



DOMA NO MORE: IMPACT OF THE *U.S. V. WINDSOR* RULING AND RECENTLY ISSUED GUIDANCE ON EMPLOYEE BENEFIT PLANS

On June 26, 2013, the United States Supreme Court issued its ruling in *U.S. v. Windsor*, No. 12-307 U.S. June 26, 2013, declaring Section 3 of the Defense of Marriage Act ("DOMA") unconstitutional. Section 3 of DOMA defined marriage for federal law purposes as only a marriage between individuals of the opposite sex. The *Windsor* court ruled that this provision violates the Equal Protection Clause and that same-sex marriages in states where they are legally recognized are now entitled to the same treatment as opposite-sex marriages under federal law.

Following the *Windsor* decision, on August 29, 2013, the IRS issued Revenue Ruling 2013-17 and two accompanying sets of Frequently Asked Questions ("FAQs"), which address the treatment of same-sex spouse for federal tax and qualified retirement plan purposes. This E*Bulletin provides a brief overview of the impact of the *Windsor* and IRS rulings on employer-sponsored benefit plans and steps that plan sponsors should take to address them accordingly.

Overview Of Impact On Employee Benefit Plans

The *Windsor* ruling has a significant impact on ERISA-covered retirement and health and welfare plans. Below is a nonexclusive list of plans and provisions impacted by *Windsor* and the IRS ruling:

Qualified Retirement Plans:
<ul style="list-style-type: none"> • Direct Rollover and Required Minimum Distribution ("RMD") Rules. Prior to <i>Windsor</i>, same-sex spouses did not have the right to benefit from the more favorable spousal rollover rules and were required to receive a deceased employee's interest within five years of death. Now, same-sex spouses are able to rollover their benefits into their own IRA, enabling them to receive payments over their lifetime and to delay RMDs to age 70 ½.
<ul style="list-style-type: none"> • Hardship Distributions. Same-sex spouses will now be treated as spouses for hardship distribution purposes.
<ul style="list-style-type: none"> • Qualified Joint and Survivor Annuity ("QJSA") and Qualified Pre-Retirement Survivor Annuity ("QPSA") Death Benefits. Same-sex spouses will now have the right to receive a QJSA if the participant spouse dies after retiring. Likewise, same-sex spouses will have a right to receive a QPSA if the participant dies before they retire. In addition, the participant will not be able to select any other form of benefit or designate a different beneficiary other than the spouse, unless the spouse consents to such election or designation as the case may be.
<ul style="list-style-type: none"> • Qualified Domestic Relations Orders ("QDROs"). QDROs relating to divorces of same-sex spouses will now have to be honored by the plan.



Health & Welfare Plans:
<ul style="list-style-type: none"> • Section 125 Cafeteria Plans. Employees will now be able to pay for their same-sex spouse's coverage on a pretax basis under the employer's Section 125 cafeteria plan. Employers will no longer have to impute the cost of health coverage and pay employment taxes on these amounts.
<ul style="list-style-type: none"> • Account-Based Plans. Employees will now be able to be reimbursed for medical expenses of their same-sex spouses under a Flexible Savings Account ("FSA"), Health Savings Account ("HSA"), or other account based plan.
<ul style="list-style-type: none"> • COBRA. An employee's same-sex spouse will now have a right to COBRA coverage upon the occurrence of a qualifying event.
<ul style="list-style-type: none"> • Family and Medical Leave Act ("FMLA"). An employee will now have the right to request unpaid FMLA leave to care for his or her same-sex spouse.
<ul style="list-style-type: none"> • Health Insurance Portability and Accountability Act ("HIPAA"). Same-sex spouses will be entitled to HIPAA special enrollment rights.
<ul style="list-style-type: none"> • Coverage. Though not directly addressed in <i>Windsor</i>, employers may have to extend coverage to same-sex spouses, if opposite sex spouses are covered.

Recently Issued Guidance By The IRS:

Pursuant to Revenue Ruling 2013-17 and the supplemental FAQs, the IRS adopted the "state of celebration" rule for purposes of determining the marital status of an individual. Under the state of celebration rule, same-sex couples who are legally married in any U.S. state, the District of Columbia, a U.S. territory, or foreign jurisdiction that legally recognizes same-sex marriage will be treated as married for all federal tax purposes, regardless of current state of residence.

