

Update for Employers – Compliance With DOMA After United States v. Windsor

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November 19, 2013

As noted in our [July advisory](#), we have continued to monitor guidance regarding the impact on employee benefit plans of the Supreme Court’s decision that Section 3 of the federal Defense of Marriage Act (“DOMA”) is unconstitutional.

Both the Internal Revenue Service (“IRS”) and Department of Labor (“DOL”) have issued guidance providing that all legal same-sex marriages will be recognized for IRS and DOL purposes where marriage is a factor including, but not limited to, filing status, claiming personal and dependent exemptions, and application to employee benefits. Both the IRS and DOL have established a “state of celebration” rule, meaning that same-sex marriages that were validly entered into in a jurisdiction whose laws authorize the marriage of two individuals of the same sex will be recognized even if the married couple resides in a jurisdiction that does not recognize the validity of same-sex marriages. Currently, 14 states (and the District of Columbia) recognize same-sex marriage, with two more states to be added shortly.^[1] The guidance expressly does not apply to registered domestic partnerships, civil unions and similar formal relationships that are not “marriage” but may be recognized under a state’s laws.

Guidance With Respect to Health and Welfare Benefit Programs

- Some employers ceased imputing income immediately following the Supreme Court’s DOMA decision and others awaited official guidance. In either case, employers are permitted but not required to make adjustments for income tax withholding that was over-withheld in 2013 as long as the employer has repaid or reimbursed the employee for such amounts before the end of the year. Employers should evaluate payroll systems and take the steps necessary to implement a pre-tax payment of premiums, to cease additional tax withholdings on imputed income for healthcare coverage to same-sex spouses and to refund or reimburse any over-withheld amounts before December 31, 2013.
 - The IRS provides two optional methods to adjust withholding for same-sex spouses. The first method allows employers to use the fourth quarter 2013 Form 941 to correct the overpayment of employment taxes during the first three quarters of 2013.
 - The second method allows employers to file one Form 941-X, for the fourth quarter of 2013, in order to correct the overpayment of FICA taxes during all quarters of 2013.
- Employers may also claim a refund for the excess social security and Medicare taxes paid on imputed income for certain years prior to 2013 using special administrative procedures outlined by the IRS.
- A taxpayer who has previously included the value of group health plan coverage or coverage under an employer-sponsored cafeteria plan that allowed employees to pay premiums for health coverage on a pre-tax basis is permitted to file an amended Form 1040 reflecting the

taxpayer's status as a married individual and may recover federal income tax paid on the value of such coverage for all years for which the period of limitations for filing a claim for refund is open (generally the last 3 years).

- Upon a COBRA qualifying event (loss of coverage in connection with termination of employment, divorce, death or legal separation) a covered same-sex spouse is now entitled to full COBRA rights.
- An employee's marriage to a same-sex spouse shall constitute a HIPAA special enrollment right as of September 16, 2013, or if later, the date of the legal marriage to the same-sex spouse.
- An employee is now able to use dependent-care reimbursement program dollars, on a pretax basis, to pay for the care of a same-sex spouse and dependents.

Guidance With Respect to Retirement Benefit Programs

- Effective September 16, 2013, an ERISA covered qualified retirement plan must comply with the rules requiring that spousal protections and benefits be extended to same-sex spouses. For example:
 - Qualified joint and survivor annuity (QJ&S) and qualified pre-retirement survivor annuity (QPSA) rights apply to an employee's same-sex spouse.
 - Qualified plans must require the consent of a participant's same-sex spouse for the participant to elect an optional form of benefit or to designate a non-spouse beneficiary.
 - Same-sex spouses may obtain a binding qualified domestic relations order.
 - Hardship distribution requests must now recognize a same-sex spouse as an eligible beneficiary.
- Future guidance regarding application of the Supreme Court decision as it applies to qualified retirement plans with respect to periods before September 16, 2013 is expected (e.g., plan amendment requirements (including the timing of any required amendments) and any necessary corrections for plan operations).

Matters Not Affected by *Windsor*

Unless ERISA or another federal law preemption applies, matters covered by state law will not be impacted by the Supreme Court's decision or the DOL and IRS guidance, in a state that does not recognize same-sex marriage. For example:

- Aspects of nonqualified retirement and other supplemental and incentive plan benefits (other than matters governed by Code Section 409A and other federal tax rules).
- Imputed income and after-tax treatment of payments for spousal coverage for purposes of any applicable state taxes.
- Compliance with applicable state law that is not preempted by ERISA or another applicable federal law.

Documents and Practices to Review Now

Plan documents and administrative practices and policies should be reviewed to determine what

changes will be needed in connection with references to an employee's "spouse" or "marriage." Some of the items to consider in this area include the following:

- Plan document and SPD references to "spouse" and "marriage"
- Employee communications regarding the Plans, including open enrollment materials
- Beneficiary designation forms
- Spousal election forms, consents and notices
- QDRO procedures and model QDRO forms
- Benefit distribution packages
- Required minimum distribution procedures
- FMLA policies
- Payroll practices

The IRS recently said to expect more guidance in the near future about how to implement the federal government's recognition of same-sex marriage. Kelley Drye & Warren LLP will continue to monitor the further developments in this area.

Contact our [Employee Benefits and Executive Compensation](#) group for help reviewing your employee benefit plans, implementing necessary changes, and preparing employee and participant communications regarding the DOMA decision.

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^[1] Currently, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Washington and Washington, D.C. recognize same-sex marriages. Hawaii and Illinois also recently approved same-sex marriage, effective December 2, 2013 and June 1, 2014, respectively.