
Guidance Issued on Federal Tax Implications of DOMA Ruling and Impact on Employee Benefits

By Kristi R. Gauthier, Stephanie L. Hicks / Sep 10, 2013

On August 29, 2013, the Internal Revenue Service issued Revenue Ruling 2013-17 regarding the federal tax implications of the United States Supreme Court's ruling on the constitutionality of the Defense of Marriage Act ("DOMA"). By way of background, in *United States v. Windsor*, the United States Supreme Court found Section 3 of DOMA to be unconstitutional. Section 3 of DOMA barred same-sex married couples from being recognized as "spouses" under federal law. In other words, the terms "spouse" and "marriage" can no longer be limited only to spouses of the opposite sex for federal law purposes.

The Revenue Ruling states that same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for federal tax purposes. This applies regardless of whether the couple lives in a jurisdiction that recognizes same-sex marriage. However, individuals in registered domestic partnerships, civil unions and other formal relationships recognized under state law that are not denominated as a marriage by that state are not treated as married.

The government is likely to issue more guidance in the future as it relates to the *Windsor* ruling and its impact on other federal laws. Below is a sampling of just some of the employee benefits issues impacted by the *Windsor* ruling and Rev. Rul. 2013-17.

Impact on Employer Health Plans

The *Windsor* ruling and Rev. Rul. 2013-17 give same-sex spouses federal income tax breaks that were traditionally reserved for heterosexual couples. Note, however, the rulings do not mandate group health plan coverage for same-sex spouses. Therefore, unless a state insurance law provides otherwise with respect to a fully-insured plan, employer-sponsored group health plans and policies are still permitted to define "spouse" as an individual who is of the opposite sex.

For plans and policies that do provide coverage to same-sex spouses, the following issues are among those affected by the *Windsor* ruling and Rev. Rul. 2013-17:

- Change in tax treatment : Same-sex spouses now qualify for the income tax exclusion for health coverage provided under an employer-sponsored health coverage. Employers no longer have to impute income to employees with same-sex spouses who are covered under the employer's group health plan.
- COBRA beneficiaries: Covered same-sex spouses are considered "qualifying beneficiaries" under the Consolidated Omnibus Budget Reconciliation Act ("COBRA") and must be given the opportunity to elect COBRA continuation coverage.
- HIPAA special enrollment rights : Same-sex spouses can be added to an employer's group health plan mid-year under the Health Insurance Portability and Accountability Act ("HIPAA").
- Election changes under a Code Section 125 plan : If a same-sex spouse exercises his or her HIPAA special enrollment rights, the employee-spouse can change his or her elections under the employer's Code Section 125 ("cafeteria") plan mid-year.
- Reimbursements by a health FSA, HRA or HSA : Medical care expenses of same-sex spouses may be reimbursed from a health flexible spending account, a health reimbursement account, or a health savings account on a pre-tax basis.

Impact on Retirement Plans

Retirement plans that are subject to the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and that are tax qualified under the Internal Revenue Code of 1986, as amended ("Code"), have several obligations to the spouse of a plan participant, regardless of whether the spouse is of the same or opposite sex.

The following retirement plan issues are among those affected by the *Windsor* ruling and Rev. Rul. 2013-17:

- Surviving-spouse annuities : Sponsors of retirement plans that are required to provide surviving-spouse annuities will be required to recognize same-sex spouses for purposes of determining such annuities. Same-sex spouses must also consent to any payment of their deceased spouse's pension benefits in a form other than a 50 percent joint and survivor annuity, with the same-sex spouse as the beneficiary.
- Determining death benefits : Sponsors of ERISA and tax-qualified plans will have to recognize same-sex spouses for purposes of determining death benefits.
- Spousal consent to beneficiary designation : Sponsors of ERISA and tax-qualified retirement plans must obtain spousal consent in order for the participant to designate a beneficiary other than his or her same-sex spouse.

Rev. Rul. 2013-17 Retroactive in Limited Circumstances

The holdings of Rev. Rul. 2013-17 will be applied prospectively as of September 16, 2013. However, taxpayers may rely on the Revenue Ruling retroactively with respect to any employee benefit plan or arrangement or any benefit provided thereunder only for purposes of filing original returns,

amended returns, adjusted returns or claims for credit or refund of an overpayment of tax concerning employment tax and income tax with respect to employer-provided health coverage benefits or fringe benefits that were provided by the employer and excludable from income based on an individual's marital status. If an employee made a pre-tax salary reduction election for health coverage under a Section 125 cafeteria plan sponsored by an employer and also elected to provide health coverage for a same-sex spouse on an after-tax basis under a group health plan sponsored by that employer, an affected taxpayer may treat the amounts that were paid by the employee for the coverage of the same-sex spouse on an after-tax basis as pre-tax salary reduction amounts.

The IRS intends to issue further guidance on the retroactive application of the *Windsor* ruling to other employee benefits and employee benefit plans and arrangements. The IRS stated in Rev. Rul. 2013-17 that such guidance will take into account the potential consequences of retroactive application to plan sponsors and plans or arrangements.

Next Steps

While Revenue Ruling 2013-17 provides much needed guidance on the impact of the *Windsor* ruling, the reach of the *Windsor* ruling as it applies to an employer's employee benefit plans is vast, and there are still many unanswered questions. While we wait for additional federal agencies to issue guidance, employers should begin identifying plans and benefits that may be impacted by the *Windsor* ruling, and review plan terms or policies defining "spouse" and "marriage." In addition, employers should work with their legal counsel to understand the same sex marriage laws in each state in which they operate. Not only will such state laws determine whether a marriage is deemed to be "valid," but the states may take contrary or conflicting tax positions from the federal government which may require separate or supplemental withholding, reporting and filing obligations on employers.

The Clark Hill employee benefits team will continue to stay abreast of this important and changing issue. If you have any questions about the impact of the repeal of Section 3 of DOMA on your employee benefit plans, please contact Ed Hammond at (248) 988-1821 or ehammond@clarkhill.com ; Kristi Gauthier at (248) 988-5854 or kgauthier@clarkhill.com ; Doug Ellis at (412) 394-2367 or dellis@clarkhillthorpreed.com ; or Stephanie Hicks at (248) 988-5893 or shicks@clarkhill.com ; or one of your Clark Hill or Clark Hill Thorp Reed labor and employment attorneys.