

Same-Sex Marriage and Your Benefit Plans: State of Celebration (Not State of Residence) Controls for Federal Tax Purposes

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SUMMARY

With a News Release, Answers to Frequently Asked Questions and a Revenue Ruling, the Internal Revenue Service (IRS) provides guidance on how the Supreme Court's recent Defense of Marriage Act (DOMA) decision¹ impacts its interpretation of federal tax laws. For federal tax purposes, any same-sex couple legally married in a jurisdiction that recognizes same-sex marriage will be treated as married, regardless of where they live. Generally, the guidance is effective prospectively as of September 16, 2013, but taxpayers may request tax refunds for prior periods if the statute of limitation has not expired.

Section 3 of DOMA limited the term "marriage" to a legal union between one man and one woman as husband and wife, and limited the word "spouse" to a person of the opposite sex who is a husband or wife. As a result, certain provisions of the Internal Revenue Code (Code) referencing the marital status of taxpayers prohibited the IRS from recognizing same-sex marriages. The Supreme Court determined that Section 3 of DOMA is unconstitutional, and the IRS, through Rev. Rul. 2013-17, has now revised its interpretation of Code sections referencing the marital status of taxpayers. This means that any term in the Code referring to marital status, such as "spouse" and "marriage" will include: "(1) an individual married to a person of the same sex if the couple is lawfully married under state law, and (2) such a marriage between individuals of the same sex."² Terms such as "husband and wife," "husband" and "wife" will be interpreted to include same-sex spouses. In addition, the IRS will interpret the Code to recognize "the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile."³

However, this new interpretation of the terms "spouse," "husband and wife," "husband" and "wife" does not extend to same-sex or opposite-sex domestic partners, civil unions or any other formal relationship that is not a "marriage" under state law.

Federal tax laws afford special tax treatment for certain employee benefits provided to employees, their spouses and their dependents. Based upon the guidance to date, from and after September 16, 2013, benefit plan administrators will need to interpret those plans so that a same-sex spouse will be afforded the same benefit rights and tax treatment as an opposite-sex spouse. This will also require coordination with payroll providers, to reflect the ability for an employee to pay for health care benefits for his or her same-sex spouse (and dependents) on a pre-tax basis.

The IRS indicated that further guidance on the potential retroactivity of the *Windsor* decision on tax-qualified retirement plans and other tax-favored retirement arrangements will be issued. This guidance

1. See: *United States v. Windsor*, 470 U.S. ___, 133 S. Ct. 3675 (2013).

2. See: Revenue Ruling 2013-17.

3. *Id.*

will address the plan amendment requirements, including when amendments must be adopted, and "necessary corrections related to plan operations for periods before the future guidance is issued."⁴ Clearly, benefit plans, administrative forms and Summary Plan Descriptions that incorporate Section 3 of DOMA to limit marital status terminology to opposite-sex couples, will need to be amended. Again, guidance on the required timing of plan amendments to tax-qualified plans and any potential retroactive application to retirement plans is still pending.

Tax Returns and Refunds

Tax returns for 2013 should be filed in accordance with this guidance. However, individual taxpayers who may have paid federal taxes for prior tax years have the option to file for refunds for periods still open under the applicable statutes of limitation. Generally, this period is three years from the filing date of the return or two years from the tax payment date, whichever is later. Specifically, the IRS guidance indicates that employees who made a pre-tax salary reduction election for health coverage under a cafeteria plan, but were required to pay for their same-sex spouse's coverage on an after-tax basis, may now treat those after-tax contributions as pre-tax salary reductions. Further, the guidance indicates that, to the extent the applicable limitation periods are still open, employees may file refund claims for any overpayment of employment (social security and Medicare) and income taxes with respect to employer-provided health coverage benefits or fringe benefits that were provided by the employer and excludable from income, based upon marital status, under specific Code Sections relating to employer-provided group health care coverage or fringe benefits.⁵

On the plan sponsor side, so long as the statute of limitation for filing a refund claim has not expired, an employer may claim a refund of any excess social security or Medicare taxes paid on benefits that should have been treated as pre-tax rather

than after-tax. The decision to do this may depend upon the number of your employees who have entered into same-sex marriages.

Other federal laws:

The IRS guidance is limited to the treatment of same-sex marriages for purposes of federal tax laws.⁶ Guidance under other federal laws will need to be issued by the applicable agency or agencies responsible for administration and enforcement of those laws.

If you have questions or need advice on this topic or other Affordable Care Act matters, contact one of the following Saul Ewing employee benefits and executive compensation attorneys: Dan Brandenburg (dbrandenburg@saul.com); Sarah Lockwood ("Sally") Church (schurch@saul.com); Joanne Jacobson (jjacobson@saul.com); Paul Kasicky (pkasicky@saul.com); Joni Landy (jlandy@saul.com) and Kevin Wiggins (kwiggins@saul.com), or any Saul Ewing lawyer with whom you regularly work.

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4. See: Q&A 19. Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law.

5. The specific Code Sections noted are: Code Sections 106, 117(d), 119, 129, and 132.

6. For purposes of the Family Medical Leave Act, the Department of Labor issued a Fact Sheet in August 2013, indicating that the term "spouse" means a husband or wife, as defined or recognized under state law for purposes of marriage in the state where the employee resides, including "common law" marriage and same-sex marriage. <http://www.dol.gov/whd/regs/compliance/whdfs28f.pdf>.