

SAME-SEX SPOUSES: Compliance after *Windsor*

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OVERVIEW

- *Windsor* decision
- Regulatory guidance
- Case law after *Windsor*
- Plan design issues

INQUIRING MINDS WANT TO KNOW . . .

- Are we required to offer benefits to same-sex spouses?
- Are we required to amend our benefit plan documents? When?
- How do we administer our plans in light of *Windsor*?

Law before *Windsor*

- Defense of Marriage Act (DOMA) - passed in 1996
- Section 2: No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.

Law before *Windsor*

- Section 3: For purposes of Federal law (statutes, rules, regulations, agency interpretation):
 - “marriage” means legal union between one man and one woman as husband and wife
 - “spouse” refers only to a person of the opposite sex who is a husband or wife

United States v. Windsor

570 U.S. _____, 133 S.Ct. 2675 (2013)

- Ruling issued June 26, 2013
- 5-4 decision
- Held Section 3 of DOMA unconstitutional; violates equal protection rights under the Fifth Amendment

United States v. Windsor

Facts and Holding

Facts:

- same-sex couple (Edith and Thea) were legally married in Canada and resided in New York (which recognizes same-sex marriage)
- Thea died leaving her entire estate to Edith
- Edith claimed federal estate tax exemption but was denied because she was not the “spouse” of Thea for federal tax purposes

United States v. Windsor

Facts and Holding

Holding:

- Edith argued that Section 3 of DOMA violates the equal protection guarantees of the Fifth Amendment because it causes legally married, same-sex couples to be treated differently than opposite sex couples
- U.S. Supreme Court agreed and struck down Section 3 of DOMA (and only Section 3) as unconstitutional

REGULATORY GUIDANCE

- IRS Revenue Ruling 2013-17 (September 16, 2013)
- IRS Notice 2013-61 (October 28, 2013)
- IRS Notice 2014-1 (January 4, 2014)
- IRS Notice 2014-19 (April 4, 2014)
- IRS Notice 2014-37 (May 15, 2014)
- IRS Frequently Asked Questions – last updated November 20, 2013
- DOL Technical Release 2013-04 (September 18, 2013)
- DOL FMLA Proposed Rule (June 27, 2014)

IRS Revenue Ruling 2013-17

- Issued September 16, 2013
- Addressed three issues raised by *Windsor* decision:
 1. Adopted a “**state of celebration**” rule – same-sex marriage is recognized for federal tax purposes if validly entered into in a state or foreign jurisdiction that authorizes such marriages, even if the couple resides in a state where same-sex marriages are not recognized (i.e. Tennessee).

IRS Revenue Ruling 2013-17 (continued)

2. For federal tax purposes, the terms “spouse”, “husband and wife”, “husband” and “wife” include individuals married to a person of the same sex, if the couple is validly married under state or foreign law.

3. Registered domestic partners and civil union partners are not spouses for federal tax purposes.

IRS Revenue Ruling 2013-17 (continued)

- Applies prospectively as of September 16, 2013.
- Taxpayers may rely on holdings retroactively:
 - to file original return, amended return, adjusted return or claim for credit or refund of overpayment of employment or income tax;
 - with respect to employer-provided health coverage or fringe benefits (tuition, meals/lodging, dependent care or transportation fringe benefits) that are excludable from income based on marital status.

IRS Revenue Ruling 2013-17 (continued)

Example:

Employer offers group health plan. Employee makes pre-tax salary reduction election for own health coverage under a cafeteria plan and coverage for same-sex spouse on an after-tax basis. The employee may treat amounts that were paid on an after-tax basis for coverage for the same-sex spouse as a pre-tax salary reduction.

IRS Notice 2013-61

- Issued October 28, 2013.
- Creates special administrative procedures for employers to claim refunds or adjustments for overpayment of FICA and withholding taxes for benefits provided to same-sex spouses for tax year 2013 and earlier (subject to statute of limitations below).
- Must present claim for refund within 3 years from the date the return was filed or 2 years from the date the tax was paid, whichever is later (for most this means 2010 through 2013 tax years).

IRS Notice 2013-61 (continued)

- Taxpayer not required to use special administrative procedures; may utilize regular process for claiming refund of tax overpayment.
- Not required to file separate returns to correct overpayment of FICA/withholding for each quarter of 2013 and prior years (within the statute of limitations).

