

## Same-Sex Marriage and Qualified Retirement Plans Post-*Windsor*

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Most private (non-government) retirement plans in the United States are governed by ERISA and the Internal Revenue Code (IRC or the Code). Historically, ERISA and the Code have not recognized the validity of same-sex marriages for retirement plan purposes. Recent changes with regard to the construction of federal law that will impact the operation of ERISA and IRC retirement plans. Plan administrators need to comply with these changes by reviewing and amending (where necessary) their plan documents and operation of the plan.

You can infer the overriding goal of ERISA from its full name: The Employee Retirement Income Security Act of 1974. ERISA requires plan assets to be held for the exclusive benefit of employees. In 1984, Congress and President Ronald Reagan extended the protection of retirement benefits to spouses by requiring plan participants to obtain spousal consent in order to designate anyone other than a spouse as a beneficiary (in the event of the participant's death) to the participant's retirement benefits. ERISA also protects retirement benefits from assignment or alienation (benefits are protected from creditor claims even in bankruptcy). QDROs (qualified domestic relations orders) are the major exception to the assignment/alienation rules. The QDRO exception allows a court or state agency to issue an order based on a state's domestic relations laws that assigns ERISA governed retirement plan benefits to a spouse, former spouse, child or dependent of the plan participant.

The application of ERISA and the IRC to same-sex marriages or couples was impacted dramatically when Congress and President Bill Clinton passed the Defense of Marriage Act in 1996 (DOMA). DOMA amended another federal law, the Dictionary Act, which governs the rules of construction (i.e., interpretation) for more than 1,000 other federal laws. For all purposes of federal law, Section 3 of DOMA defines the term 'marriage' as exclusively "a legal union between one man and one woman as husband and wife" and the word 'spouse' as a "person of the opposite-sex who is a husband or wife." Among other things, DOMA impacted ERISA governed plans by excluding same-sex spouses from spousal consent protections and by prohibiting assignment of plan benefits to same-sex spouses via the QDRO exception.

On June 26, 2013, the Supreme Court held in *United States v. Windsor* that Section 3 of "DOMA violates basic due process and equal protection principles applicable to the Federal Government". 579 U.S. 12 (2013). The IRS has published guidance (Rev. Rul. 2013-17 and 2014-19) to clarify changes to ERISA governed retirement plans in light of the *Windsor* ruling. The IRS publications make clear that as of June 26, 2013, for purposes of interpreting the Code (which governs numerous aspects of ERISA plans):

1. The use of gender-neutral terms such as "spouse" or "marriage" and gender-specific terms such as "husband" and "wife" should be interpreted to include same-sex spouses.
2. As of September 16, 2013, a valid same-sex marriage means a same-sex marriage valid in the state where it was entered into without regard to the couple's current state of domicile. Between June 26 and September 16, 2013, a valid same-sex marriage was based solely on the participant's current state of domicile.

3. An individual in a formal relationship (such as a registered domestic partnership or civil union) recognized under a state's law, but not denominated as a marriage under that state's law, is *not* recognized as being a spouse, husband or wife. This is true whether the formal relationship is between opposite-sex or same-sex individuals.

*Windsor* and the subsequent IRS Revenue Rulings mean that plan sponsors must treat same-sex marriages the same as opposite-sex marriages as of June 26, 2013 (September 16, 2013 if the plan participant was domiciled in a state that did not recognize same-sex marriage at the time). With regard to ERISA governed plans, here is a short list of items that may require attention:

- **Spousal Consent and Beneficiary Designations** The spouse of a married participant must consent to the designation of anyone other than the spouse as the beneficiary to the participant's benefit. If a same-sex married participant signed a beneficiary designation (naming someone other than his/her spouse as the beneficiary), then a new designation and the spouse's consent must be obtained (otherwise, the designation is not valid). Review your beneficiary designation forms for compliance with *Windsor* and consider asking all participants to review their designations.
- **Loans** If your plan is subject to QJSA (Qualified Joint and Survivor Annuity) requirements and allows loans, then spousal consent is generally required before the participant can borrow from the plan. Obtain spousal consent for plan loans if your plan has QJSA requirements.
- **Distributions** If your plan is subject to QJSA or QPSA (Qualified Pre-retirement Survivor Annuity) requirements, then obtain spousal consent (for married participants) unless the distribution is in the form of a QJSA or QPSA.
- **RMDs (Required Minimum Distributions) and Rollovers** The rules governing RMDs are different for married participants than single participants. And there are rollover options available to surviving spouses (upon the death of the participant) that are different than options available to non-spouses.
- **Attribution of Ownership and Nondiscrimination Testing** There are certain tests that all ERISA plans must pass with regard to annual contributions and application of rights, benefits and features. The tests compare contributions and account balances of Highly Compensated Employees and Key Employees with contributions and account balances to Non-Highly Compensated Employees and Non-Key Employees. Spouses of owners are attributed ownership of the business for testing purposes. Include same-sex spouses as owners for purposes of nondiscrimination testing.
- **Plan Document and Summary Plan Description (SPD)** If your retirement plan's document and/or SPD refers to DOMA or otherwise fails to recognize same-sex marriages, then the document and/or SPD must be amended by December 31, 2014.

As noted above, a same-sex marriage is recognized for federal purposes (and therefore ERISA plan purposes) if the marriage was sanctioned by a state that allows same-sex marriage (regardless of the couple's current state of residence). As of this writing, nineteen states and the District of Columbia allow same-sex marriage either by referendum (Maine, Maryland, Washington), legislation (Delaware, D.C., Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, Vermont) or judicial holding (California, Connecticut, Iowa, Massachusetts, New Jersey, New Mexico, Oregon, Pennsylvania). This list will continue to grow. While *Windsor* struck down Section 3 of DOMA as an unconstitutional application of *federal* power, it did not go so far as to find unconstitutional *state* laws that discriminate against same-sex couples. Nevertheless, at least one federal district court has struck down a state ban on same-sex marriage as a violation of the federal constitution. In *Geiger v. Kitzhaber*, the US District Court of Oregon found that Oregon's Measure 36 ban on same-sex marriage violated the equal protection clause of the 14<sup>th</sup> Amendment because Measure 36 has no rational basis to any legitimate government interest.<sup>i</sup> It is possible that this issue—whether state discrimination against same-sex couples violates the federal constitution—will eventually wind its way to the Supreme Court.

Plan administrators should review their plan documents and Summary Plan Descriptions for *Windsor* violations and make any necessary changes prior to December 31, 2014. Plan administrators should also encourage participants to review their beneficiary designation forms and (if necessary) complete new forms and obtain spousal consent.

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<sup>i</sup> *Geiger v. Kitzhaber* did not have a case citation as this article went to print. The case was published on May 19, 2014. Text of the case was found at <http://ww2.lgbtqnation.com/assets/2014/05/oregon-decision.pdf>

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