

employee benefits lawflash

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IRS Releases Guidance for Effective Date of Same-Sex Spousal Retirement Rights

Plan sponsors now know how and by when retirement plans must comply with the U.S. Supreme Court's decision in Windsor.

The IRS has released its long-awaited guidance on the effective date by which qualified retirement plans must recognize same-sex spousal rights as a result of the U.S. Supreme Court's decision in *United States v. Windsor*.¹ As anticipated, the IRS guidance set forth in IRS Notice 2014-19 does not apply same-sex spousal rights retroactively.² Instead, retirement plans must recognize statutory spousal rights for same-sex spouses, such as the right to consent to the participant's waiver of a qualified joint and survivor annuity, beginning June 26, 2013, the date of the *Windsor* decision. Similarly, retirement plans are required to recognize same-sex marriage based on the "state of celebration" rule, rather than a "state of domicile" rule, beginning September 16, 2013, the date of earlier IRS guidance that established the state of celebration standard.

Background

The *Windsor* decision held that the federal Defense of Marriage Act (DOMA) provision establishing marriage for federal law purposes as a legal union between opposite-sex spouses was unconstitutional. Based on DOMA, many plan sponsors limited spousal rights under their retirement plans accordingly, while other plan sponsors voluntarily extended those rights to same-sex spouses and other same-sex partners. The *Windsor* decision effectively required many of those spousal rights to extend to same-sex spouses.

Earlier IRS guidance in Revenue Ruling 2013-17 clarified the extension of those rights in some respects by (1) establishing that the validity of a same-sex marriage is based on its recognition by the state of celebration (the state where the marriage ceremony occurred), rather than its recognition by the same-sex spouses' current state of domicile, and (2) declining to extend those rights to same-sex relationships that are not denominated as marriage under state law (e.g., domestic partnerships).³ However, this earlier IRS guidance did not establish any specific rules about how and when qualified retirement plans needed to comply with these new same-sex spousal rules and requirements.

New Guidance

IRS Notice 2014-19 provides additional and helpful guidance for the timing and scope of the implementation of same-sex spousal rights by qualified retirement plans. The following are some of the key points covered by the new guidance:

- As noted, operational compliance for plan qualification purposes is required as of June 26, 2013. A plan's failure to recognize same-sex marriage prior to that date will not adversely affect the plan's tax-qualified status.

1. 133 S. Ct. 2675 (2013).

2. View IRS Notice 2014-19 at <http://www.irs.gov/pub/irs-drop/n-14-19.pdf>.

3. View Revenue Ruling 2013-17 at <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>.

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- Similarly, recognition of same-sex marriage based on state of celebration is required for plan qualification purposes as of September 16, 2013. For periods prior to that date, plans may apply a state of domicile rule.
- Notwithstanding these mandatory compliance dates, plans may nevertheless choose to recognize same-sex marriage for some or all purposes prior to those dates. The IRS acknowledges that those plan sponsors that have voluntarily recognized same-sex relationships before they were required to do so have not thereby jeopardized their plans' tax-qualified status. Those plans that have not previously recognized same-sex relationships prior to the mandatory compliance dates may also now choose to do so, but those plans will have to ensure that they are able to meet retroactive amendment restrictions and operational administrative hurdles.
- Plans need only be amended to comply with mandatory requirements if they include provisions that are inconsistent with recognition of same-sex marriage, (e.g., if the plan defines "marriage" or "spouse" by reference to DOMA).
- If amendments are required for compliance, those amendments are due by the later of December 31, 2014 or the end of the plan's otherwise applicable 2013 remedial amendment period for required amendments—generally September 15, 2014 for calendar year plans with calendar year sponsors. As such, the amendment deadline is December 31, 2014 for calendar year plans with calendar year sponsors, but fiscal year plans with fiscal year sponsors may have later amendment deadlines. Any such required amendments will be exempt from otherwise applicable restrictions on amendments increasing benefit liabilities because of failure to satisfy statutory funding targets.
- Any amendments voluntarily extending same-sex spousal rights to periods before the mandatory compliance dates, or amendments to extend those rights to same-sex relationships other than marriage, will be treated as discretionary amendments. Those amendments will be due by the later of December 31, 2014 or the end of the plan year that includes June 26, 2013—generally December 31, 2013 for calendar year plans with calendar year sponsors. Again, fiscal year plans with fiscal year plan sponsors may have later amendment deadlines. Further, these amendments will be subject to any otherwise applicable restriction on amendments increasing benefit liabilities because of failure to meet statutory funding targets.
- One important point to note is that the limits on retroactivity described in IRS Notice 2014-19 only apply for tax qualification purposes. As such, the IRS guidance does not provide relief from any individual claims that a same-sex spouse may seek to bring asserting spousal rights for retirement plan benefits accruing before the *Windsor* decision. Absent any subsequent administrative relief (which is not expected), it appears that any such claims must be handled through a plan's claim and appeals procedures and, perhaps ultimately, the courts.

Now that this guidance is available, plan sponsors should evaluate whether any conforming plan amendments are necessary or desirable and, if so, ensure that they are properly adopted by the applicable deadline (which will be by the end of 2014 for most plans).

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