IRS Notice 2013-61 (continued)

- Requires employer to repay any overpayment of FICA tax to employee on or before December 31, 2013.
- File Form 941 for 4th quarter of 2013 or prior year (within the statute of limitations) and reduce 4th quarter wages by the benefit amount treated as wages in the first three quarters of that year.

IRS Notice 2014-1

- Released December 16, 2013 (appeared in January 4, 2014 Internal Revenue Bulletin)
- Addresses elections and reimbursements under cafeteria plans, flexible spending accounts (health, dependent care and adoption assistance) and health savings accounts

IRS Notice 2014-1 (continued)

Cafeteria plan mid-year election changes:

- “Change in marital status” (Q&A-1):
 - same-sex couples married on or after the date of the *Windsor* decision (June 26, 2013) meet this requirement and may make qualifying mid-year election changes.

IRS Notice 2014-1 (continued)

- “Significant change in cost of coverage” (Q&A-2):
 - generally, a change in tax treatment does not qualify as a “significant change in cost of coverage” under the change in status regulations.
 - cafeteria plan will not be considered to have failed to meet the election requirements solely because it allowed a mid-year election change based on the interpretation that change in tax law by *Windsor* was a “significant change in cost of coverage”.

IRS Notice 2014-1 (continued)

- Effective date of new election (Q&A-3 and 4):
 - generally, the date that any other change in coverage becomes effective for a qualifying benefit offered through the cafeteria plan (i.e., first of month, next payroll period).
 - If, before the end of the cafeteria plan year including 12/16/13, an employer receives notice that participant is married to same-sex spouse for whom they have been paying for coverage on an after-tax basis, the employer *must* treat the employee's payment for that benefit as a pre-tax salary reduction effective as of the later of:

IRS Notice 2014-1 (continued)

- the date a change in legal marital status is required for income tax withholding purposes (when employee files a W-4); or
- a “reasonable period of time” after December 16, 2013.

“Notice” from the employee: making an election under the cafeteria plan to pay for cost of spousal coverage through salary reduction OR filing a revised W-4.

IRS Notice 2014-1 (continued)

- Tax treatment of cost of coverage for same-sex spouse (Q&A-5):
 - Amount paid for spousal coverage is excluded from employee's gross income for cafeteria plan year including December 16, 2013 and any prior years within the statute of limitations (generally 3 years).
 - Participant may seek refund of tax paid on cost of spousal coverage and exclude amount from gross income when filing an income tax return for the year.

IRS Notice 2014-1 (continued)

Example:

Beginning 1/1/2013 Employee A paid cost for spousal health coverage on after-tax basis (\$500 per month). This amount was included as taxable income and wages to Employee A. On October 5, 2013, Employee A makes a change in status election to pay cost of spousal health coverage on pre-tax basis. Employer implements this election effective November 1, 2013 and excludes cost of coverage from Employee A's gross income and wages for all remaining pay periods in 2013.

IRS Notice 2014-1 (continued)

Example: (continued)

Employee A and spouse file joint federal tax return for 2013. The value of spousal coverage for the full 2013 taxable year (including cost that was paid on after-tax basis prior to November 1, 2013) may be excluded from gross income on joint return for 2013. Employee A may also request a refund of federal employment taxes paid in relation to cost of spousal coverage.

IRS Notice 2014-1 (continued)

- FSA Reimbursements (Q&A-6):

- Cafeteria plan *may* permit reimbursement of health, dependent care or adoption assistance expenses of a participant's same-sex spouse or same-sex spouse's dependent incurred during cafeteria plan year that include June 26, 2013 or, if later, the date of the marriage.

- Applies even if employee originally elected employee-only coverage under FSA.

IRS Notice 2014-1 (continued)

- Contribution limits for HSAs (Q&A 7 and 8):
 - same-sex couples who are married as of the last day of the taxable year are subject to same joint deduction limit for contributions to HSAs as opposite-sex couples (\$6,450 for 2013 and \$6,550 for 2014).

IRS Notice 2014-1 (continued)

- Contribution limits for HSAs (Q&A 7 and 8) (continued):
 - excess contributions – contributions for one or both of spouses may be reduced to avoid exceeding contribution limit; excess may be distributed from HSAs of one or both spouses no later than tax return due date for the spouses; any remaining excess contributions that are not distributed by that date will be subject to excise tax.

