

IRS Chimes in on Applying Same-Sex Marriage Ruling to Benefit Plans

The IRS issued guidance responding to the June 2015 decision in *Obergefell v. Hodges*, where the Supreme Court ruled that states must permit same-sex marriage and recognize same-sex marriages performed in other states. Specifically, the IRS confirmed that qualified retirement plans may — but need not — change plan terms or operations as a result of *Obergefell*, and described requirements for discretionary amendments. Although health and welfare plans are also not required to change their terms as a result of the decision, the guidance discusses how *Obergefell* potentially could affect plan operations and provides that cafeteria plans may permit mid-year election changes to add a same-sex spouse. Plan sponsors should review plan terms and operations to evaluate any required, and/or desired, changes.

Background

In its 2013 *United States v. Windsor* decision, the Supreme Court struck down Section 3 of the Defense of Marriage Act (DOMA), which limited marriage, as defined by federal law, to a union between one man and one woman. (See our [June 26, 2013 For Your Information](#).) Subsequent IRS guidance, effective September 16, 2013, recognized for federal tax purposes all same-sex marriages entered into in states that recognize such marriages. (See our [August 30, 2013 For Your Information](#).) As a result, qualified retirement plans must recognize same-sex marriages for plan qualification requirements that apply if a participant is married — such as survivor benefits, spousal consent, eligibility for joint and survivor annuities, and qualified domestic relations orders. (See our [July 12, 2013 For Your Information](#).)



In later guidance, IRS provided a deadline of June 26, 2013 (the date of the *Windsor* decision) as the effective date for retirement plans to recognize same-sex marriages for federal tax purposes, with amendments to any inconsistent terms due by December 31, 2014. This guidance also gave plans the option to apply *Windsor* retroactively to a date prior to June 26, 2013, for some or all purposes (e.g., just for purposes of qualified joint and survivor annuities or qualified pre-retirement annuities) — so long as an amendment specifies the applicable date and purpose of the changes, and, in the case of a plan subject to ERISA, the sponsor communicates the

amendment to participants via a summary of material modifications or an updated summary plan description). (See our [April 9, 2014 For Your Information](#).)

Additionally, post-*Windsor* IRS guidance on cafeteria plan elections provided that an employee who had paid for his or her same-sex spouse's health coverage on an after-tax basis may file an amended return for open tax years to claim a refund of income taxes paid on those premiums. (See our [August 30, 2013 For Your Information](#).) Further guidance permitted a participant married to a same-sex spouse as of June 26, 2013, to make a mid-year election to add the same-sex spouse and/or the same-sex spouse's dependents to coverage on the basis that the participant experienced a change in legal marital status. (See our [January 8, 2014 For Your Information](#).)

The *Windsor* decision did not address the treatment of same-sex marriages for purposes of state law, and litigation nationwide considered that issue. (See our [April 27, 2015 FYI InDepth](#).) In its 2015 *Obergefell v. Hodges* decision, the Supreme Court ruled that same-sex couples have a constitutional right to marry — and, accordingly, states must both permit same-sex marriage and recognize same-sex marriages performed in other states. (See our [June 26, 2015 FYI Alert](#).)

Application of *Obergefell* to Qualified Retirement Plans and Health Plans

The IRS issued [Notice 2015-86](#) on December 9, 2015, to provide additional guidance relevant to qualified retirement, and health and welfare, plan sponsors in response to the *Obergefell* decision.

Qualified Retirement Plan Guidance

In addressing qualified retirement plan issues, the IRS confirmed the following:

There is no need to do anything. Because prior guidance already mandated recognition of same-sex spouses, qualified retirement plans do not need to change terms or operations in any way due to *Obergefell*.

Discretionary amendments are permitted. Qualified retirement plans may be amended, however, to provide rights or benefits that are now, but were not previously, available to participants with same-sex spouses — for example to allow participants who began a single life annuity distribution before June 26, 2013 to elect a qualified joint survivor annuity distribution with a new annuity starting date.

The deadline for adopting a discretionary amendment is generally the end of the plan year when the amendment is operationally effective. An amendment responding to *Obergefell* that is effective in 2016, for example, must be adopted by December 31, 2016. However, a different deadline may apply for a governmental plan depending on the timing of the governing body's legislative session.

Retroactive amendments are still permitted. A plan can be amended to recognize same-sex marriages on a retroactive basis, even if the plan was not so amended under earlier guidance. And, as before, the sponsor can opt to apply *Windsor* retroactively only for certain purposes but not for others.

Comment. This flexibility is important because recognition of same-sex spouses for all purposes under a plan prior to June 26, 2013 could trigger requirements that are hard to implement retroactively, such as the ownership attribution rules.

Section 436(c) applies if the amendment increases plan liabilities. If an amendment responding to *Obergefell* increases a single employer defined benefit plan's liabilities, such as by extending rights to same-sex spouses, the

Code 436(c) requirements apply. This means that the plan sponsor must make additional contributions if the plan's adjusted funding target attainment percentage (AFTAP) does not meet specified thresholds.

Health and Welfare Plan Guidance

The guidance covers the effect of the decision on health and welfare plan operations and specifies how, in certain cases, a participant may be permitted to make a mid-year cafeteria plan election change to cover a same-sex spouse:

There is no need to change plan terms. Health and welfare plans need not change any terms in response to *Obergefell*, as federal tax law generally does not require health and welfare plans to offer spousal coverage at all, and *Windsor/post-Windsor* guidance already addressed the federal tax treatment of same-sex spousal benefits for health and welfare plans that do provide spousal coverage.

Comment. Notably, *Obergefell* does not require a health and welfare plan that provides spousal coverage to extend that coverage to same-sex spouses. However, a plan may increase its risk of legal challenges if it does not do so. Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination with respect to compensation, terms, conditions or privileges of employment because of race, color, religion, sex or national origin, applies to employer-provided benefits. The EEOC has [announced](#) that lesbian, gay, bisexual and transgender individuals may bring valid sex discrimination in employment claims under Title VII.

***Obergefell* could affect plan operations.** If the ruling alters the group of spouses eligible for spousal coverage under the terms of the plan, plan operations may need to change. For example, if the plan offers coverage to a participant's spouse as defined under applicable state law, because of *Obergefell's* holding that all states recognize same-sex marriage, the plan must now offer coverage to same-sex spouses in states that previously did not permit same-sex marriage.

Mid-year changes to cafeteria plan elections to cover a same-sex spouse are permissible in certain circumstances. Cafeteria plans that allow for a mid-year change in election on account of a significant improvement in coverage during the coverage period may allow a participant to revoke an existing election and make a new election if the participant's same-sex spouse first became eligible for coverage during the plan year. This new eligibility could be due, for example, to an amendment to the terms of the plan, a change in applicable state law, or a change to the interpretation of the plan's terms. In these circumstances, the plan may permit a participant to either add the same-sex spouse to existing coverage or elect new coverage for the participant and the same-sex spouse.

A cafeteria plan can be amended at any time to allow participants to make a mid-year election change due to a significant improvement in coverage. Such an amendment must be adopted by the last day of the plan year that includes the later of (1) the date same-sex spouses first became eligible for coverage under the terms of the plan, or (2) December 9, 2015. The amendment can be retroactive to the date same-sex spouses first became eligible for coverage.

In Closing

This guidance essentially confirms the status quo for qualified retirement plans. Some health and welfare plans, however, may need to make operational changes.

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