# Complying With IRS Guidance On Same-Sex Marriage

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On August 29 the IRS released Rev. Rul. 2013-17, announcing that all legally married same-sex couples will be treated as married for federal tax purposes, regardless of their state of domicile. This ruling is effective as of September 16, with both immediate and long-term effects on individuals and their employers.

Rev. Rul. 2013-17, 2013-38 IRB 1, announced that effective September 16, all legally married same-sex couples will be treated as married for federal tax purposes, regardless of their state of domicile. The revenue ruling, along with simultaneously released frequently asked questions, is the IRS's first step in implementing the Supreme Court's June 26 decision in *United States v. Windsor*,[1] which invalidated the provision of the 1996 Defense of Marriage Act (DOMA) defining marriage as between one man and one woman. The question before the Court in *Windsor* was whether a same-sex married couple, legally married and residing in New York, was entitled to the same treatment for federal estate tax purposes as opposite-sex married couples. The Court recognized that the decision would have implications beyond Edith Windsor's challenge for an estate tax refund: "The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright, and veterans' benefits."

Although the Court recognized that the decision would affect federal tax law, it offered little guidance to administrative agencies regarding implementation. In finding the law unconstitutional, the Court also did not set any specific date on which the terms "married" and "spouse" would include legally married same-sex couples, or address how the IRS or any other administrative agency should determine whether a person is married — a potentially difficult task considering the stark differences among states in the recognition and treatment of same-sex marriages.

Rev. Rul. 2013-17 and the related FAQs provide at least initial answers to key questions, such as who will be considered legally married. However, they raise additional questions for employers, including those concerning possible retroactive application of the holding in *Windsor*. The IRS has indicated it will issue additional guidance, and other agencies may issue guidance on federal programs affected by the tax code and other laws governing the treatment of employees and the benefits available to them. In the meantime, employers can take several steps to comply with existing guidance and provide reasonable direction to their employees whose benefits are affected by *Windsor*.

### A. Who Will Be Considered Legally Married?

Rev. Rul. 2013-17 is based on a 1958 revenue ruling on the determination of marital status for federal income tax purposes of individuals who have entered into a common law marriage in a state recognizing those marriages. In Rev. Rul. 2013-17, the IRS concludes that it will treat as married all same-sex couples legally married in a jurisdiction that authorizes same-sex marriage, even if the couple is domiciled in a jurisdiction that does not legally recognize same-sex marriage. The ruling will allow individuals to move between states without fear that their marital status for federal tax purposes could change at a state's border. The revenue ruling notes that the IRS position ensures

[1]133 S. Ct. 2884 (2013).

consistency with the established precedent for common law marriage and will avoid complexities in the administration of tax policy affecting individuals and employee benefits.

Couples who have entered into domestic partnerships, civil unions, or other state-recognized relationships but are not legally married will not be considered married for federal tax purposes.

### B. Retroactivity

Rev. Rul. 2013-17 became generally effective September 16. Married same-sex couples generally must now file any original federal tax returns as married filing jointly or married filing separately. Individuals who were in same-sex marriages in prior tax years may, but are not required to, file amended returns electing to be treated as married for federal tax purposes for one or more tax years still open under the statute of limitations. For most individuals, those are 2010, 2011, and 2012. The IRS has indicated it will create a streamlined procedure for employers seeking a refund of payroll taxes previously paid on health insurance and fringe benefits provided to same-sex spouses.

While awaiting further guidance, employers may wish to consider whether and how to communicate the implications of the IRS position to employees who may be considering filing amended returns. It is important to note that filing an amended return likely will require more changes than simply adding box 1 of each spouse's Form W-2. The amounts in box 1 may need to be adjusted for imputed income and eligibility for pretax payment for health insurance provided to a same-sex spouse. Employers may want to consider whether to issue corrected Forms W-2 for affected employees or to adopt some alternative method of communicating any adjustments in the amount of wages, and whether to provide that information preemptively or only upon request.

### C. Impact of the Revenue Ruling — Generally

The FAQs released with the revenue ruling provide some helpful specifics and examples on several topics, including filing status for federal tax returns; claiming dependents; taking deductions; qualifying for the adoption credit; the tax treatment of benefits provided to same-sex spouses, including refunds for prior years; and the application of the revenue ruling to qualified retirement plans.

### D. Impact on Payroll and Employee Benefits

As of September 16, employee benefit plans must treat same-sex spouses in the same manner as opposite-sex spouses. While the IRS intends to provide additional guidance regarding possible retroactive treatment of legally married same-sex couples under qualified retirement plans, other tax-favored retirement arrangements, and cafeteria plans, there are several adjustments that employers may need to make quickly, as well as several ongoing administrative requirements. Employers should be coordinating those changes with their plans' vendors, brokers, and record keepers to ensure consistent administration and communication with plan participants.

