# DOMA – What Your Plan Should Be Doing to Comply with the Supreme Court Ruling and Regulatory Guidance

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When the U.S. Supreme Court handed down its decision in the *Windsor* case last summer, employers and plan sponsors were left to wonder how the decision would impact the administration of their retirement and welfare plans. In September, the Internal Revenue Service and the Department of Labor issued much needed guidance on the application of the *Windsor* decision (Revenue Ruling 2013-17 and Technical Release 2013-04). Pursuant to this guidance the IRS and the DOL adopted the "state of celebration" rule regarding same-sex couples. Under this rule, a same-sex marriage recognized as valid by the state in which it was initially established will be treated as a marriage for federal tax purposes, regardless of the married couple's state of residence. The IRS also issued "Frequently Asked Questions" applying the holding of Rev. Rul. 2013-17. However, the guidance did not fully address many of the practical applications of the change in the definition of "spouse" for federal tax purposes. Additional guidance was issued by the IRS in October which answered some questions for individuals and employers regarding applying for tax refunds or credits for FICA and employment taxes paid for benefits provided to same-sex spouses. Again in late December, the IRS issued additional guidance aimed at cafeteria plans, flexible spending arrangements and health savings accounts.

In light of this guidance, employers and plan sponsors still have unanswered questions about the total impact of the *Windsor* decision on their plans. In many cases employers are forced to make a good faith judgment call when faced with questions that fall within gray areas not directly addressed by the regulatory guidance.

It is important for employers and plan administrators to attempt to address these issues on a proactive basis instead of being forced to make a hasty decision. In either case, documentation of a rational, good faith determination is essential. Pending additional guidance from the IRS and/or DOL, here are some areas you should be addressing now.

*Retirement Plans:*

The "Frequently Asked Questions" issued by the IRS specifically address the effect of Revenue Ruling 2013-17 on qualified retirement plans. Question & Answer #16 states that qualified retirement plans are required to treat a same-sex spouse as a "spouse" for purposes of federal tax laws relating to qualified retirement plans. The IRS also stated in Question & Answer #19 that it intends to issue further guidance on compliance by qualified retirement plans and "other tax-favored retirement arrangements" to address, among other things, plan amendment requirements and plan corrections relating to plan operations for periods before future guidance is issued.

The implications of this guidance on employers and their qualified retirement plans will depend on the plan language. If your plan currently defines "spouse" or "marriage" solely in relation to state law, the plan may need to be amended to point to federal law and include same-sex spouses. At this point, we do not have a plan amendment deadline. Hopefully, IRS guidance on this issue will be issued in the near future. However, operational compliance with the Revenue Ruling is required beginning September 16, 2013. This will necessitate a review of your plan operations to ensure that employees that are part of a

same-sex marriage are treated the same as employees in opposite-sex marriages for purposes of your retirement plan, including:

- Qualified joint and survivor annuities
- Beneficiary designations
- Spousal waivers (to designate non-spouse beneficiary and to receive plan loans)
- Hardship/unforeseeable emergency distributions
- Qualified domestic relations orders
- Required minimum distributions
- Rollover rights of spouses
- Attributions rules for spouses, which may affect top heavy testing, non-discrimination testing and control group determinations

*Welfare Plans:*

The effect of the Supreme Court ruling and regulatory guidance on welfare plans depends, in large part, on whether the employer offers benefits to same-sex spouses. If such benefits were offered prior to the *Windsor* decision, the employer was required to include the value of such benefits in the employee's gross income. After the *Windsor* decision, these benefits are no longer taxable and are to be treated the same as benefits provided to opposite sex couples for federal tax purposes. This requires that the employer revise payroll systems to stop including the value of benefits to same-sex couples in gross income for employees. The IRS has also provided guidance on how individuals and employers may apply for a refund of certain amounts of taxes paid on the value of such benefits.

Employers may consider whether they desire to cover same-sex spouses. Currently there is no requirement under federal law or Tennessee state law that welfare benefits must be offered to same-sex spouses. Additionally, there is no Tennessee state law prohibiting discrimination based on sexual orientation. However, the lack of a statutory basis to claim "discrimination" may not deter employees from raising the issue with the employer or a federal or state regulatory agency.

If an employer decides to offer benefits to same-sex spouses, this decision must be communicated to employees to allow them to make enrollment decisions. The communication should include information regarding any verification process the employer will use to verify that the same-sex couples were married in a jurisdiction that recognizes such marriages. If the employer decides to use such a verification process, it must also decide whether to require such proof of a valid marriage from opposite-sex couples. A "double standard" in favor of opposite-sex couples may not be viewed favorably by employees.

A decision to offer health benefits to same-sex spouses also affects COBRA and HIPAA special enrollment rights. Same-sex spouses must be treated just as opposite-sex spouses for these purposes. This may require revision of an employer's health plan administration to ensure equal treatment.

Any changes to welfare benefits must be documented through plan amendments and updating of all benefit forms and any employee communications such as summary plan descriptions, handbooks and employment policies. These changes should also be communicated to any insurance companies and third-party administrators.

These are just a few of the issues that employer must consider to be in "good faith" compliance with the IRS and DOL guidance. Even though we do not have specific guidance regarding plan amendment requirements, employers must make a good-faith effort to comply with the guidance that has been issued. Doing nothing is not an option. We recommend a full review of retirement and welfare benefit plans and administrative procedures to prevent conflicts within your benefit plan structure as a whole and to meet your "good faith" compliance duty.