The ruling clarifies that it extends to all applicable federal tax provisions in which marriage is a factor including, but not limited to, employee benefits, income filing status, personal and dependency exemptions, gift and estate tax purposes, and the earned income tax credit and child tax credit. The ruling, however, does not extend to other types of formal arrangements that are not marriages under state law (*e.g.*, domestic partnerships and civil unions).

Under the ruling, individuals who are in legally recognized same-sex marriages can amend prior tax returns and elect to be treated as married for tax purposes for all open tax years (*i.e.*, the later of three years from the date returns were filed or two years from the date taxes were paid). The ruling also clarifies that same-sex spouses may make claims to recover income taxes paid on the value of employer sponsored health coverage purchased or provided to a same-sex spouse. Employers cannot file refund claims for excess withholding of income taxes for prior years (only employees can make these claims), but employers may make adjustments for withheld amounts from the employee in the current year, provided the employer reimburses the employee for the excess withholding amounts before the end of the current calendar year.



The ruling also allows employers to recover any FICA and Medicare tax overpayments resulting from imputed income on benefits provided to same-sex spouses, provided the statute of limitations is still open. The IRS intends to issue additional guidance establishing a streamlined process for employers to claim refunds for payroll taxes paid on benefits offered to same-sex spouses.

The IRS FAQs reiterate the guidance under the ruling and also provide initial guidance on the ruling's impact on qualified retirement plans. Specifically, the FAQs state that qualified retirement plans are required to treat a same-sex spouse (regardless of state of residence) as a "spouse" for all plan purposes effective September 16, 2013. Future guidance is expected to address the extent to which these rules will be applied retroactively as well as plan amendment deadlines and content requirements.

Action Items

The IRS guidance is helpful. However, there are many questions left unanswered. While such issues will eventually be addressed in future guidance, employers should start taking steps to bring their plans into compliance with the new requirements, including:

- Identify and review the scope of applicable state laws in all jurisdictions where the employer operates.
- Identify employees in same-sex marriages.
- Identify, review and amend employer sponsored benefit plans as needed. Qualified plans that define the term "spouse" pursuant to DOMA will have to be amended. Although there is no current deadline to incorporate these changes, employers must begin to operate their qualified plans in accordance with the ruling effective September 16, 2013. Likewise, nonqualified plans that "piggyback" on the terms of the employer's qualified plan provisions should also be reviewed. Health and welfare plans (and associated policies/certificates of coverage) may have to be amended to extend coverage. Material changes will have to be disclosed to plan participants via ERISA's applicable disclosure procedures.
- Review administrative practices. Employers should review and modify their internal FMLA, COBRA and HIPAA procedures and coordinate with their third party administrators and insurance carriers.
- Update payroll systems. Employers should update their payroll systems to allow employees in same-sex marriages to pay for benefits on a pre-tax basis.

Employers should stay abreast of further developments in this area. In the meantime, if you have questions regarding the effect of the *Windsor* case or Revenue Ruling 2013-17 on your employee benefit plans or need assistance bringing them into compliance, please contact your Jones Walker relationship attorney.

— [Timothy P. Brechtel](#) and [Ricardo X. Carlo](#)



Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

Timothy P. Brechtel
Jones Walker LLP
201 St. Charles Ave
New Orleans, LA 70170-5100
504.582.8236 tel
tbrechtel@joneswalker.com

Ricardo X. Carlo
Jones Walker LLP
201 St. Charles Ave
New Orleans, LA 70170-5100
504.582.8409 tel
rcarlo@joneswalker.com

This message and any attachment hereto is subject to the privilege afforded Attorney Work Products and Attorney-Client communications.

IRS Circular 230 Disclaimer: Pursuant to Treasury guidelines, any tax advice contained in this communication does not constitute a formal opinion. Accordingly, any tax advice contained in this communication is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of avoiding penalties that may be asserted by the Internal Revenue Service.

This newsletter should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your own situation and any specific legal questions you may have.

To subscribe to other E*Bulletins, visit <http://www.joneswalker.com/ecommunications.html>.