Executive Compensation & Benefits Tax

December 23, 2015

IRS Provides Additional Guidance on Treatment of Same-Sex Marriages under Benefit Plans

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In IRS Notice 2015-86, the Internal Revenue Service (IRS) provided guidance to sponsors and administrators of employee benefit plans regarding the application of the U.S. Supreme Court's decision in Obergefell v. Hodges *to plan participants with same-sex spouses.*

Supreme Court Decisions and Prior IRS Guidance

On June 26, 2013, the U.S. Supreme Court in *United States v. Windsor* held that Section 3 of the Defense of Marriage Act—which limited the definition of "marriage" to marriage between a man and a woman for all purposes under Federal law—was unconstitutional. In response to that decision, the IRS released Revenue Ruling 2013-17 indicating that, effective as of September 16, 2013, same-sex spouses would be treated as married for all Federal tax purposes as long as the marriage was validly entered into in a state or country whose laws authorize same-sex marriage (generally referred to as the "state of celebration" rule). The IRS issued further guidance in Revenue Ruling 2014-19 on the timing and scope of required plan amendments to comply with *Windsor*. For further information about these prior IRS rulings, please see our prior Client Alerts from September 3, 2013 and April 9, 2014.

The *Windsor* decision and IRS guidance did not require states to modify their civil marriage laws or to recognize same-sex marriages performed in other states. Earlier this year, however, the U.S. Supreme Court held in *Obergefell v. Hodges* that states are required to apply their civil marriage laws to same-sex couples on the same terms and conditions as opposite-sex couples, and that states are prohibited from refusing to "recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character." Because *Obergefell* requires that states recognize marriages of same-sex couples performed in other states, certain marriages performed in previous periods will be recognized for the first time for state law purposes.

The *Obergefell* decision prompted many plan sponsors to ask whether they need to adopt new plan amendments or changes in administrative practices with respect to same-sex marriages. Sponsors have also been considering whether to adopt voluntary amendments providing additional benefits and

protections for participants with same-sex spouses. Notice 2015-86 was issued to address concerns raised by those plan sponsors.

Guidance for Qualified Retirement Plans

Because *Obergefell* does not change the Federal definition of marriage from the "state of celebration" rule already endorsed under *Windsor*, Notice 2015-86 confirms there are no mandatory changes for qualified retirement plans beyond those previously required under *Windsor* and the prior IRS guidance. However, a sponsor may want to amend its qualified retirement plans to provide additional benefits and protections for participants with same-sex spouses, such as offering a new joint and survivor annuity election in cases where the participant was previously required to begin receiving a single life annuity. Because these would be discretionary and not mandatory amendments, the Notice cautions that the amendments would be subject to the same funding restrictions (for defined benefit pension plans) and nondiscrimination tests that apply to all discretionary amendments. In addition, the amendments would have to be adopted by the end of the plan year in which they become operationally effective.

Guidance for Health and Welfare Plans

Notice 2015-86 confirms that Federal tax law generally does not require health and welfare plans to offer any specific rights or benefits to a participant's spouse. For plans that do offer spousal coverage, however, the *Obergefell* decision may require the plan to recognize additional same-sex marriages and to extend coverage to additional spouses.

If a "cafeteria plan" under Section 125 of the Internal Revenue Code did not permit coverage of same-sex spouses as of the beginning of the plan year, and the plan is changed during the year to permit such coverage, Notice 2015-86 provides guidance on how the plan can permit a participant to revoke an existing election and submit a new election. Specifically, if the plan already permits election changes due to a "significant improvement in coverage" during the coverage period, then the plan can simply rely on that provision to permit a participant with a same-sex spouse to make an election change. If the plan does not currently permit election changes due to a "significant improvement in coverage," the Notice confirms that the sponsor can amend the plan to permit such changes. To be effective to permit an election change during the plan year in which same-sex spouses first become eligible for coverage, the amendment would have to be adopted by the last day of the plan year that includes the *later* of the date such coverage becomes available or December 9, 2015.

**We would like to thank Senior Law Clerk Benjamin H. Asch for his contribution to this alert.*

If you have any questions about the content of this alert please contact the Pillsbury attorney with whom you regularly work, or the author below.

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