



August 30, 2013

IRS Issues Guidance on Defense of Marriage Act (DOMA)

By Jennifer Lunski, Esq.

The IRS issued guidance on August 29, 2013 relating to the US Supreme Court's Defense of Marriage Act (DOMA) decision that affects the rights of same-sex married couples. The "state of residency" rule is gone. The federal government now officially recognizes same-sex marriage regardless of state of residence. For example, if a same-sex couple was legally married in California (which recognizes same-sex marriage) and moved to Texas (which does not recognize same-sex marriage), they would be viewed as married for federal tax purposes.

What This Means to Employers

- Employers do not have any obligation to take action on prior years. The priority is to be accurate in 2013. No federal imputed income should be applied to the later of January 1, 2013 or the date of the same-sex marriage.
- Employers will want to identify same-sex legally married couples and change imputed income accordingly. Payroll and HR should work together to change the deductions of these employees so that no federal imputed income applies (change required from post tax to pre tax).
- Employees who were married in states that recognize same-sex marriages can get the same benefit rights as opposite-sex married individuals.
- Initial guidance does not appear to indicate that this tax treatment clarification is a qualifying event for spouses to enroll in the plan in advance of the standard open enrollment period.
- There is no change to the previous IRS guidance in terms of common law marriages, domestic partners and civil unions. No federal imputed income is applicable for common law spouses. Imputed income is applicable for domestic partners and civil unions.
- Plan documents, employee handbooks and any other documents that define marriage need to be examined and revised for accuracy.
- While more governmental guidance is expected on the details, changes will be necessary around policies related to FMLA leave, COBRA, medical plan benefit eligibility, HSAs and FSAs (including healthcare and dependent care).
- Employers may choose to claim a refund of, or make an adjustment for, any excess social security taxes and Medicare taxes paid on same-sex spouse



benefits in prior years. A special administrative procedure for employers to do so will be provided in forthcoming guidance to be issued by the IRS.

What This Mean to Your Employees

Same-sex legally married couples who purchased health insurance coverage from their employers on a post-tax basis may treat the amounts paid for that coverage as pre tax and exclude it from income in the future. Employers may also want to inform employees about the potential opportunity to file amended returns and collect tax refund(s). This is not a government-required employer notice but may be appreciated by employees.

For information on filing an amended return, go to Tax Topic 308, *Amended Returns* at <http://www.irs.gov/taxtopics/tc308.html>. Refund claims can still be filed for tax years 2010, 2011, and 2012. Some taxpayers may have special circumstances (such as signing an agreement with the IRS to keep the statute of limitations open) that permit them to file refund claims for tax years 2009 and earlier. It is important for employees to realize that filing for the refund requires a change in their marital status that may or may not have an overall positive benefit for them. They should consult their tax advisor.

How Woodruff-Sawyer Will Assist You

- A detailed legislative update on this topic will be released in early September.
- Our compliance team attorneys are available to schedule a call with you to review the impact on your organization.
- Imputed income spreadsheets will be provided to you to help with calculations.
- Plan documents we previously provided to you will be updated based on this new guidance.
- Sample communications will be provided to send to your employees about how this will impact them (currently in development and will be circulated to you in the near future).
- A list of states that recognize same sex marriages, common law marriage, civil unions and domestic partners will be provided (currently in development and will be circulated to you in the near future).
- Our compliance team will be recording a podcast on this topic for you to listen to at your leisure.



About Jennifer

Jennifer is Vice President, Compliance Officer in the Benefits practice at Woodruff-Sawyer & Co. She consults directly with our Employee Benefits clients on all matters of compliance and leads both internal and external trainings. She has also conducted numerous trainings on ERISA, COBRA and HIPAA to Department of Labor employees, the Department of Justice and to employers that sponsor ERISA-covered plans. A published expert on ERISA, COBRA and HIPAA rules and regulations, Jennifer has investigated a broad spectrum of company employee benefit plans and has extensive experience negotiating with industry fiduciaries and service providers.

Before joining Woodruff-Sawyer & Co, Jennifer was a Senior Investigator at the US Department of Labor (DOL), Employee Benefits Security Administration in San Francisco. Jennifer can be reached at 415.402.6577 or jlunski@wsandco.com.

The information provided in this article should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only and you are urged to consult an attorney concerning your own situation and any specific legal questions you may have.

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