IRS Notice 2014-1 (continued)

- Contribution limits for Dependent Care Assistance (Q&A-9 and 10):
 - same-sex couples who are married as of the last day of the taxable year are subject to same joint exclusion limit for contributions to dependent care FSAs as opposite-sex couples (\$5,000).
 - excess contributions – contributions for one or both of the spouses may be reduced for the remaining portion of the tax year to avoid exceeding the applicable limit; excess contributions included in spouses' gross income.

IRS Notice 2014-1 (continued)

- Written Plan Amendments:

- No amendment required for cafeteria plans that include language allowing election changes upon change in marital status.

- If employer wishes to allow such election changes and plan document does not include language allowing such changes, cafeteria plan must be amended on or before the last day of the first plan year beginning on or after 12/16/13; amendment may be retroactive to the first day of the plan year including 12/16/13 if the plan operates in accordance with Notice 2014-1.

IRS Notice 2014-19 and FAQs

- Issued April 4, 2014
- Expressly limited to qualified retirement plans under Code Section 401(a) (the related FAQs extend the guidance to 403(b) plans).
- Any retirement plan qualification rule that applies because a participant is married must be applied to a participant who is legally married to an individual of the same-sex.

IRS Notice 2014-19 and FAQs (continued)

■ Examples:

- Qualified joint and survivor annuity/qualified preretirement survivor annuity – requires payment to spouse; may only be waived by married participant with spousal consent.
- “Profit-sharing plan exception” – 401(k) plans and other defined contribution plans are exempt from QJSA and QPSA requirements if upon death of participant, a married participant’s benefit is payable to surviving spouse.

IRS Notice 2014-19 and FAQs (continued)

- Required minimum distributions – distribution alternatives for surviving spouses that are not available to non-spouse beneficiaries.
- QDROs – anti-alienation rules do not apply to “alternate payee” which includes spouse or former spouse.
- Controlled group rules – attribution of ownership interests of spouse.
- Top Heavy rules – attribution of ownership interest of spouse is determining whether an employee is a “key employee”, including 5% owner.

IRS Notice 2014-19 and FAQs (continued)

- Compliance with *Windsor*: qualified retirement plan operations must be in compliance with *Windsor* as of June 26, 2013 (although a plan sponsor may choose to apply *Windsor* retroactively under Rev. Ruling 2013-17).
- No qualification issue if plan failed to treat same-sex spouses as spouses prior to June 26, 2013.
- No qualification issue if between June 26, 2013 and September 15, 2013, the plan treated same-sex spouses as spouses only if the participant was domiciled in a state that recognizes same-sex marriage.

IRS Notice 2014-19 and FAQs (continued)

- Plan Amendments: plan amendment required if:
 1. the definition of “spouse” references DOMA or is limited to person of the opposite sex;
 2. plan terms are “otherwise inconsistent” with the outcome of *Windsor* (“spouse”, “legally married spouse” or “spouse under Federal law” with no distinction between same-sex and opposite-sex spouses is not inconsistent);
 3. the plan sponsor intends to voluntarily adopt an effective date before June 26, 2013 for some or all plan purposes.

IRS Notice 2014-19 and FAQs (continued)

- Amendment deadline: generally the later of:
 1. the end of the plan year in which the change is first effective or the employer's tax filing deadline (including extensions) for the year that includes the date the change is first effective, whichever is later; or
 2. December 31, 2014 (for governmental plans, the close of the first regular legislative session of the legislative body with authority to amend the plan that ends after December 31, 2014)

IRS Notice 2014-19 and FAQs (continued)

- Discretionary amendments (those that institute new rights as discussed under the FAQs or those with a pre-June 26, 2013 effective date): amendment deadline is the end of the plan year for which the change is effective or December 31, 2014, if later.
- IRS notes that even though an amendment may not be required, a “clarifying amendment” may be useful for purposes of plan administration.

IRS Notice 2014-19 and FAQs (continued)

- Section 436(c):

- a required amendment as a result of *Windsor* to defined benefit plan is not subject to Section 436(c) limitation;

- a discretionary amendment implementing pre-June 26, 2013 effective date is subject to Section 436(c) limitation

(Section 436(c) - amendment that increases liabilities of a plan cannot take effect unless plan's adjusted funding target attainment percentage is sufficient or employer makes an additional contribution).

IRS Notice 2014-19 and FAQs (continued)

- FAQs issued in conjunction with Notice 2014-19 on IRS website.
- Q&A-1: If participant in profit-sharing or stock bonus plan is lawfully married on date of death to same-sex spouse and date of death is on or after June 26, 2013, death benefit must be paid to same-sex spouse (unless spousal consent to waive is obtained or QDRO provides otherwise).

