

Same-sex marriage recognition has limited retroactive impact on qualified retirement plans

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In brief

On April 4, the IRS published Notice 2014-19 providing guidance for employee benefit plan sponsors on the application of the Supreme Court's *Windsor* decision on qualified retirement plans. It addresses the retroactive effect of the *Windsor* decision as well as the remedial amendment period applicable to required plan amendments. Notice 2014-19 gives examples of retirement plan qualification requirements under which a participant's marital status affects the payment of benefits, and includes guidance on how to satisfy those requirements. Additional answers to frequently asked questions were simultaneously updated on the IRS website. Those FAQs provide further examples of actions plan sponsors may consider to align plan operations with benefits and rights afforded to same-sex spouses, as well as the application of recent guidance to multiemployer plans and Section 403(b) plans. While each plan's current terms, as well as the plan sponsor's decisions regarding discretionary provisions, will dictate whether plan amendments are necessary, Notice 2014-19 specifies the deadline for adopting required plan amendments (for example, because the plan defines the terms 'marriage' or 'spouse' to include only opposite-sex marriages/spouses) is generally December 31, 2014, or if later, the due date for filing the plan sponsor's federal income tax return for the period that includes June 26, 2013. The deadline for adopting discretionary amendments is generally the last day of the plan year in which the amendment is put into effect operationally.

In detail

Background

The US Supreme Court's decision in *United States v. Windsor* means that employees who are legally married under the laws of any state or foreign country are also recognized as married for federal tax purposes. Prior to the *Windsor* holding, Section 3 of the Defense of Marriage Act (DOMA) precluded recognition of same-sex marriages for

federal purposes. Therefore, employees with same-sex spouses were treated as single for purposes of benefits based on marital status under employer-sponsored plans, regardless of whether they were considered married for purposes of some states' laws.

Because the *Windsor* holding found Section 3 of DOMA to be unconstitutional, many plan sponsors and practitioners were concerned about its potential

retroactive effect on earlier benefit payments to participants who were in valid same-sex marriages. This could also affect spousal rights or claims for benefits where valid same-sex spouses may have been denied payments or other spousal protections such as survivor annuities, rights to consent to alternate beneficiaries, or recognition as alternate payees under qualified domestic relations orders upon divorce.

Limited retroactive application to qualified retirement plans

[Notice 2014-19](#) requires qualified retirement plans to be operated consistent with *Windsor* effective June 26, 2013 (the date the Supreme Court's opinion was published). Therefore, all qualified retirement plans must generally recognize a same-sex marriage as equivalent to an opposite-sex marriage for all purposes as of that date provided the marriage was valid under the laws of the state or foreign jurisdiction in which it was performed.

There was an open question following the *Windsor* decision concerning whether plans would be required to apply a state of celebration rule or a state of residency rule in determining the validity of same-sex marriages. This issue was addressed by the IRS in [Revenue Ruling 2013-17](#), which applies prospectively from September 16, 2013 and requires that all qualified retirement plans apply a state of celebration rule for purposes of recognizing same-sex marriages. Notice 2014-19 provides additional limited relief for plans that were required to make decisions on claims in the interim period between the *Windsor* holding and Revenue Ruling 2013-17. Pursuant to that relief, plans won't be disqualified for applying a state of residency rule recognizing same-sex marriages as valid only if the participant resided in a state that recognized same-sex marriages during that interim period. According to updated [FAQs published by the IRS](#) simultaneously with Notice 2014-19, similar relief applies to plans that recognized choice of law provisions referring to state laws prohibiting same-sex marriage recognition. However, importantly these relief provisions only applied until September 16, 2013. Following that date, all qualified retirement plans are required to apply a state of celebration

rule which requires recognizing same-sex marriages performed under the laws of any state or foreign country regardless of where the couple resides or whether the plan has choice of law provisions to the contrary.

