Published on *The National Law Review* https://natlawreview.com

IRS, Department of Labor Rulings Clarify Treatment of Same Sex Couples for Benefit Plan Administrators and Sponsors

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The United States Supreme Court's landmark *Windsor* decision in June of this year invalidated certain key provisions of the **Defense of Marriage Act** by holding that the disparate tax treatment of validly married same sex couples as compared to other married couples was a violation of the United States Constitution. The Internal Revenue Service (IRS) and Department of Labor (DOL) have now each issued rulings which clarify the effects of Windsor on employee benefit plans. Both the IRS and DOL have jurisdiction under various aspects of ERISA, and therefore both have a significant role in providing the regulatory framework in which plans operate. For example, certain spousal rights on payouts to married participants are set forth in Internal Revenue Code Section 417, so IRS guidance is important. Similarly, many non-tax aspects of ERISA refer to spousal rights, so DOL guidance is likewise critical. Fortunately, the standards advanced by both agencies are consistent and relatively clear.

The determining factor under both the IRS guidance, Revenue Ruling 2013-17, and the DOL guidance, Tech. Release 2013-04, is whether a particular couple was legally married in a particular jurisdiction, the "state of celebration," regardless of recognition of the marriage in their state of residence. Therefore, as a practical matter, a Michigan same-sex couple who were married in a state that recognizes same-sex marriage, such as Vermont, will have their marriage recognized for benefit plan purposes notwithstanding that under Michigan law, at least for now, the State of Michigan will refuse to recognize the Vermont marriage for state law purposes. Conversely, other types of state-sanctioned relationships, such as a "civil union" or similar non-marital status, need not be recognized for employee benefit plan purposes. Only married couples, determined by the law of the place of marriage, can be considered as "married" or as a "spouse" for employee benefit plan purposes. This should be a manageable burden for plan administrators, as tendering of a valid marriage certificate from a state should end the matter, so that an investigation of the validity of the marriage in the law of residence of the participant and putative spouse will not be required.

For employee/participants, this determination will have significant impact for federal tax purposes, including the opportunity to file amended tax returns, including possible claims for refund for items such as employer provided spousal health insurance coverage that were previously included in taxable income. Michigan state tax treatment is not changing, at least for now.

For plan sponsors, the terms of a particular plan must be consulted to determine what benefits are

provided for a "spouse," but in any event a valid same-sex marriage under the law of the state of celebration must be recognized to the same extent as a conventional traditional marriage. As pointed out above, certain aspects of the law governing pension plans mandate spousal rights, and for those purposes, the "state of celebration" rule must be followed. For welfare benefit plan purposes, however, a plan is not legally required to provide spousal benefits, nor is it required to recognize a same-sex marriage if spousal benefits are provided. For example, as the law now stands, it appears that a welfare plan could limit coverage to a legally married spouse "as recognized under the laws of Michigan" or the state of residence. Stay tuned, however, because the validity of state laws (such as that of Michigan) that draw such distinctions are the subject of various legal challenges as to their constitutionality that are moving up through the federal court system.

National Law Review, Volume III, Number 283