IRS Notice 2014-19 and FAQs (continued)

- Q&A-2: Choice of law provision in plan document cannot restrict the definition of “spouse” to opposite-sex spouses after June 26, 2013; prior to September 16, 2013 plan may limit “spouse” to a spouse recognized in state of domicile; thereafter the “state of celebration” rule applies.
- Q&A-3: Plan may utilize correction procedures of EPCRS to correct failures by plan to implement a retroactive *Windsor* amendment.

IRS Notice 2014-19 and FAQs (continued)

- Q&A-4: Plan sponsor may amend the plan to provide new rights or benefits to same-sex spouses.
- Q&A-5: Rev. Ruling 2013-17 and Notice 2014-19 apply to 403(b) plans.
- Q&A-6: Amendments to multiemployer defined benefit plans are allowed during funding improvement period or rehabilitation period (exception to Section 432 limitations).

IRS NOTICE 2014-37

- Released May 15, 2014
- Addresses mid-year amendments of safe harbor plans under Section 401(k) or 401(m)
- Such amendments allowed if adopted under amendment deadline provisions of Notice 2014-19.

IRS FREQUENTLY ASKED QUESTIONS

- <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>
- Last updated November 20, 2013
- Address various implications and effects of tax law provisions on same-sex married couples
- Examples – filing of tax returns, dependent status, head-of-household status, standard deduction, claims for refunds

IRS FREQUENTLY ASKED QUESTIONS

- Reiterates previous guidance regarding application of *Windsor* to qualified retirement plans:
 - must treat same-sex spouses as a “spouse” under the terms of the plan
 - must recognize same-sex marriage that was validly entered into in a jurisdiction that recognizes such marriages (state or foreign jurisdiction)
 - individuals in registered domestic partnerships and civil unions not considered a “spouse”
 - qualified retirement plans must comply with Rev. Ruling 2013-17 as of September 16, 2013.

DOL TECHNICAL RELEASE 2013-04

- Issued September 18, 2013
- Provides guidance on the meaning of “spouse” and “marriage” as those terms appear in ERISA and provisions of the Internal Revenue Code which the DOL interprets.
- Identical to IRS interpretation and application of *Windsor* decision (“state of celebration” rule).

DOL TECHNICAL RELEASE 2013-04

(continued)

- “Spouse” refers to any individuals who are lawfully married in a state (or foreign jurisdiction) that recognizes such marriage but who are domiciled in a state that does not recognize such marriages (for example, Tennessee).
- “Marriage” = includes a same-sex marriage that is legally recognized as a marriage under any state (or foreign) law.

DOL PROPOSED RULE (FMLA)

- Published June 27, 2014 (79 Fed. Reg. 36445); comment period closed August 11, 2014.
- Purpose is to update the regulatory definition of “spouse” for purposes of the FMLA.
- Extends protections of FMLA to all eligible employees in legal same-sex marriages regardless of state of domicile.

DOL PROPOSED RULE (FMLA) (continued)

- Current FMLA definition of “spouse” is based on law of employee’s state of residence
- Proposed rule changes “state of residence” rule to “state of celebration” rule, consistent with IRS and DOL guidance.

DOL PROPOSED RULE (FMLA) (continued)

- Under proposed rule, eligible employees may take FMLA leave:
 - to care for same-sex spouse with serious health condition;
 - to take qualifying exigency leave due to same-sex spouse's covered military service;
 - to take military care-giver leave for same-sex spouse;
 - to care for stepchild (child of same-sex spouse) to whom employee does not stand *in loco parentis*; and
 - to care for stepparent (employee's parent's same-sex spouse).

DOL PROPOSED RULE (FMLA) (continued)

- Proposed rule encompasses valid same-sex marriages entered into in foreign countries and common law marriages if they became valid in a state that recognizes such marriages. Same-sex civil unions are not recognized.
- Employer may require reasonable documentation or statement of family relationship (remains unchanged by proposed rule).
- FAQs issued in conjunction with proposed rule.

CASE LAW AFTER *WINDSOR*

Deboer v. Snyder, 2014 U.S. App. LEXIS 21191 (Nov. 6, 2014):

-Consolidated five cases challenging state law bans on same-sex marriage in four states – Kentucky, Michigan, Ohio and Tennessee.

