Pension Plan Fix-It Handbook

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Post-*Windsor* Adjustments Need Attention To Bring Plans in Line With IRS Guidance

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Let's begin at the end.

That is, the end of our October 2013 column. It concluded with the need for federal regulatory guidance on retroactive application of the *U.S. v. Windsor* decision, S. Ct. 2675 (2013), which declared the lack of recognition of same-gender marriages unconstitutional. That guidance has arrived, to the relief of many retirement plan sponsors, but the guidance still means work for the plan sponsor.

IRS issued Notice 2014-19, posted answers to Frequently Asked Questions about application of the decision and published post-*Windsor* guidance for qualified retirement plans on its website.

Let's review some critical dates:

- June 26, 2013: the date of the *Windsor* ruling
- Sept. 16, 2013: the date IRS issued Revenue Ruling 2013-17

Briefly, as of June 26, 2013, the Defense of Marriage Act was ruled unconstitutional, with the effect that a same-gender spouse must be treated in the same way as an opposite-gender spouse. The conundrum is that some states recognize same-gender marriages and some do not, resulting in a potential administrative nightmare.

(The accompanying table on page 3 presents some affected operational items to review, or to confirm that you have already reviewed.)

Rev. Rul. 2013-17 provided that, for federal tax purposes, the terms "spouse," "husband and wife," "husband" and "wife" include an individual married to a person of the same gender, if they were married in a state, the District of Columbia, a U.S. territory or a foreign country (collectively referred as a "state") whose laws authorize the marriage of two people of the same gender and for which the term "marriage" includes marriages of individuals of the same sex. The holding applied regardless of the state in which the individuals lived.

States whose laws authorize same-gender marriages are referred to as "states of celebration." In the ruling, it didn't matter whether the employee lived in a state that didn't recognize same-gender marriages, as long as the marriage took place in a state that did.

Where Do We Stand Now?

Qualified retirement plan operations must reflect the *Windsor* decision as of June 26, 2013. Although permissible, retirement plans do not have to reflect the *Windsor* decision before June 26, 2013. In fact, IRS suggests caution in amending plans to an effective date before June 26, 2013, and careful review of the impact of such a change on other qualification areas.

For example, under Internal Revenue Code 436(c), an amendment to a single-employer defined benefit plan that increases liabilities cannot take effect unless the plan is funded sufficiently or the employer makes an additional contribution.

If the plan is amended to comply with the *Windsor* ruling as of June 26, 2013, the funding limitation will not apply. However, it will apply if the plan is amended with an effective date before June 26, 2013.

See *Andersen*, p. 2

Andersen (continued from p. 1)

A retirement plan will not be treated as failing to meet the *Windsor* requirements if before Sept. 16, 2013, the plan only recognized same-gender marriages when the participant lived in a state that recognized same-gender marriages. For example, if a participant was married in a state that recognized same-gender marriages but moved to a state that did not, the plan did not recognize the marriage.

Things to Think About

Does your plan have to be amended?

Yes, if your plan refers to DOMA or contains language that is not consistent with the *Windsor* decision.

No, if it does not. For example, if your plan defines spouse as "legally married spouse" or "spouse under Federal law" or if the word "spouse" is used without any distinction as to whether it is a same-gender or opposite-gender spouse. This latest Rev. Rul. notes that a clarifying amendment might be useful, for plan administration purposes.

If an amendment is required, when must it be made?

The Rev. Rul. provides that an amendment must be made by the applicable deadline for the remedial amendment period (in other words, tax filing due date for the year the change is effective) under Section 5.05 of Rev. Proc. 2007-44 or its successor, or Dec. 31, 2014.

Did your plan follow the spousal consent rules for benefit payments that began after June 26, 2013?

Any benefits to a same-gender spouse paid after June 26, 2013, in a form other than a qualified joint and survivor annuity without spousal consent will not cause the plan to lose its qualified status if procedures similar to the Employee Plans Compliance Resolution System procedures are followed. A plan will have to go back and obtain spousal consent; if spousal consent is not obtained, the benefit must be paid in the form of a QJSA.

See *Andersen*, p. 3

Consider Same-gender Married Couples When Evaluating Retirement Plan Services

As plan sponsors evaluate their retirement education offerings for participants, or consider whether to contract with their plan administrator to add this service, they should consider a new audience for such advice: same-gender couples.

Sweeping changes in employee benefits, including adjustments to retirement plans, are now taking place as a result of the U.S. Supreme Court decision in *U.S. v. Windsor,* S. Ct. 2675 (2013) that struck down Section 3 of the Defense of Marriage Act as unconstitutional. Followed by subsequent guidance from IRS (see April story, June columns) and the U.S. Department of Labor and similar shifts in taxation and estate planning, a new survey found that at least 40 percent of married same-gender couples say they have been motivated to begin or revisit their financial planning in light of the High Court's decision.

