

Pension Plan Fix-It Handbook

Employee Benefits Series

THOMPSON

October 2013 | Vol. 21, No. 1

What IRS Guidance After DOMA Decision Means for Employee Benefits

By Mary B. Andersen, CEBS, ERPA



Mary B. Andersen is president and founder of ERISA Diagnostics Inc., an employee benefits consulting firm that provides services related to Forms 5500, plan documents, summary plan descriptions and compliance/operational reviews.

Andersen has more than 25 years of benefits consulting and administration experience. She is a CEBS fellow and member of the charter class. She has also achieved the enrolled retirement plan agent designation. Andersen is the contributing editor of the Pension Plan Fix-It Handbook.

Many retirement plan areas require immediate attention as the result of the U.S. Supreme Court's ruling in *U.S. v. Windsor* and recent IRS guidance on how that ruling on same-gender marriage applies to federal tax law and regulation. It's particularly important to review defined benefit plan issues.

Employee Benefits Implications

Since the *Windsor* ruling (No. 12-307 (June 26, 2013)) finding Section 3 of the Defense of Marriage Act unconstitutional, a host of repercussions for employee benefits plans has emerged.

In response, IRS issued Revenue Ruling 2013-17 in late August as the first federal guidance on the taxation of same-gender spouses and some of their new benefits issues. The ruling was effective Sept. 16, and IRS has said it will take into account the ramifications to the plan sponsor, the plan and affected employees and beneficiaries. However, retirement benefits professionals seek more guidance on retroactive recognition of same-gender marriage and benefits rights.

Let's briefly examine retirement plan areas that require immediate attention after the *Windsor* ruling, and discuss related DB plan issues needing more guidance.

What Plan Sponsors Should Do Immediately

- 1) Develop a policy regarding employee benefits issues for same-gender spouses in states that do not recognize same-gender marriages.
- 2) Review plan documents for the definition of spouse and revise accordingly, if reference is made to DOMA.
- 3) Update administrative manuals and procedures. Large organizations with operations in multiple states should reflect state-specific requirements (for example, whether same-gender marriages are legal) and conduct information sessions for personnel responsible for benefits administration.
- 4) Review all administrative forms and update accordingly.
- 5) Contact vendors to ensure awareness and compliance (actuary, rollover vendor, qualified domestic relations order administrator, for example).
- 6) Communicate the law to employees and remind them of the importance of up-to-date beneficiary designations.
- 7) Review all plan communications to ensure compliance with the new definition of "spouse."
- 8) Stay tuned for more guidance.

Released concurrently with Rev. Rul. 2013-17 were two sets of Frequently Asked Questions — "Answers to Frequently Asked Question for Registered Domestic Partners and Individuals in Civil Unions" and "Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law." The latter has questions and answers specifically related to employee benefits plans.

IRS also said it intends to issue further guidance that addresses issues such as:

See Andersen, p. 2

- plan amendments and their timing; and
- necessary corrections relating to plan operations for periods before guidance is issued.

At the time this column went to print, the U.S. Department of Labor had yet to provide guidance on this topic.

Revenue Ruling 2013-17: A Summary

In the ruling, IRS concluded that for federal tax purposes, the terms “spouse,” “husband and wife,” “husband” and “wife” include an individual married to a person of the same sex if they were lawfully married in a state, the District of Columbia, a U.S. territory or a foreign country (collectively referred to as a “state”) whose laws authorize the marriage of two individuals of the same sex and the term “marriage” includes marriages of individuals of the same sex. This holding applies regardless of the state in which the individuals may live. States whose laws authorize same-gender marriages are referred to as the “States of Celebration.”

Currently, there are 13 states (Delaware, Rhode Island, Minnesota, Washington state, California, New York state, Maryland, Maine, Vermont, New Hampshire, Massachusetts, Connecticut and Iowa) and the District of Columbia that recognize same-gender marriages.

However, the term “marriage” does not include registered domestic partners, civil unions or similar relationships not considered a “marriage” under state law, regardless of whether it is a same-gender or opposite-sex relationship.