- *Bourke v. Beshear*, 2014 U.S. Dist. LEXIS 17457 (W.D. Ky. 2014)
- *DeBoer v. Snyder*, 973 F. Supp.2d 757 (E.D. Mich. 2014)
- *Obergefell v. Wymyslo*, 962 F.Supp.2d 968 (S.D. Ohio 2013)
- *Henry v. Himes*, 2014 U.S. Dist. LEXIS 51211 (S.D. Ohio 2014)
- *Tanco v. Haslam*, 2014 U.S. Dist. LEXIS 33463 (M.D. Tenn. 2014)

- District Court in each case held bans on same-sex marriage and refusal to recognize same-sex marriages entered into in other states unconstitutional; decisions appealed to Sixth Circuit Court of Appeals and consolidated; oral argument held on August 6, 2014

CASE LAW AFTER *WINDSOR* (continued)

Sixth Circuit Court of Appeals decision:

- reversed the district courts below in each component case; upheld the constitutionality of same-sex marriage bans in four states – Kentucky, Michigan, Ohio and Tennessee.
- creates a split among the circuit courts (Courts of Appeal in the 4th, 7th, 9th and 10th circuits have issued opinions nullifying state bans on same-sex marriage).

Attorneys for the American Civil Liberties Union (which represented the plaintiffs in the Ohio cases) have stated that they intend to immediately apply for review before the United States Supreme Court.

CASE LAW AFTER *WINDSOR* (continued)

Bostic v. Schaefer, 760 F.3d 352 (4th Cir. July 28, 2014), *cert. denied*, 135 S.Ct. 308 (Oct. 6, 2014) –

Virginia statute that barred same-sex marriage or prohibited recognition of otherwise-lawful same-sex marriages from other jurisdictions unconstitutional to the extent that they prevented same-sex couples from marrying and prohibited Virginia from recognizing same-sex couples' lawful out-of-state marriages.

CASE LAW AFTER *WINDSOR* (continued)

Condon v. Haley, No. 2:14-4010 (D. S.C. Nov. 12, 2014)

Same-sex couple was denied a marriage license. Following decision in *Bostic*, they filed suit challenging South Carolina's constitutional and statutory bans on same-sex marriage as being unconstitutional; federal district court judge ruled in their favor based on Fourth Circuit decision in *Bostic* and enjoined state officials from enforcing the bans, but issued a temporary stay until November 20, 2014 to allow the state to appeal to the Fourth Circuit Court of Appeals.

CASE LAW AFTER *WINDSOR* (continued)

Roane County Circuit Court decision:

- *Borman v. Borman*, Circuit Court No. 2014CV36 (August 5, 2014)
- Same-sex couple married in Iowa denied a divorce in Tennessee
- Effectively upheld Tennessee's ban on same-sex marriage
- Judge Simmons stated that *Windsor* did not hold that a state law that defines marriage as a union of one man and one woman is unconstitutional or that a state's refusal to recognize a same-sex marriage from another state violates the Constitution.

CASE LAW AFTER *WINDSOR* (continued)

Cozen O'Connor, P.C. v. Tobits, 2013 U.S. Dist. LEXIS 105507 (E.D. Pa. July 29, 2013) – surviving spouse benefit awarded to same-sex spouse under profit sharing plan.

Obergefell v. Kasich, 2013 U.S. Dist. LEXIS 106226 (S.D. Ohio July 22, 2013) – temporary restraining order issued prohibiting local registrar from accepting death certificate for same-sex married person that did not reflect the person was married and his husband was his surviving spouse.

CASE LAW AFTER *WINDSOR* (continued)

Glossip v. Missouri Dep't of Transp. & Hwy. Patrol Employees' Retirement Sys., 411 S.W.3d 796 (Mo. 2013) – affirmed decision denying survivor benefits to same-sex partner of deceased highway patrol employee (couple never married).

In re Fonberg, 736 F.3d 901 (9th Cir. 2013) – awarded back pay for cost of health insurance to former federal employee who had not been permitted to enroll her same-sex domestic partner in federal employee health plan.

CASE LAW AFTER *WINDSOR* (continued)

Roe v. Empire BlueCross BlueShield, 2014 U.S. Dist. LEXIS 61345 (S.D. NY May 1, 2014) – self-insured health plan that specifically excluded same-sex couples does not run afoul of ERISA.

Health Plan Design After *Windsor*

- Multiple state operations
- Confirmation/documentation requirements
- Communication to employees
- Company image
- Employee demographics
- Industry influence
- Vendor/customer relationships
- Waiting on the court system vs. being ahead of the curve

QUESTIONS?

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