



September 6, 2013

IRS Recognizes Legal Same Sex Spouse Marriages

The agencies have begun to issue guidance clarifying their position on Defense of Marriage Act (DOMA) issues for legally married same-sex couples after the US Supreme Court struck down the DOMA section which stated that marriage is between a man and a woman. See our [Update](#) on the DOMA decision.

The IRS and Treasury have issued [initial guidance](#) along with frequently asked questions stating that legally married same-sex couples will be treated as married for federal tax purposes, even if they live in a state that does not recognize same-sex marriage. The guidance also specifically notes that even though registered domestic partnership and civil unions are treated as “marriage equivalents” under the laws of certain states, these relationships will not be recognized as marriages for federal law purposes. In addition, the guidance makes clear that Section 2 of DOMA, which provides that states do not have to recognize same-sex marriages performed in other states, remains in effect.

General Employee Plan Guidance

Health and welfare plan sponsors should consider the following in light of the recent guidance:

- There is still no federal requirement to offer spousal health and welfare benefits to any or every spouse with respect to self-insured plans. Thus a self-insured plan sponsor is not required to offer benefits to a same-sex spouse.
- For all legally married same-sex spouses regardless of state of domicile, any insured or self-insured employer-paid coverage (if offered) is excludable from an employee's federal wages (effective September 16, 2013).
- Plan sponsors will still need to comply with applicable state laws, such as state tax laws that treat benefits for same-sex partners as taxable income.
- Where the plan is insured, state insurance laws could require the issuer to provide coverage/benefits to a same-sex spouse.
- For individuals of the same-sex and opposite sex who are in registered domestic partnerships, civil unions or other similar formal relationships that are not marriages under state law, any insured or self-insured employer-paid coverage is excludable from an employee's wages only if the partner qualifies as a tax dependent under the Internal Revenue Code (this rule has not changed).

Employers Offering Same Sex Marriage Benefits

The IRS issued [Same-Sex Marriage FAQs](#) that focus on individual tax return issues and also

address some employee benefit topics. The guidelines and FAQs state that same-sex couples, legally married in jurisdictions that recognize their marriages, will be treated as married for all federal tax purposes, including income, gift and estate taxes. They also require that the exclusion for employer-paid health insurance is to be prospectively effective September 16, 2013, which many same-sex spouses previously bought on an after-tax basis. Thus, employers will now need to have employees pay for any same-sex spouse benefits on a pre-tax basis for federal tax purposes. Employers will also want to ensure that Forms W-2 for the 2013 tax year (to be issued in January 2014) reflect the above federal tax treatment of same-sex spouse benefits.

As to other welfare benefit issues affected by the guidance, plan sponsors offering same-sex marriage benefits should also note that federal tax refunds are available for an employee whose same-sex spouse had employer-sponsored health coverage.

- All same-sex married couples will have the opportunity to amend their tax returns for 2010 to 2013 filings. Not all couples will be interested in doing so however, as some may pay higher income taxes as a result of the “marriage penalty.”
- If an employer provided health coverage for an employee’s same-sex spouse and included the value of that coverage in the employee’s gross income, the employee can file an amended Form 1040 reflecting the employee’s status as a married individual to recover federal income tax paid on the value of the health coverage of the employee’s spouse. (FAQ 10)
- If an employer sponsored a cafeteria plan that allowed employees to pay premiums for health coverage on a pre-tax basis, a participating employee can file an amended return to recover income taxes paid on premiums that the employee paid on an after-tax basis for the health coverage of the employee’s same-sex spouse. (FAQ 11)
- Employees may claim a refund of taxes by filing an amended Form 1040 for 2010, 2011, and 2012 tax years. (FAQs 10 and 11)
- An employer may also claim a refund of social security and Medicare taxes paid on the value of the same-sex spouse’s health coverage by filing Form 941-X for the 2010, 2011, and 2012 tax years. The IRS will issue a special administrative procedure for employers to file refund claims or make adjustments in the near future. (FAQ 12)
- Claims for refunds of overwithheld income tax for prior years as noted above cannot be made by employers – they must be filed by the employee. (This apparently means that employers are not required to provide amended Forms W-2.) Employers may, however, make adjustments for income tax withholding that was overwithheld from an employee in the current (2013) year provided the employer repays or reimburses the employee for the overwithheld income tax before the end of the calendar year. (FAQ 13)
- If an employer cannot locate a former employee with a same-sex spouse who received the employer-provided health benefits that were treated as wages, the employer may still claim a refund of the employer portion of the social security and Medicare taxes on the benefits (but not the employee portion). Also, if an employee is notified and given the opportunity to participate in the claim for refund of social security and Medicare taxes but declines in writing, the employer can claim a refund of the employer portion of the taxes, but not the employee portion. Employers can use the special administrative procedure that will be set forth in future guidance to file these claims. (FAQ 14)
- The IRS also provided guidance on a number of other individual tax issues for same-sex spouses.

