PUBLICATION

New IRS Rules on Same Sex Marriages and How the Rules Affect Employer-Sponsored Retirement Plans

April 24, 2014

I. The Supreme Court Windsor Decision

In the U. S. Supreme Court's decision in United States v. Windsor (Windsor), the Court held that, for federal purposes, Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. Although the dispute in the Windsor case related to a federal tax issue, the effect of the decision is more far-reaching. In essence, the federal government may not treat same-sex marriages any differently than it treats opposite-sex marriages. To date, the Court has not determined that Section 2 of DOMA, which allows a state to refuse to recognize a same-sex marriage which arises under the laws of another state, is unconstitutional, though current litigation appears to be headed for a decision in that regard.

II. The Effect of the Windsor Decision for Federal Tax Law Purposes

For purposes of this Alert, it is important to recognize that the Windsor decision applies to federal laws relating to employee benefits. For example, prior to the Windsor decision a same-sex spouse had no COBRA rights and generally could not make a claim for medical benefits under a cafeteria plan's medical flexible spending account. In addition, a same-sex spouse was not treated as a spouse for tax-qualified retirement plan (Plan) purposes, and thus had none of the rights and options which were available to an opposite-sex spouse under such a plan. Based upon guidance issued by the IRS (including IRS Notice 2014-19 dated April 4, 2014) for purposes of the federal tax laws, as well as the U. S. Department of Labor for purposes of enforcing the Employee Retirement Income Security Act of 1974, as amended (ERISA), it is now clear that a same-sex spouse under the laws of any domestic or foreign jurisdiction is a spouse for benefit plan purposes, regardless of the state of domicile. Prior to that recent IRS Notice, the retroactive effect of the Windsor decision on Plans was not addressed.

The Windsor decision and its effect applies only to same-sex spouses, legally married under the laws of any jurisdiction, but not to civil unions, domestic partnerships, or other relationships.

Note that the federal laws which determine ownership of employers contain attribution of ownership rules for controlled group analysis. These attribution of ownership rules apply for benefit plan purposes, and thus same-sex spousal ownership would be taken into account in the same way as opposite-sex spousal ownership. The same would be true for certain restrictions on allocations of contributions to spouses.

III. The Retroactive Effect of Windsor for Federal Tax Law Purposes

Based on IRS Notice 2014-19 and earlier guidance from the Service, we can now plan for certain effects of the Windsor decision under federal tax laws.

Prior to June 26, 2013, a Plan will not treat a same-sex spouse as a spouse under a tax-qualified retirement plan, for federal tax law purposes. However, an employer may amend its Plan to provide for the recognition of same-sex marriages as of some earlier date.

From June 26, 2013 to September 16, 2013, a Plan may apply the law of the state of domicile of the same-sex spouses to determine status as a spouse for Plan purposes (which may result in the person not being treated as a spouse for this period), or may apply the law of the state of celebration of the marriage for this period (which would result in the person being treated as a spouse regardless of where he or she lived during this period).

On and after September 16, 2013, a same-sex spouse under the law of any jurisdiction will be treated as a spouse for so long as he or she remains married, regardless of the state of domicile.

For any applicable period, a same-sex spouse must operationally have been provided the same benefits and rights as an opposite-sex spouse. For so long as a same-sex spouse is treated as a spouse under the applicable state law, that spouse has the right, for example, to be the sole death beneficiary absent consent to a different beneficiary, and would have the right to a survivor annuity in a Plan in which an annuity form of payment was applicable.

IV. Plan Amendments May Be Required or Advisable

A Plan *must* be amended if it expressly defines a spouse, or contains other language which would treat a same-sex spouse in a way which is inconsistent with the Windsor decision, or IRS Notice 2014-19, or other IRS guidance on related issues. Any required amendment must generally be adopted by the end of 2014.

A Plan *may* be amended (generally by the end of 2014) to provide for a general effective date for the recognition of same-sex marriages which is earlier than June 26, 2013, but the IRS cautions that this may result in difficult compliance issues.

IRS Notice 2014-19 is not clear as to whether an amendment is required for the use of either the law of the state of celebration or the law of the state of domicile to determine status as a spouse for the period from June 26, 2013 to September 16, 2013. However, based on a discussion with the IRS Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), the understanding is that an amendment is not required for either approach, but rather a Plan may be operated in either way without the requirement for an amendment.

Governmental Plan amendments need not be adopted before the close of the first regular post-2014 session of the legislative body with the authority to amend the Plan. It would appear that the effect of the Windsor decision on governmental or church plans will be fairly limited, except to the extent the employer chooses to have it apply, because most of the tax law provisions relating to spouses are not required to be followed by such Plans, but state law issues may arise.

If a Plan's language is not inconsistent with the Windsor decision, and the Plan has been administered in accordance with the Notice (e.g., using either the law of the state of domicile or the law of the state of marriage celebration from June 26, 2013 to September 16, 2013), then an amendment is not required. The IRS indicated in Notice 2014-19, however, that an amendment may still be helpful or advisable for Plan administration.

If there is any question about whether an amendment is required, or if a discretionary amendment is being considered, the advice of counsel should be sought sufficiently in advance of the end of 2014 to consider and discuss the issues, draft any necessary amendments, and have those amendments appropriately approved, dated and signed by the end of 2014.

Any material amendment to a Plan is required to be communicated to participants in the form of a "summary of material modifications" or a new summary plan description.

V. Plan Administration Inconsistent With the Windsor Decision

If a Plan has been operated on or after June 26, 2013 (or some earlier date provided by a Plan amendment, at the discretion of the employer) contrary to the Windsor decision or contrary to other IRS guidance, corrections may be needed.

Plan sponsors should take steps to determine whether any employee has had a same-sex spouse for any period on or after June 26, 2013 (or some earlier date provided by an amendment). If so, and if the Plan applies the law of the state of domicile for the period from June 26, 2013 to September 16, 2013, the law of the state of domicile should be determined. Such steps may be accomplished by a general communication explaining that if an employee had a same-sex spouse during this period they should contact the Plan administrator, and if there is any change in any spousal status the Plan administrator should be notified. This communication could, for example, be distributed as a summary of material modifications. Based upon that information and prior administration, as well as the effect of any amendments in this regard, a correction of the prior administration may be required.

VI. The Effect of Other Federal Laws

IRS Notice 2014-19 only applies to tax-qualified retirement plans and only for federal tax law purposes. Other federal agencies have not yet issued guidance on the retroactive effect of the Windsor decision under other federal laws. Presumably, the other agencies will largely follow the lead of the IRS Notice, as they have done after prior IRS guidance on the Windsor decision. However, even if the U. S. Department of Labor takes the same position as the IRS on a limited retroactive effect, the participants in a plan have their own right of action.

VII. The Effect on Plans Other Than Tax-Qualified Retirement Plans

It is also important to note that the IRS Notice only specifically addresses tax-qualified retirement plans. The retroactive effect on other types of plans, such as cafeteria plans and welfare plans (e.g., health plans) needs further guidance by all relevant federal agencies.

VIII. Summary

The Windsor decision has changed the landscape for benefit plans which are regulated by federal law. Tax-qualified retirement plans may need to be amended this year to preserve that status.

Should you wish to discuss the impact of that decision or IRS Notice 2014-19 (or the earlier IRS guidance) on your particular situation, please contact one of the attorneys in the Firm's Tax Group.