



September 2013

## IRS Issues Post-*Windsor* Guidance Recognizing Same-Sex Marriages

In June, the United States Supreme Court held in the case of [United States v. Windsor](#) that Section 3 of the Defense of Marriage Act (DOMA), which restricted the definition of "marriage" for purposes of federal law to a union between a man and a woman, was unconstitutional. This ruling was anticipated to have a significant impact on Internal Revenue Service (IRS) policy, as the IRS has historically taken the position that DOMA precluded it from recognizing same-sex marriages. Following the issuance of the ruling, both plan sponsors and participants looked to the IRS for guidance as to how this change would affect the numerous special protections and opportunities available to a spouse under the sections of the Internal Revenue Code governing employer retirement and welfare benefit programs.

The IRS has answered some of these questions with the release of Revenue Ruling 2013-17. In crafting the Revenue Ruling, the IRS recognized the complexities involved in dealing with individuals whose marriages are performed in a state in which the marriages are legal and recognized but who reside in a state that does not recognize such marriages. As a result, the Revenue Ruling provides that the IRS will recognize a same-sex marriage if the individuals involved have been lawfully married in a state that permits same-sex marriage, even if the couple is domiciled in a state that does not recognize same-sex marriage. The Revenue Ruling also makes it clear that couples who are not legally married, but have entered into a domestic partnership, civil union, or similar relationship, are not considered to be married under IRS rules. These changes are prospective and take effect on September 16, 2013.

Along with the Revenue Ruling, the IRS issued a series of questions and answers for [same-sex spouses](#) as well as a separate series for individuals of the same sex and opposite sex who are in registered [domestic partnerships, civil unions, or similar relationships](#) that are not legal marriages.

### IMPLICATIONS FOR EMPLOYEE BENEFIT PLANS

As of September 16, 2013, for purposes of the Internal Revenue Code, a same-sex spouse whose marriage is recognized as a legal marriage in the state where it took place must be treated in the same manner as a legally married opposite-sex spouse, regardless of whether the employee lives in, or the employer is located in, a state that does not recognize same-sex

marriage. This means that a number of plan requirements previously inapplicable to a same-sex spouse may now be available to that same-sex spouse. This list includes, but is certainly not limited to, the following:

- The application of retirement plan spousal consent requirements to a same-sex spouse
- The extension of retirement plan qualified joint and survivor annuities to a same-sex spouse
- The availability of retirement plan spousal rollover rights to a same-sex spouse
- The ability of a same-sex spouse to obtain a right to a retirement plan or medical plan benefit through a qualified domestic relations order or qualified medical support order
- The application of the more favorable spousal minimum-required distribution rules to a same-sex spouse eligible for a retirement plan benefit
- The extension of the right to receive benefits for a same-sex spouse on a pretax basis (previously, income was imputed to the employee for the portion of the benefit attributable to a same-sex spouse)
- The broadening of the welfare plan change-in-status rules to include events involving a same-sex spouse

These changes may require amending plan documents to reflect the new definition of "spouse" under the Internal Revenue Code and updating insurance contracts, summary plan descriptions, benefit forms, and numerous other plan communications that previously provided for different treatment of a same-sex spouse based upon the pre-*Windsor* IRS definition of "spouse."

#### **TAX IMPLICATIONS FOR EMPLOYERS**

Employers may need to make changes in their payroll and benefits systems to reflect the changes required under *Windsor* and the Revenue Ruling. These changes may range from withholding changes due to an employee's new ability to file a joint income tax return to the exclusion of premium amounts of a same-sex spouse from income. Employers do not need to take immediate action, as additional IRS guidance is expected to clarify how employers can make appropriate adjustments to payroll tax withholdings and to assist individual taxpayers in filing for refunds of overpaid taxes. Further IRS guidance is also expected to address the retroactive application of these new rules to employee benefit plans.

As the changes required under *Windsor* and the Revenue Ruling are for purposes of federal law and the Internal Revenue Code only, employers with employees in states that do not recognize same-sex marriage may wish to consider the different tax implications for employee benefits related to a same-sex marriage for federal and state purposes. Also, employers may want to consider how they will determine if a same-sex marriage must be recognized for purposes of their benefit plans.

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For more information, or if you have any questions about how the new rules affect your employee benefit plans, please contact one of the following attorneys in Robinson & Cole's [Employee Benefits and Compensation Practice Group](#).

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