

EMPLOYEE BENEFITS & EXECUTIVE COMPENSATION ALERT

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Landscape for Same-Sex Employee Benefits Comes into Clearer Focus

The Supreme Court's decision in *U.S. v. Windsor*, declaring Section 3 of the Defense of Marriage Act ("DOMA") to be unconstitutional,¹ left unanswered several important questions regarding retirement and welfare plan governance and administration.

Recently, the Internal Revenue Service issued guidance intended to address some of these questions. The IRS takes the position that, for all federal tax purposes, including the governance and administration of qualified retirement plans and welfare benefit plans, the terms "spouse," "husband and wife," "husband" and "wife" include an individual lawfully married to a person of the same sex. Moreover, for purposes of determining controlling law with respect to the performance of a same-sex marriage, the IRS has adopted what can be called a "state of ceremony" (or "state of celebration") rule. For federal tax purposes, individuals of the same sex will be considered lawfully married if they are married in a jurisdiction that allows same-sex marriage, regardless of whether the same-sex couple resides in or relocates to a state that does not recognize same-sex marriage.

As a consequence, a qualified retirement plan or a welfare benefit plan must treat validly married same-sex spouses as married for all purposes of plan administration and governance.

With respect to an employer-sponsored cafeteria plan, if an employee has made a pre-tax salary reduction election for health coverage and also elected to provide health coverage for a same-sex spouse on an after-tax basis through a group health plan sponsored by the employer, the employee may treat any amounts paid on an after-tax basis as paid on pre-tax basis by filing an amended tax return or by claiming a tax credit or refund for an overpayment. The employer sponsoring the cafeteria plan may also claim a refund or make an adjustment for any excess Social Security or Medicare taxes paid with respect to such cafeteria plan benefits. A special administrative procedure is expected to be issued to address such refunds.

What Should a Plan Sponsor Do Now?

The IRS has not yet issued guidance concerning the application of *Windsor* with respect to a number of other retirement plan and welfare plan issues. In the future, the IRS is expected to issue guidance regarding plan amendment or correction requirements, as well as the retroactive application of the Court's decision in *Windsor*. In the meantime, the guidance recently published by the IRS that is the subject of this Client Alert has a *prospective* application that began on September 16, 2013.

At this time the sponsor of a qualified retirement plan or welfare benefit plan should scrutinize all plan documents, participant communications and administrative practices to determine what, if any, changes will need to be made in order to comply with the Court's ruling and the guidance issued by the IRS. Among the provisions to which a plan sponsor should pay particular attention are those that reference "spouse" or "married." These include, but are not limited to, plan provisions or communications regarding:

¹ See our July 2013 Client Alert, "DOMA, *Windsor* and the Same-Sex Employee Benefits Landscape" found [here](#)).

- spousal consent requirements with respect to beneficiary designations and forms of benefit payment (such as a qualified joint and survivor annuity);
- qualified pre-retirement survivor annuity distribution provisions;
- qualified domestic relations orders;
- required minimum distribution rules;
- hardship distributions;
- COBRA continuation coverage;
- federal taxation of health benefits for a same-sex spouse;
- availability of benefits under a health savings account; and
- benefit elections under a Code Section 125 cafeteria plan.

To determine the validity of a same-sex marriage for purposes of plan administration and governance, beginning on or after September 16, 2013, the administrator of a qualified retirement plan or welfare benefit plan should have in place a procedure by which it can determine whether a same-sex marriage was performed in a jurisdiction that recognizes same-sex marriage.

If you have any questions concerning how to proceed with respect to the recent guidance issued by the IRS or the Windsor decision, please contact us.

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This edition of the Employee Benefits & Executive Compensation Alert highlights recent guidance published by the IRS concerning the consequences of the Supreme Court's decision in U.S. v. Windsor. The Alert was written by Devin M. Karas, a member of the Employee Benefits & Pension Practice Area at Reid and Riege, P.C. The Practice Area works closely with clients to design and draft tax-qualified and nonqualified retirement plans. For information or additional copies of this Alert, or to be placed on our mailing list, please contact Devin (tel. 860-240-1063) (e-mail dkaras@rrlawpc.com) or another member of the Practice Area, John J. Jacobson, Chair (tel. 860-240-1006) (e-mail jjacobson@rrlawpc.com), John V. Galiette (tel. 860-240-1009) (e-mail jgaliette@rrlawpc.com), Ronald J. Koniuta (tel. 860-240-1034) (e-mail rkoniuta@rrlawpc.com), or Erik M. Sharp (tel. 860-240-1074) (e-mail esharp@rrlawpc.com), or the Reid and Riege attorney with whom you regularly work.

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