouses or participants located in states which recognize same-sex marriages prior to September 16, 2013.

As a result of *Windsor*, Rev. Ruling 2013-17 and other recent guidance, many retirement plans will also need to change their procedures for obtaining spousal consent for benefit elections. In particular, employers may find that they will want to obtain new beneficiary designation forms from any employees in same-sex marriages. For example, if an employer has an employee who was already in a same sex marriage, the employer and its retirement plan almost certainly did not require the employee to have his same sex spouse sign off on any beneficiary designation form filed prior to June 2013. As a result of the *Windsor* decision, that employee's beneficiary designation is no longer valid if it names any beneficiary other than the same-sex spouse. If the employee dies and the retirement plan pays out his death benefits to the beneficiary named in the outdated beneficiary designation form, it risks having to also pay the spouse, or even loss of the plan's tax qualified status.

Health Plan Implications

Using the same overall guidance and the *Windsor* decision itself, employers sponsoring cafeteria plans, health and dependent care flexible spending accounts, HSA's and medical plans need to evaluate how *Windsor* and the federal guidance has affected these employee benefits. Prior to *Windsor*, DOMA had a direct impact on same-sex unions because what would have been a tax-free health benefit for the spouse in an opposite-sex marriage was treated a *taxable benefit* in a same-sex marriage. While the new standard of "state of ceremony" does not completely solve all issues relating to same-sex marriage, it does clearly allow the same-sex spouse to receive non-taxable coverage under existing health plans. The federal guidance provided some transition relief in 2013 for individuals who should be able to claim the favorable tax treatment for a same-sex marriage after June 26, 2013, but at this time, plan sponsors should be looking at changing their procedures to make sure this is handled correctly in their medical plans.

Some things we do know from the IRS guidance on health plans include the recognition of the same-sex couple for cafeteria plan purposes. This means that a plan may allow an employee in a same-sex marriage to enroll the employee's spouse. Plans may also permit an employee who marries a same-sex spouse to make a mid-year election change due to a change in legal marital status. Medical flexible

spending accounts may cover a same-sex spouse, and qualifying medical expenses incurred by same-sex spouses are eligible for tax reimbursement through a health savings account.

It may be necessary to amend the health plan on the last day of the first plan year beginning on or after December 16, 2013, but only if the plan term is inconsistent with the *Windsor* case and the IRS guidance. The deadline typically becomes December 31, 2014, for calendar year plans, and employers should review their health plan documents now to see if a change is required.

What *Windsor* Did Not Change

Nothing in the *Windsor* decision or the federal guidance requires plans to offer group health plan coverage to same-sex spouses. However, employers should keep in mind that same-sex spouses may become automatically eligible for their group health plan as a result of the *Windsor* decision even though the plan does not intend to offer such coverage. Frequently, the health plan defines "spouse" in accordance with applicable law, in which case it does not specifically exclude same-sex spouses and would now appear to automatically include same-sex spouses without further amendment to the medical plan. Furthermore, continued medical coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") should now be offered to same-sex spouses even if it was not in prior years. The last quarter of 2014 is a good time for an employer to talk to its group health plan service provider and COBRA administrator to determine how this should be handled.

Once the dust settled, the *Windsor* decision was not the earth-shattering event many anticipated. Employers now have had time to consider the implications and should make a technical review of what the retirement plan and medical plan both intend to provide, and in fact provide, to same-sex spouses. The problem or missed opportunities from the *Windsor* decision should be part of the fourth quarter planning for any employer who offers retirement or group health benefits to eligible employees.

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