**1. Determining who is married.** One of the first decisions employers must make is how they will gather the information necessary to determine which employees are considered married under Rev. Rul. 2013-17. Employees with a same-sex spouse who have been treated as single under federal law may have been legally married in a jurisdiction that authorized that marriage. Employers that have tracked and treated legal same-sex marriages in the same manner as domestic partnerships or civil unions will need to distinguish between marriages recognized by the IRS and relationships recognized only by the state. For any employee whose marital status is affected by Rev. Rul. 2013-17, the employer will need an updated Form W-4.

Employers must think carefully about how they communicate administrative changes to employees and may decide to send the information to all employees, or at least a sufficiently inclusive group of those potentially affected. Employers should follow the same standards for same-sex married couples that they do for opposite-sex married couples. If an employer has not had a practice of requiring employees to provide a marriage certificate to be treated as married under the employer's plans, it should not require that a marriage certificate be provided by same-sex spouses.

**2. Updating systems and documents.** Employers must also update their systems to reflect the new regime under Rev. Rul. 2013-17. Because federal, state, and local laws governing the treatment of same-sex marriages are changing rapidly, employers must keep track of who is considered married and for what purposes. Employees in domestic partnerships or civil unions may be treated as married for state law purposes but not federal tax purposes, while employees who have been legally married but are residing in a state that does not recognize same-sex marriage may be treated as married for federal but not state tax purposes. Pending further administrative guidance, it is unclear in some situations whether employees who are married for federal tax purposes are also married for purposes of other federal laws, such as the Family and Medical Leave Act (FMLA). The Labor Department has indicated that, under current guidance, when determining whether an employee is eligible to take leave under FMLA, the marriage

laws of the state of residency will dictate whether an individual is a spouse.

Employers may also need to update plan documents. For qualified plans, that may include the plan document itself if it defines the term ''spouse'' to exclude same-sex spouses. For all plans, the employer may be required to update the summary plan description and other explanatory forms, election forms, and spousal consent forms.

**3. Spousal consent.** Spousal consent may pose one of the biggest challenges to employers in the short term. Many employee benefit plans, including qualified retirement plans, require spousal consent for some elections, such as death benefits, distribution benefits, and loans. Although the guidance does not require that employers update spousal consent for individuals who were not treated as married before September 16, if a participant dies without obtaining spousal consent a non-spouse designated beneficiary will not receive benefits under the plan. Employers may wish to obtain updated spousal consents from same-sex married couples to avoid legal challenges to the distribution of benefits and, in light of that risk, maintain good relations with employees.

**4. Payroll.** Effective September 16, employers will no longer be required to impute income on the fair market value of healthcare benefits provided to an employee's same-sex spouse. Because affected employees may seek refunds of income taxes that were overwithheld, employers may be asked to assist employees with amended returns and may be filing refund claims of their own. The guidance provides that employees who have paid for medical coverage for their same-sex spouses in prior years on an after-tax basis — whether or not through a cafeteria plan — are permitted to file amended returns for any open tax year to recover the income tax paid on those premiums. The employer in that scenario may claim a refund for Social Security and Medicare taxes paid on those premiums, but not for any overwithholding of income taxes. The FAQs explain that further guidance will provide special administrative procedures for employers wishing to file claims for refunds or make adjustments for excess FICA and FUTA taxes paid on same-sex spouse benefits. Self-employed individuals who employ their same-sex spouses may be eligible for a refund of Social Security, Medicare, and FUTA taxes for all open years.

**5. Special enrollment periods.** Rev. Rul. 2013-17 and the related FAQs do not address whether employers should open special enrollment periods in connection with the changes required as of September 16 or whether employees whose elections under a cafeteria plan were limited by DOMA should be permitted to change those elections. Employers should look to their plan documents, administrative policies, and reg. section 1.125-4 to decide how to handle that question or whether to conduct any special enrollment.

**6. Long-term changes.** Changes made for participants in ongoing employer-sponsored benefit plans will need to be applied for new employees and any new or modified employee benefit plans. Given the timing of the revenue ruling, employers may need to make changes now to their open enrollment materials to either solicit from employees or provide employees with the relevant information. New hire materials may also need to be revised to solicit accurate information regarding marital status. Some employers may be evaluating whether to continue to offer coverage to domestic partners. Employers that initially offered domestic partner benefits because marriage was not an option for employees with a same-sex partner, and continued to offer them because of the disparate federal tax treatment afforded to legally married same- and opposite-sex couples, could conclude that there is no basis for continuing to offer benefits to same-sex domestic partners — especially those who reside in states that recognize same-sex marriage — if benefits are not offered to opposite-sex domestic partners.

### E. Conclusion

With the legal treatment of same-sex marriage changing quickly at the local, state, and federal levels, the responsibility falls to employers to be aware of the current laws and to effectively communicate those laws and their practical implications to their employees. While Rev. Rul. 2013-17 provides clear guidance on some key points, such as the interpretation of plan documents as of September 16, it leaves employers with a variety of decisions to make, including whether and how to change plan design, how to administer those changes internally, and how best to communicate those changes to employees.