

## EMPLOYMENT SERVICES ALERT

6/5/14

### Deadline Looming to Amend Retirement Plans for Same-Sex Benefits

The recent IRS Notice 2014-19 provides much needed guidance on how qualified retirement plans should treat the marriages of same-sex couples following the Supreme Court's decision in *United States v. Windsor*. The *Windsor* decision invalidated Section 3 of the 1996 Defense of Marriage Act ("DOMA") that barred married same-sex couples from being treated as married under federal law.

Many questions were left unanswered in the wake of the *Windsor* decision, most notably those relating to the application of the decision (including retroactive application) on federal laws affecting employee benefits. Employers were left questioning how, if at all, they needed to change their plans to comply with the Supreme Court's decision.

Prior to this most recent guidance, the IRS had issued Revenue Ruling 2013-17 and a different set of Frequently Asked Questions providing that same-sex couples legally married in a jurisdiction with laws authorizing same-sex marriage will be treated as married for federal tax purposes, regardless of whether the couple resides in a state where same-sex marriage is recognized. This IRS approach recognizing same-sex marriages based on the "state of celebration" took effect September 16, 2013. At that time, the IRS promised to issue additional guidance regarding the retroactive impact of the *Windsor* decision. The most recent guidance now addresses the retroactivity issue.

Notice 2014-19 clarifies that, effective as of June 26, 2013, retirement plans must be administered in a manner that reflects the *Windsor* ruling. Notably, Notice 2014-19 provides that plans are not required to retroactively recognize same-sex spouses prior to that date. In addition, plans that initially applied a "state of residence" approach, as opposed to the IRS' state of celebration approach, are not required to retroactively adopt the state of celebration approach prior to September 16, 2013. (A state of residence approach means the plan extended spousal rights and benefits only to same-sex spouses legally married and residing in a jurisdiction where same-sex marriage is legal or recognized.)

The deadline for adopting plan amendments pursuant to the Notice is the later of (1) December 31, 2014 or (2) the deadline under Revenue Procedure 2007-44 (i.e., the later of [A] the end of the plan year in which the change is first effective or [B] the due date of the employer's tax return for the tax year that includes the date on which the change is first effective). Special amendment timing rules apply to governmental plans and 403 plans. In the case of a governmental plan, an amendment does not need to be adopted until the end of the first regular legislative session that ends after December 31, 2014. The deadline for adopting an amendment to a 403(b) plan is the last day of the plan's remedial amendment period.

Before an employer decides to implement the *Windsor* decision retroactively, the sponsor should discuss these issues with their legal counsel. Recognizing same-sex spouses for all purposes prior to June 26, 2013 may result in requirements that are difficult to implement and create unintended consequences.

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