DB Plan-specific Issues

Here are some general and DB plan-specific issues that will need attention:

- *Qualified Joint and Survivor Annuity* — A same-gender spouse will now be entitled to the “J&S” annuity payable under DB plans, money purchase pension plans and 403(b) plans unless that spouse consents to distribution in another form of payment or to another payee. The IRS FAQs clearly state that, “A qualified plan must treat a same-sex spouse as a spouse for purposes of satisfying the federal tax laws relating to qualified retirement plans.”
- *Qualified pre-retirement survivor annuity* — Many DB plans subsidize the QPSA and therefore an election to receive and consent to waive may be moot. However, where the plan charges for the QPSA and provides the necessary election forms, the same-gender spouse must consent to be waived as the beneficiary, if elected by the participant.

- *Rollovers* — The same-gender spouse now will be able to roll over the distribution payment of a deceased participant to his or her own individual retirement account and not be limited by distribution restrictions.
- *QDROs* — The same-gender spouse will be able to obtain a QDRO to reassign part of a participant’s retirement benefit, usually in the case of a divorce, in states where same-gender marriages are recognized or in community-property states.
- *Hardship distributions for 401(k) and 403(b) plans* — Currently, a plan can allow for a hardship distribution to help pay for a spouse’s funeral, tuition or medical expenses. If a plan provides such a provision, the hardship distribution feature now will be available to the same-gender spouse.
- *Loans* — Same-gender spousal consent becomes required for a loan.
- *Required minimum distributions* — The surviving same-gender spouse will be entitled to the same distribution options currently available to the opposite-sex spouse, in other words, after the death of a participant, the beneficiary can defer payment until the end of the calendar year in which the participant would have been 70½. In addition, the minimum incidental death benefit rules will not apply to same-gender spouses.

Retroactive Application Guidance Coming

Of particular concern to retirement plan sponsors is any retroactive application of the definition of “spouse.” A major issue in DB plans is marital status and beneficiary election. Both affect the retirement benefit that is paid to the participant and, ultimately, to the beneficiary.

In the case of a married participant, spousal consent is obtained when needed, in other words, upon election of the QPSA (if necessary) and at the time the participant applies for retirement benefits. Rev. Rul. 2013-17 implies that all retirements after Sept. 16, 2013, must comply with the new definition of “spouse.”

Four scenarios that may cause problems for plan sponsors come to mind:

- Participants with Sept. 1, 2013, retirement dates whose first payment is made at the end of that month.
- Participants with Oct. 1, 2013, or later retirement dates who have submitted the necessary retirement paperwork.

See Andersen, p. 3

Andersen (continued from p. 2)

- Recently retired participants.
- Single participants who died in situations where a QPSA would have been payable, if married.

Retirement applications should be reviewed for possible revisions; alternatively, any attestations regarding marital status should be expanded to include reference to same-gender marriages. Employers may want to contact counsel to discuss contacting single participants with retirement dates on or before Sept. 1, 2013, where the necessary paperwork already has been submitted to confirm whether there is a same-gender partner with spousal consent rights.

It is unclear whether employers will be required to contact participants who began receiving payments before Sept. 16, 2013. Will plans with a fully subsidized QPSA be required to notify the last known beneficiary of a single participant who died before retirement to

confirm whether there was a same-gender marriage in effect? A practical approach would be for the government to provide a safe harbor for plan sponsors that administered their plans in accordance with federal law regarding domestic partners at the time that benefits commenced.

Rollover distributions will become uniform for opposite-gender spouses and same-gender spouses in states that recognize same-gender marriages. Same-gender participants not married in a state that recognizes same-gender marriages will be subject to the current nonspouse rules.

Calculation of the maximum benefits payable under Code Section 415(b) will be made regardless of the same-gender QJSA's value. This may provide larger benefits from the qualified plan and lower benefits from any nonqualified plan for highly compensated individuals and could affect qualified plan funding requirements. 



Insight you trust.

This article originally appeared in the *Pension Plan Fit-It Handbook*. © 2013 Thompson Publishing, Washington, D.C.

Go to <http://www.thompson.com/public/offerpage.jsp?prod=mend> for more information.