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The Impact of IRS Recognition of All Legal Same-Sex Marriages on Nonprofit Organizations' Employee Benefit Plans

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On August 29, 2013, the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17, which answers many questions raised by the Supreme Court's ruling in *United States v. Windsor* earlier this summer. In *Windsor*, the Court held that Section 3 of the Defense of Marriage Act (DOMA), which defined marriage as a union between a man and a woman for federal law purposes, was unconstitutional because it denied same-sex couples equal protection under the law. Revenue Ruling 2013-17, the IRS's first formal response to the Windsor decision, holds that for all federal tax purposes:

- The term "marriage" includes a marriage between two individuals of the same sex, provided those individuals are lawfully married under state law (or the laws of a territory or foreign jurisdiction with the legal authority to sanction marriage);
- A same-sex marriage sanctioned under the laws of the state or territory in which it was performed will be recognized, even if the married couple lives in a state that does not recognize same-sex marriage;
- A same-sex (or opposite-sex) couple is not considered married by virtue of entering into a registered domestic partnership, civil union or other similar formal relationship recognized under state law (but not classified as a marriage under the laws of that state).

These general principles will apply for all tax purposes, including income, employment, and estate taxes, on a prospective basis as of September 16, 2013. The Revenue Ruling also permits affected same-sex couples to rely on its holdings with respect to original, amended, and adjusted tax returns (and claims for credits or refunds) for tax years still falling within the IRS's statute of limitations (generally, 2010, 2011, and 2012). The remainder of this alert summarizes what we know now about how these rules will affect nonprofit organizations' employee benefit plans (acknowledging the IRS's promise that there is more guidance to come).

Implications for Nonprofit Organizations' Qualified Retirement Plans

In a set of Frequently Asked Questions released contemporaneously with Revenue Ruling 2013-17, the IRS explicitly provides that qualified retirement plans "must treat a same-sex spouse as a spouse for purposes of satisfying the federal tax laws relating to qualified retirement plans." The FAQs specifically emphasize that this is the case even if the plan is operated by a nonprofit organization in a state that does not recognize same-sex marriage.

Beginning September 16, 2013, plan sponsors must treat the same-sex spouse of any plan participant as that participant's spouse for all purposes under the plan. The new rule impacts, among other things, surviving spouse beneficiary provisions, qualified joint and survivor annuity and qualified pre-retirement survivor annuity requirements, required minimum distributions, hardship withdrawal rules, and qualified domestic relations orders.

The IRS acknowledges that Revenue Ruling 2013-17 does not address the application of the *Windsor* decision to periods before September 16 and states that it expects to issue future guidance for this purpose. This guidance will also include instructions to plan sponsors regarding required plan amendments and any necessary corrections relating to past plan operations.

Implications for Nonprofit Organizations' Health Plans

The forthcoming employee plan guidance should also address health plans. The existing guidance, however, provides helpful direction for plan sponsors who currently offer health coverage to same-sex couples. Prior to DOMA, employers were not permitted to provide health coverage to the same-sex spouses of their employees on a tax-free basis (unless the employee's same-sex partner otherwise qualified as the employee's dependent for health plan purposes). As a result, nonprofit employers were

required to treat the value of such coverage as taxable to the employee. Additionally, employees were not permitted to pay premiums for their same-sex spouse's coverage on a pre-tax basis through a cafeteria plan, but rather had to pay them on an after-tax basis.

As a result of the new Revenue Ruling, nonprofit employers should now cease treating coverage provided to employees' same-sex spouses as taxable.[1] The FAQs noted above also clarify that the classification of such benefits as taxable for open tax years can be corrected. Specifically, for those years:

- Employees will be permitted to file amended Form 1040s to reflect a reduction in their taxable income in an amount equal to the value of the coverage provided to their same-sex spouses (whether such coverage was initially paid for by the employer or by the employee on an after-tax basis); and
- Nonprofit employers will be permitted to seek refunds of any Social Security and Medicare taxes paid with respect to those amounts. Generally, refund requests would need to cover employer and employee payments of these taxes (with the employee share returned to employees). Future guidance will establish streamlined administrative procedures for this process.

What Should Nonprofit Employers Do Now?

Nonprofit employers should take the following steps:

- As of September 16, nonprofit employers should provide same-sex spouses the same rights as opposite-sex spouses under their retirement plans.
- Employers that offer same-sex health benefits should immediately: (i) stop imputing taxes on the share of the premiums paid by the employer on behalf of same-sex spouses, and (ii) if the employer sponsors a cafeteria plan, take employee contributions toward that coverage on a pre-tax basis.
- Review plan documents, forms, and notices to identify provisions affected by these changes.
- Determine whether any individuals with "domestic partner" status should be changed to "spouse" status. To the extent necessary, request additional information from same-sex couples covered under their plans to determine whether such couples are legally married.

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1 As noted above, the Revenue Ruling applies only to legally married couples. As such, plans that provide coverage to domestic partners will need to continue the existing practice of imputing income with respect to most non-married partners.