

# One Minute Memo®



## IRS Guidance Addresses Retroactive Impact of Same-Sex Marriage Ruling on Retirement Plans

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On April 4, 2014, the IRS issued Notice 2014-19 (an official copy can be found [here](#)), which provides long-awaited guidance for applying last year's Supreme Court decision in *U.S. v. Windsor* to 401(k) plans and other qualified retirement plans.

In *Windsor*, the Supreme Court struck down the portion of the Defense of Marriage Act ("DOMA") that defines marriage for federal purposes as being between one man and one woman. This ground-breaking decision, which was issued on June 26, 2013, required the federal government to recognize same-sex marriages for the first time. In its first guidance issued after the *Windsor* decision (Revenue Ruling 2013-17), the IRS stated that, beginning September 16, 2013, the determination of whether a couple is married must be made for federal tax purposes by reference to a "state of celebration" standard. That is, if a same-sex couple enters into a marriage in a state or other jurisdiction that allows such a marriage under its laws, they will be treated as married for Internal Revenue Code purposes even if they now live in a jurisdiction that does not recognize their marriage.

Revenue Ruling 2013-17 noted specifically that the IRS would issue further guidance addressing any retroactive impact of the *Windsor* decision on employee benefit plans. Notice 2014-19 provides much-needed, and mostly favorable, guidance for employers with respect to their qualified retirement plans.

The highlights of this latest IRS guidance are:

- The IRS confirms that qualified retirement plans must recognize valid same-sex marriages for spousal consent elections, minimum survivor benefits, eligibility for joint and survivor annuities, and other protections afforded to eligible spouses under federal law.
- Retirement plans are not required to apply the *Windsor* decision to employees with same-sex spouses prior to June 26, 2013. If a plan does not wish to recognize same-sex spouses prior to that date, the IRS will not seek penalties or disqualification on that basis.
- A plan may, however, be revised to reflect the *Windsor* decision for some, or all, purposes prior to June 26, 2013, as long as the plan continues to satisfy discrimination testing and all other qualification requirements. The IRS cautions, however, that recognizing same-sex marriages retroactively prior to June 26, 2013 may be difficult to administer or may create unintended consequences.
- A plan is permitted to determine whether an employee has a same-sex spouse during the period between June 26, 2013 and September 16, 2013 - before the IRS had issued guidance under *Windsor* - by reference to *either* the law in the jurisdiction where the marriage was celebrated or else in the jurisdiction in which the couple lives.

- The guidance notes that, if the plan's governing documents define "spouse" (and other terms relating to spousal rights) by reference to DOMA, or the plan's terms are otherwise inconsistent with the *Windsor* decision, plan amendments will be required. Any such amendments will generally be required by no later than December 31, 2014 (although later deadlines may apply depending on the applicable IRS remedial amendment period or in the case of governmental retirement plans).
- For underfunded defined benefit pension plans subject to the restrictions under Code Section 436, any required plan amendments to reflect the *Windsor* decision can be made even if they exacerbate the plan's underfunded status. However, the Code Section 436 restrictions will continue to apply to any optional plan changes that may adopt in light of the IRS guidance.

Overall, the IRS guidance is mostly good news for employers as it generally limits the retroactive application of the *Windsor* decision back to June 26, 2013, *i.e.*, the date the Supreme Court issued its ruling. However, there are some complexities and potential risks for companies to address. In particular, even though the guidance provides relief from IRS sanctions for failing to recognize same-sex marriages prior to the *Windsor* decision, or for using the law of the state of residence to determine whether a marriage will be recognized prior to September 16, 2013, the guidance would not necessarily preclude a same-sex spouse's claim for a benefit with respect to a participant who died before that date. Also, we recommend that companies discuss with their advisors the need for any plan amendments, updates to plan communications and administrative procedures, and any other changes to reflect the latest IRS guidance.

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