SEYFARTH SHAW

Management Alert

IRS Adopts Ceremony Rule for Same-Sex Spouse Determinations

By Charlene Kelly, Joy Sellstrom, Fredric Singerman and Sarah Touzalin

On August 29, 2013, the Department of Treasury (Treasury) and the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17, available *here*, which provides that same-sex couples legally married in a domestic or foreign jurisdiction that recognizes their marriage will be treated as married for federal tax purposes, regardless of where they reside. The ruling applies to all federal tax provisions where marriage is a factor, including employee benefits. Concurrently, Treasury and the IRS issued Frequently Asked Questions (FAQs) for same-sex couples (available *here*) and updated FAQs for registered domestic partners and individuals in civil unions (available *here*) that reflect the holdings in Revenue Ruling 2013-17.

This guidance clarifies much of the uncertainty raised by *Windsor* in the employee benefits arena addressed in our June 28, 2013 management alert," U.S. Supreme Court Ruling Affects Benefits for Same-Sex Spouses," which is available *here*.

Law Where Ceremony Took Place Governs

As we discussed in our earlier alert, the Supreme Court's opinion striking down Section 3 of the Defense of Marriage Act (DOMA) made it clear that the term "spouse" when used in federal law must include same-sex spouses who are legally married under applicable state law. However, *Windsor* did not address which state's law would apply (*e.g.*, the state where the marriage was performed or where the couple resides).

Revenue Ruling 2013-17 establishes that, for federal tax purposes, a "spouse" means an individual lawfully married to the taxpayer in a domestic or foreign jurisdiction whose laws authorize the marriage. This includes married persons of the same sex, even if the couple resides in a jurisdiction that does not recognize the validity of the marriage. This approach is commonly called the ceremony rule.

The guidance also clarifies that the term "marriage" for federal tax purposes does not include registered domestic partnerships, civil unions or other relationships formally recognized under state law that are not denominated as a marriage under that state's law.

Effective Date and Retroactivity

The ruling applies prospectively as of **September 16, 2013**. For purposes of filing tax returns or claims for refunds, however, taxpayers may rely on the ruling retroactively to recover overpayments of income and employment taxes with respect to employer-provided health coverage, dependent care assistance, qualified scholarships and certain fringe benefits provided based on marital status. (See below for further detail.)

Retirement Plans

Our prior alert highlighted many of the issues raised by the different treatment accorded to opposite-sex and same-sex spouses under the rules that apply to qualified retirement plans. Under Revenue Ruling 2013-17, it is now clear that, at least effective September 16, 2013, a participant's same-sex spouse will have the same rights to a spousal death benefit, and the right to consent or withhold consent to a

designation of a non-spouse beneficiary, as opposite-sex spouses. Similarly, hardship withdrawals from a Section 401(k) will be available for the same-sex spouse's (and his or her child's) medical, funeral or education expenses in the same way as for opposite-sex spouses. Qualified domestic relations orders will also be available for same-sex spouses. For these purposes, whether the individual is a "spouse" will be determined based upon the laws of the jurisdiction where the marriage was celebrated.

While it is clear that, as of September 16, 2013, a qualified plan must pay death benefits to a participant's surviving same-sex spouse unless the spouse consents to a different beneficiary, an open issue remains as to whether a same-sex spouse has a cause of action under ERISA for a death benefit if the participant died prior to September 16, 2013, having designated a non-spouse beneficiary. At least one District Court has already held in favor of the same-sex spouse in this situation. But what if the plan had already paid the benefit out to the non-spouse beneficiary before Revenue Ruling 2013-17 was issued, or even *Windsor* was decided? After all, same-sex marriage has been legal in some U.S. states since 2004 and in some foreign countries since 2001.

The IRS has promised additional guidance to address the potential retroactive application of *Windsor*, and also to address how and when plan amendments may be made in order to retain a plan's qualified status.

Health and Welfare Plans

As stated in our prior alert, under ERISA, with respect to benefits provided under a self-funded plan, employers may define "spouse" however they choose. One option is to defined "spouse" as it is defined for federal tax purposes. As a result of the ruling, under this approach, coverage would be extended to all same-sex spouses who were married in a jurisdiction that permits same-sex marriage, regardless of their state of residency and regardless of the law of the state in which the plan sponsor is located.

According to the ruling, employees who paid for health coverage for a same-sex spouse on an after-tax basis, or who recognized imputed income for the coverage, may now treat the amounts as pre-tax and excludable from income. These employees may file for a refund of income and employment taxes paid on the value of the employer-provided coverage that would have been excluded from income had the same-sex spouse been recognized as the employee's legal spouse, and if the employee's portion of the coverage was paid on an after-tax basis, on the employee's contributions as well. A refund claim may be filed for any prior tax years for which the statute of limitations is open (generally 2010, 2011 and 2012).

Similarly, employers may want to file refund claims for social security and Medicare taxes paid on previously taxed health insurance and fringe benefits provided to same-sex spouses. The IRS has indicated that it is planning on issuing "streamlined procedures" for employers who wish to file for a refund, as well as further guidance on cafeteria plans.

With respect to income tax withholding, employers may only make adjustments for income tax withholding that was over-withheld in the current year, provided the employee is reimbursed for the over-withheld tax before the end of the calendar year. Of course, employers who have not already done so should stop imputing federal taxable income with respect to coverage provided to same-sex spouses and their children. However, Revenue Ruling 2013-17 may not have an impact on state income tax requirements if the state does not follow federal rules in defining taxable income.

Hopefully, the additional promised guidance will contain more answers for employers on how to administer elections changes, COBRA elections and special enrollments.

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