"Post-Windsor: Retirement Planning for Same-Sex Couples," is a study commissioned the Insured Retirement Institute of 504 individuals that identify as lesbian or gay residing in the 13 states plus the District of Columbia that allowed legal same-gender marriages as of September 2013. The survey noted a generally highly compensated and educated market for financial planning services among same-gender married couples and those who said they plan to marry after the *Windsor* decision. The respondents pointed to retirement planning as their No. 1 financial area needing help.

Especially relevant to retirement plan sponsors is the fact that 53 percent of the IRI survey's respondents said they have added, or plan to add, their spouse as a beneficiary of a defined benefit retirement plan — or have been added themselves. In comparison, just 23 percent said they had added, had been added to or will add their spouse to a health plan.

The survey also showed that this segment of plan participants is likely to grow quickly: Nearly half of unmarried same-gender couples and 60 percent of those currently in civil partnerships are planning to marry. And many surveyed are approaching retirement, with the median age of respondents at 51.

Eighty-seven percent of respondents have saved money for retirement, and 40 percent have amassed $250,000 or more. Yet nearly two-thirds said they do not have a financial planner, which likely will lead them to look to their employer retirement plan for such assistance. ❖

Andersen (continued from p. 2)

Did one of your participants in a legal same-gender marriage die after June 26, 2013?

The rules require that a survivor benefit be paid to the same-gender spouse unless there was spousal consent to the designation of another beneficiary. Interestingly, FAQ-1 on post-*Windsor* guidance from IRS specifically mentions beneficiary designations under profit-sharing or stock bonus plans with respect to participants who die after June 26, 2013, while Q-2 of the Notice (relating to the date plans must operate in compliance with the *Windsor* decision) refers to qualified retirement plans, with no distinction made between defined contribution and DB plans.

See *Andersen*, p. 4

Post-*Windsor* Guidance Checklist

Issue	Affected areas	Action Steps
Governing documents	Plan document Summary Plan Description Administrative forms	Review the definition of spouse. Does it refer to DOMA? If yes, the plan must be amended. If no, consider whether a "clarifying amendment" is in order. Review your plan documents and administrative forms; change as necessary.
Communication channels	How do you communicate benefit information to your participants? Internet, intranet, third-party administrator portal?	Identify all employee benefit communication channels and carefully review to ensure consistency with the amended plan document.
Data	Marital status codes	How do you capture marital status? Apply the same procedure to same-gender participants and inform the plan's recordkeeper and/or actuary.
Beneficiary designations	Outdated beneficiary forms can be a nightmare resulting in litigation. Many plan sponsors already have taken steps to "refresh" existing beneficiary designation because plan sponsors have been aware of the *Windsor* decision since mid-2013.	You may want to re-solicit beneficiary designations if you have not already done so.
Benefits in pay status before June 26, 2013	Plans are not required to apply the *Windsor* decision before June 26, 2013.	This is a potential communication opportunity to plan participants.
Benefits in pay status beginning on or after June 26, 2013, and before Sept. 16, 2013	A retirement plan will not be treated as failing to meet the requirements before June 26, 2013 if same-gender marriages were recognized only if the participant was domiciled in a state that recognized same-gender marriages.	Verify procedures to ensure whether state of domicile rule was applied correctly, if applicable. Potential communication opportunity to plan participants.
Benefits in pay status beginning on or after Sept. 16, 2013	State of celebration rule must be followed regardless of where participant lives.	Verify that administrative forms were updated and used. Potential communication opportunity to plan participants.
QDROs	Administrative procedures must be updated.	If QDROs processed internally, verify procedures updated accordingly. If QDROs processed externally, obtain written verification that procedures are in compliance with the *Windsor* decision
Rollovers	Same-gender spouse will be able to roll over the distribution of a deceased participant to his or her own IRA.	Verify procedures are in place to identify same-gender spouses and properly administer rollovers.
Minimum distributions	The same-gender spouse will be entitled to the same distribution options currently afforded the opposite-gender spouse, for example the beneficiary can defer payment until the end of the calendar year in which the participant would have been 70 ½. In addition, the minimum incidental death benefit rules will not apply to same-gender spouses.	Verify procedures are in place to identify same-gender spouses and properly administer minimum distributions.

Andersen (continued from p. 3)

However, the plan will not be disqualified if it followed the state-of-domicile rule before Sept. 16, 2013, meaning it recognized the same-gender spouse only if the participant and spouse lived in a state that recognized same-gender marriages.

While it will be possible to identify single participants who died after June 26, 2013, it might not be possible for plan sponsors to know whether the single participant was in a legal same-gender marriage unless the participant notified human resources after the *Windsor* decision or the plan sponsor specifically asked on the plan administrative forms. If plan sponsors did not amend their administrative forms to ascertain whether the participant was in a legal same-gender marriage, it is possible that in some cases benefits were not paid correctly and corrective action will be necessary.

Operational Considerations

The plan's operational aspects must be reviewed, potentially changed and documented. It is possible that many plan sponsors already have done so.

Finally, I will offer my usual mantra: Whatever you do, make sure you document, document, document! ❖