IRS Issues Guidance on Same-Sex Marriages

Following the United States Supreme Court's decision in *U.S. v. Windsor,* the Internal Revenue Service ("IRS") has issued Revenue Ruling 2013-17, which includes significant guidance on the treatment of same-sex couples and spouses under the nation's tax laws, including the employee benefits provisions of the Internal Revenue Code.

Background

In *U.S. v. Windsor,* the U.S. Supreme Court held that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional. Our newsletter discussing the *Windsor* case and its impact on employee benefits may be accessed here. As a result, federal law will recognize valid same-sex marriages.

The Internal Revenue Code includes hundreds of provisions that refer to a taxpayer's marital status or spouse. For employee benefits purposes, these provisions give an employee's spouse a tax benefit, an entitlement (usually in the context of qualified retirement plans) or an obligation, such as under a QDRO.

The IRS's Position

Revenue Ruling 2013-17 includes a lengthy discussion of the IRS's position on recognizing marriages under state law and concludes as follows:

1. For federal tax purposes, a same-sex couple will be recognized as married if the couple was validly married **in a state that authorizes same-sex marriages.** Neither the state of the couple's residence nor the state(s) in which either spouse works is relevant.
2. For federal tax purposes, the term "marriage" does not include domestic partnerships, civil unions, or other formal relationships recognized under state law that are not denominated as "marriage" under state law.

Effect on Employers

The IRS's position will have the following general effects on employee benefit plans:

1. Beginning immediately, for plan administrative purposes, with respect to Federal mandates such as qualified plan death benefits, employers must treat same-sex spouses the same as they would treat opposite-sex partners. For example, if a spousal waiver is required in order for an employee to designate an alternate death beneficiary, the waiver should be secured from a same-sex spouse as well as an opposite-sex spouse.

2. Employers generally do not have to treat same-sex spouses the same as opposite-sex spouses in the absence of a mandate. For example, an employer-provided medical plan could cover opposite-sex spouses but not same-sex spouses. Although opinions differ on this point, this should be the case even in states that have laws that prohibit workplace discrimination based on sexual orientation, since such laws would be pre-empted as they relate to ERISA plans.
3. Marriage is based on the state law of the state where the marriage is validly entered into.
4. Employers should make employees aware that valid same-sex marriages are recognized for purposes of the employer's employee benefit plans and explain to employees the benefits that are available to spouses. Such communication should also explain that domestic partner, etc., relationships are not marriages and the partners in such arrangements are not spouses.
5. Employers that have domestic partner policies and that have been providing employer-provided coverage for domestic partners should review the evidence that was submitted to support domestic partner status. For those states that currently recognize same-sex marriages, such evidence could well include a marriage certificate issued by a state that recognizes same-sex marriages. In such a case, the domestic partner is now considered a spouse and should be treated accordingly.
6. Proof of marriage that may be required by employers should be the same for all marriages. In general, we believe that requiring proof of marriage is not practical unless employees are required to update that proof periodically. Note, however, that anecdotal evidence is that up to 20% of employees falsely claim individuals to be their spouses and dependents and a periodic audit may save the employer significant funds.
7. Benefits that are provided on a tax-free basis to an employee's spouse must now be provided on a tax-free basis to both same-sex and opposite-sex spouses. It is no longer necessary for an employer to impute income for employer-provided coverage for same-sex spouses. It is, however, necessary to continue to impute income for employer-provided coverage for domestic partners, etc.

Retroactive Effect

The Revenue Ruling has several retroactive consequences:

1. Individuals may file amended tax returns for open tax years to claim refunds for tax-free benefits that were treated as taxable.
2. Employers may file claims for refunds of employment taxes for employer provided tax-free health coverage benefits or fringe benefits that were treated as taxable.
3. There is not yet a requirement for employers to issue amended Forms W-2 or to amend plans. The IRS has promised more guidance on the application of the *Windsor* case to employee benefit plans, including guidance on necessary plan amendments.

For additional information, please contact:

Barry L. Klein
215.569.5403 • Klein-B@BlankRome.com