



Employers Should Consider the Implications of Same-Sex Marriage Rulings on Their Retirement and Welfare Plans Before Year-End

NOVEMBER 21, 2013

Since the U.S. Supreme Court struck down the core of the Defense of Marriage Act (“DOMA”) in June, additional guidance has trickled out. With the end of the year looming, it’s time for plan sponsors to review their plans in light of this guidance and decide on next steps. Here are a few items plan sponsors should consider:

- Employers should no longer be imputing federal tax with respect to the health benefits of same-sex spouses. Further, IRS Notice 2013-61 describes how plan sponsors can correct the overpayment of employment taxes, both for 2013 and past tax years.
- Check your plan definitions.
 - If your retirement plan limits “spouses” to individuals of the opposite sex, or if it references DOMA, you should amend your plan by the end of the year. The Internal Revenue Code requires that spouses be given certain rights under retirement plans (such as consenting to naming a non-spouse beneficiary, and waiving a qualified joint and survivor annuity form of benefit). Therefore, you must review these provisions in your retirement plan to ensure that the plan document does not exclude same-sex spouses from enjoying these rights. Same-sex spouses will also impact plan administration regarding minimum required distributions, rollovers, hardship withdrawals, and QDROs. Note that, operationally, retirement plans were required to treat same-sex spouses as “spouses” by September 16, 2013.
 - On the other hand, there is no explicit requirement that health plans cover same-sex spouses. To determine whether your health plan, as written, covers same-sex spouses, the first step is to check the plan terms. If “spouse” is defined simply by cross-referencing state law, then same-sex spouses are covered where applicable. If, however, your health plans defines “spouse” as a person of the opposite sex, or if it references DOMA, then your plan might not currently cover same-sex spouses. I recommend that employers cover same-sex spouses to the same extent that they cover opposite-sex spouses. Same-sex spouses tend to be a low-cost population, but being sued for discrimination (if your health plan covers spouses only of the opposite sex) could be very expensive, even if the claim is ultimately unsuccessful.
 - Both the IRS and DOL have clarified that a same-sex marriage is valid, even if the spouses live in a state that does not permit same-sex marriage, as long as the marriage was valid in the state in which it was celebrated.

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