Plan sponsors should refer to their corporate tax advisers with respect to these tax refund issues.

Employees should be referred to their own personal tax advisors.

Employers Offering Domestic Partner Benefits

The IRS issued [Domestic Partner FAQs](#) focusing on individual tax return issues. These FAQs provide information to individuals of the same sex and opposite sex who are in registered domestic partnerships, civil unions or other similar formal relationships that are not marriages under state law. For convenience, these individuals are referred to as “registered domestic partners” in the FAQs. Plan sponsors should refer employees to their own personal tax advisors for assistance with these individual tax return issues.

As to welfare benefit issues affected by the guidance, plans sponsors should note that these “registered domestic partners” are not considered as married or spouses for federal tax purposes. Therefore, same-sex and opposite-sex domestic partners and partners in civil unions still do not have the same federal tax treatment as married (same- and opposite-sex) couples. Thus, any insured or self-insured employer-paid coverage provided to a registered domestic partner is excludable from an employee’s wages only if the domestic partner qualifies as a tax dependent under the Internal Revenue Code (this rule has not changed).

Additional Guidance Expected

The IRS intends to issue further guidance with respect to cafeteria plans and the retroactive application of the DOMA decision to other employee benefits. This guidance will take into account potential consequences for plan sponsors, plans, employers, and employees. Future guidance should give plan sponsors additional time to adjust their payroll and benefits administration procedures.

Other agencies (such as DOL and HHS) are also expected to issue guidance for employer-sponsored plans that is consistent with the IRS guidance. Employers will need to follow agency guidance on the following issues:

- Plan participants should be able to change their health benefit elections with respect to a same-sex spouse under certain circumstances (such as loss of spouse’s coverage or change in marital status).
- Health FSAs, HSAs, and HRAs should be able to reimburse qualifying expenses of same-sex spouses.
- Same-sex spouses should have HIPAA special enrollment rights (e.g., associated with marriage or loss of eligibility for spouse’s coverage).
- Same-sex spouses should have COBRA continuation coverage rights.
- Employees are able to obtain FMLA leave to care for same-sex spouses. However, according to a recently issued FMLA fact sheet, the DOL’s FMLA “spouse” definition does not cover situations in which an employee in a same-sex marriage resides in a state that does not recognize same-sex marriage, but was married or works in a state that does recognize such marriages. It remains to be seen whether the DOL will change this provision.

Amendments May Be Needed

All employers, even those who are not in states that recognize same-sex marriage, will need to take appropriate actions. For example, when considering administration and plan design changes, plan sponsors should review plan documents and open enrollment and other materials for definitions of “spouse” and determine whether amendments may be needed to take into account

benefit and administration changes in response to the IRS guidance. Plans will need to decide if they want to keep or modify their eligibility rules for same-sex married couples, domestic partners, partners in civil unions, and their dependents.

The DOMA decision has wide-ranging implications for employee benefit plans. Contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220 should you have any questions. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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877-861-3220



news@connerstrong.com



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