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### IRS Issues Guidance on Plan Amendments for Same-Sex Marriage

Last week, the Internal Revenue Service (“IRS”) issued additional guidance on amendments to qualified retirement plans required by the U.S. Supreme Court’s ruling in *United States v. Windsor*, in which the Court held certain provisions of the Defense of Marriage Act (“DOMA”) unconstitutional. Depending on a retirement plan’s current language, amendments may be necessary by the end of 2014 to comply with this new guidance.

**Background.** As reported in *theHRBenefitsAuthority* on [August 30, 2013](#), the IRS issued a revenue ruling last year that detailed the application of the *Windsor* decision to employee benefit plans. With regard to qualified retirement plans, the IRS provided:

- September 16, 2013 was the first date on which retirement plans must prospectively treat same-sex spouses in the same manner as opposite-sex spouses for purposes of satisfying Internal Revenue Code (“Code”) requirements that apply to retirement plans (e.g., spousal death benefits); and
- To determine whether a participant was legally married, the IRS announced that retirement plans must use a “state of celebration” approach, in which a same-sex couple legally married in the state or foreign country in which their marriage was performed will be treated as married, even if the state in which the couple resides fails to recognize same-sex marriages.

**Notice 2014-19.** On Friday, the IRS issued additional guidance on the retroactive application of *Windsor* to qualified retirement plans:

- **Retroactive Compliance.** Retirement plans are required to comply with the *Windsor* decision (i.e., treat same-sex spouses in the same manner as opposite-sex spouses) as of June 26, 2013, the date of the Supreme Court’s decision.
- **Amendments May Be Required.** Plan sponsors may need to amend their retirement plans to reflect this retroactive operational compliance. However, amendments are only required if plan language regarding who constitutes a “spouse” and what constitutes a “marriage” is inconsistent with the *Windsor* decision or IRS guidance. For example:
  - *Amendment needed.* If a plan defines a spouse as “a member of the opposite sex to whom the participant is married” or “the participant’s spouse, as defined under the Defense of Marriage Act,” then a plan amendment is likely necessary.
  - *No amendment needed.* If a plan defines a spouse as “the participant’s legally married spouse” or “spouse as determined under federal law,” then a plan amendment is not necessary.
- **Method of Determining Marriages During the Compliance Gap Period.** In its prior guidance, the IRS stated that, effective September 16, 2013, retirement plans needed to use a state of celebration approach to determine whether a participant was legally married under the plan. However, it appears that for the period beginning June 26, 2013 (the date of required retroactive compliance) and ending September 15, 2013, plans may have applied a “state of domicile” approach instead.

**Guidance Applicable to Tax-Qualification Only.** This IRS guidance only speaks to the steps that plan sponsors must take to ensure that their qualified retirement plans stay tax-qualified under the Code. Accordingly, with regard to a participant's or beneficiary's claim for benefits under the Employee Retirement Income Security Act ("ERISA"), such as the plan's failure to pay a QPSA to a same-sex surviving spouse, it has yet to be seen whether courts will permit these claims to apply retroactively.

**Next Steps.** Plan sponsors should review their qualified retirement plans to determine whether an amendment to comply with this new IRS guidance is necessary. If so, the plans must generally be amended by **December 31, 2014**. Plan sponsors should also consider whether retroactive application of these rules to June 26, 2013, will require any corrective action.

Plan sponsors that already adopted an amendment specifying a September 16 effective date will need to revise these amendments and determine whether a subsequent amendment is required to reflect the general June 26 effective date.

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