

IRS Guidance Clarifies Retroactive Retirement Plan Impact of US Supreme Court's *Windsor* Ruling

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Recently, the Internal Revenue Service (IRS) issued Notice 2014-19¹ and a set of Frequently Asked Questions² clarifying certain retirement plan implications of the US Supreme Court's ruling in *U.S. v. Windsor*.

In *Windsor*, the Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. Section 3 of DOMA previously had provided that, for purposes of all federal laws, the word "marriage" means "only a legal union between one man and one woman as husband and wife," and the word "spouse" refers "only to a person of the opposite-sex who is a husband or wife."

In *Windsor*, the Supreme Court ruled that Section 3 of the Defense of Marriage Act is unconstitutional.

Prior to this most recent guidance, the IRS had issued Revenue Ruling 2013-17³ and an earlier set of Frequently Asked Questions⁴ providing that same-sex couples legally married in a jurisdiction with laws authorizing same-sex marriage will be treated as married for federal tax purposes, regardless of whether the couple resides in a state in which same-sex marriage is recognized. This IRS approach recognizing same-sex marriages based on the "state of celebration" took effect September 16, 2013. At that time, the IRS promised to issue additional guidance regarding the retroactive impact of the *Windsor* decision. The most recent guidance now addresses the retroactivity issue.

PLAN ADMINISTRATION

Notice 2014-19 clarifies that, *effective as of June 26, 2013*, retirement plans must be administered in a manner that reflects

the *Windsor* ruling. Notably, Notice 2014-19 provides that plans are *not* required to retroactively recognize same-sex spouses prior to that date. In addition, plans that initially applied a "state of residence" approach, as opposed to the IRS' state of celebration approach, are not required to retroactively adopt the state of celebration approach prior to September 16, 2013. (A state of residence approach means the plan extended spousal rights and benefits only to same-sex spouses legally married and residing in a jurisdiction in which same-sex marriage is legal or recognized.)

Not requiring retirement plans to retroactively recognize same-sex spouses prior to the June 26, 2013 effective date of the *Windsor* ruling mitigates potential plan liabilities for death benefits and other benefits for same-sex spouses prior to that date. Specifically, unless a plan sponsor voluntarily elects to recognize same-sex spouses prior to that date, the IRS guidance relieves the plan sponsor from a dilemma of either: (1) reissuing benefit election paperwork to participants with same-sex spouses who elected benefits prior to that date, or (2) risking plan disqualification. In addition, prior to that date; plans are not required to recognize a same-sex spouse for purposes of death benefit payments (such as the qualified pre-retirement survivor annuity (QPSA) under a defined benefit plan).

Following are some of the key implications plan sponsors will need to consider in extending spousal rights and benefits under their retirement plans to same-sex spouses.

DEFINED CONTRIBUTION PLANS

- A participant's same-sex spouse must be recognized as the default beneficiary under the plan in the event the participant fails to designate a beneficiary or the beneficiary predeceases the participant.
- A participant's same-sex spouse must consent to the participant's designation of a beneficiary other than the same-sex

spouse. Any beneficiary designations made prior to June 26, 2013, are now invalid without a same-sex spouse's consent to the designation.

- Plans that permit hardship withdrawals must consider a participant's same-sex spouse in determining whether the participant is eligible to take certain withdrawals, such as medical, tuition, or funeral expenses, for the same-sex spouse.
- Plans that permit participant loans must obtain a same-sex spouse's consent to a loan if the plan currently requires an opposite-sex spouse to consent to a loan.

Plan sponsors should communicate with participants about these changes, including notifying participants that existing beneficiary designations are invalid without a same-sex spouse's consent.

Practice Tip

Plan sponsors should communicate with participants about these changes, including notifying participants that existing beneficiary designations are invalid without a same-sex spouse's consent. The automatic invalidation of beneficiary designations executed *prior to the Windsor effective date* presents practical issues for plan administrators regarding the way to identify affected participants and notify them of the need to submit new beneficiary designations. Some plan sponsors are using this as an opportunity to remind all participants to review and update their beneficiary designations.

DEFINED BENEFIT PLANS

- Spousal survivor benefits in the form of a qualified joint and survivor annuity (QJSA) or qualified optional survivor annuity (QOSA) and a QPSA must be extended to same-sex spouses.
- Plans that offer optional payment forms in lieu of a QJSA/QOSA or a QPSA payable to a spouse must obtain a same-sex spouse's consent to the participant's election of a payment form payable to a beneficiary other than the same-sex spouse.

Practice Tip

Plan sponsors should update their benefit election forms to notify participants of spousal eligibility for certain forms of payment and to clarify that a same-sex spouse's consent is required to elect certain optional forms of payment.

ALL RETIREMENT PLANS

- Same-sex spouses who divorce may enter into a qualified domestic relations order (QDRO) to divide retirement plan assets.
- Same-sex spouses have the right to directly roll over eligible rollover distributions and must be notified of their rollover rights.
- Required minimum distributions may need to be recalculated for participants with a same-sex spouse and can be delayed for a surviving same-sex spouse.

Practice Tip

Plan sponsors should update their QDRO procedures and rollover forms to reflect these changes for same-sex spouses.

PLAN AMENDMENTS

Amendments are not required for plans that define marriage or spouse by general reference to federal law or in a manner that is otherwise not inconsistent with *Windsor*. However, plans that define "marriage" by reference to DOMA or that limit "spouse"

to an individual of the opposite-sex must be amended to reflect the *Windsor* ruling and related IRS guidance. Plans also need to be amended if spousal rights and benefits were administered in a manner that reflects the outcome of *Windsor* prior to June 26, 2013. All *Windsor*-related amendments generally must be adopted by December 31, 2014.

NEXT STEPS

To be clear, retroactive only to June 26, 2013, all qualified retirement plans must recognize same-sex spouses. As noted above, the plan sponsor may use a "state of residence" approach from June 26, 2013, and must use the "state of celebration" approach beginning September 16, 2013.

Plan sponsors should consider what changes to the administration of their retirement plans are necessary to reflect the *Windsor* ruling effective as of June 26, 2013. In light of the favorable IRS guidance in Notice 2014-19, plan sponsors that updated the administration of their plans in light of Revenue Ruling 2013-17 will only need to go back from September 16, 2013, to June 26, 2013, to adjust plan administration (e.g., review benefits that commenced during that time and solicit spousal consents or pay in QJSA form, etc.)

In addition, plan sponsors should review their retirement plan documents to determine whether amendments are required or desirable to clarify the administration of spousal rights and benefits for same-sex spouses. Even if an amendment is not technically required by the IRS, a clarifying amendment nevertheless may be helpful for administration purposes. For example, plan sponsors that intend to rely on Notice 2014-19 to deny benefit claims to same-sex spouses prior to June 26, 2013, should consider adopting a plan amendment to clarify the effective date on which the plan begin recognizing same-sex spouses. 🌐

NOTES

1. <http://www.irs.gov/pub/irs-drop/n-14-19.pdf>.
2. <http://www.irs.gov/Retirement-Plans/Answers-to-Frequently-Asked-Questions-Regarding-the-Application-of-the-Windsor-Decision-and-Post-Windsor-Published-Guidance-to-Qualified-Retirement-Plans>.
3. <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>.
4. <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>.

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