Plan sponsor discretion permitted in offering broader plan rights

Plan sponsors may (but aren't required to) recognize same-sex marriages as valid for purposes of their qualified retirement plans before June 26, 2013; however, the IRS cautioned that such an approach may trigger requirements that are difficult to administer retroactively. Plans may also be amended to provide new rights or benefits for participants with same-sex spouses. For example, plans that offer survivor annuities may (but are not required to) add provisions allowing participants with same-sex spouses who are in pay status to revoke prior elections and make a new election for a qualified joint and survivor annuity (QJSA) if it wasn't previously available to them.

Observation

Notice 2014-19 provides welcome guidance to plan sponsors and administrators. It provides certainty that plans won't be disqualified simply because spousal protections were not extended to couples in same-sex marriages before June 26, 2013. In addition, because plan sponsors are given discretion to implement same-sex marriage recognition in a broader manner, plan sponsors may consider adopting an earlier effective date or modifying or adding plan benefits, rights or features to create workable solutions for their unique participant demographics.

Timing and necessity of plan amendments

While each plan's current terms will dictate whether plan amendments are required for consistency with the

Windsor decision and other subsequent guidance, Notice 2014-19 specifies that if plan amendments are required (for example, because the plan defines the terms 'marriage' or 'spouse' to include only opposite-sex marriages/spouses), then the deadline for adopting such amendments is generally the later of December 31, 2014 or the due date for filing the plan sponsor's federal income tax return for the period that includes June 26, 2013 (including extensions). For discretionary amendments (for example, where a plan sponsor desires to recognize same-sex marriages prior to the date of the *Windsor* decision, or to add subsequent election features for participants in pay status with same-sex spouses), the amendment must generally be adopted by the end of the year in which the change first takes effect operationally. The IRS also noted that, even though a plan may not technically require an amendment to comply with the *Windsor* holding, clarifying amendments may be useful for plan administrative purposes.

Observation

*Many plans won't require formal plan amendments because they don't limit the definition of spouse or marriage to only opposite-sex spouses/marriages. Prior to the *Windsor* decision, those plans were operated in accordance with Section 3 of DOMA which precluded recognition of same-sex marriages for purposes of federal laws such as ERISA and the qualification requirements applicable to tax-favored retirement plans. However, plans that include gender specific definitions of marriage or spouse must be amended to treat same-sex marriages as equivalent to opposite sex marriages by the deadline specified in Notice 2014-19. Even though plans may not require technical amendments in all cases, all*

plan sponsors should be communicating with their plans' recordkeepers and administrators to ensure administrative procedures are updated to recognize valid same-sex marriages, along with spousal protections inherent in that status.

For more information on how the recognition of same-sex marriages affects benefits under both qualified retirement plans and employee welfare benefit plans see [HRS Insight 2013, Vol. 16](#). For more information on guidance included in Revenue Ruling 2013-17, including the state of celebration rule and the differences between same-sex spouses in legal marriages versus civil unions or domestic partnerships, see [HRS Insight 2013, Vol. 18](#).

Observation

While same-sex marriage recognition in and of itself won't generally require new participant reporting and disclosure procedures, employers and plan sponsors should consider adding participant communications to explain how the Windsor holding and subsequent guidance requiring same-sex marriage recognition may affect their benefits and rights under pension and profit sharing plans. All existing participant communications should be reviewed to determine whether changes are needed to election forms, notices and other participant communications to accurately reflect the associated spousal benefits, rights and features.

The takeaway

Notice 2014-19 provides important guidance for plan sponsors on the potential retroactive effects of the *Windsor* decision and subsequent guidance. Since plans will be required to recognize same-sex marriages beginning on June 26, 2013 — that is, the date the *Windsor* holding was published — plan sponsors gained some certainty that plan disqualification won't result from the failure to recognize same-sex marriages before that date. The Notice also confirmed that existing plan provisions that don't distinguish between opposite-sex spouses and same-sex spouses won't require formal plan amendments; however, plans that do make such distinctions must be amended by the later of December 31, 2014, or the plan sponsor's federal income tax return due date for the period that includes June 26, 2013.

Let's talk

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