

legislative update

Windsor Decision

On June 26, 2013, the Windsor decision declared Section 3 of DOMA- Defense of Marriage Act- which defined marriage as being a “legal union between one man and one woman as husband and wife” and defined a spouse as “a person of the opposite sex who is a husband and wife” as unconstitutional. In response to this decision, the IRS has continued to release additional guidance for ensuring equal treatment for same-sex spouses. On December 17, 2013, [the IRS released its most recent regulations](#) in regards to how it further affects cafeteria plans, Flexible Spending Account (FSA) reimbursements, and contribution limits for Health Savings Accounts (HSA) and Dependent Care Assistance Programs (DCAP).

Cafeteria Plans: Mid-Year Election Changes

Individuals who were lawfully married to a same-sex spouse as of 6/26/2013 or who has become lawfully married to a same-sex spouse since, can make a mid-year election change due to a change in legal marital status. Any election change must still satisfy the regulations that generally concern election changes. These changes should be made effective no later than the date that coverage under the plan would be added under the cafeteria plan’s usual procedures for change in status elections or within a reasonable time period after December 16, 2013. Employers are not required to make coverage retroactive.

If elections are being taken out post-tax for a same-sex spouse, employers should begin pre-tax salary reductions upon notice that the participant is married to the individual receiving the post-tax benefit no later than the date that a change in legal marital status would normally be required or within a responsible time frame after December 16, 2013. For participants who have been legally married to their same-sex spouse and have paid for their spouse’s benefits on a post-tax basis, they may seek a refund of federal income or federal employment taxes on any amounts representing the after-tax costs associated with spousal health coverage for any years under §6511 (generally three years after the date of filing a tax return).

FSA Reimbursements

A cafeteria plan may allow expenses incurred by an FSA participant’s same-sex spouse or dependent of a same-sex spouse to be reimbursed starting no earlier than the beginning of the plan year that includes the date of the Windsor decision (6/26/2013) or the date of the marriage. This includes health, dependent care, and adoption assistance flexible spending accounts. For example, if an employer’s plan

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year started 1/1/2013 and a participant who enrolled at that time had a same sex spouse, their spouse's expenses could be reimbursed for any claims incurred since 1/1/2013.

Contribution Limits for HSAs and Dependent Care Assistance Programs

Same-sex married couples are subject to the family annual limit on HSA accounts. This means that if either spouse elected family coverage under an HDHP and opened an HSA account, their limit for the 2013 taxable year is \$6,450. If the contribution limit for two same-sex spouses exceeds the HSA contribution limit for a married couple, contributions must either be reduced for one or both spouses to avoid exceeding the limit or the excess amount may be distributed from the HSA of one or both spouses no later than the tax return due date for the spouses. Any excess contributions that remain undistributed as of the date for filing the tax return will be subject to excise taxes.

Same-sex spouses are also subject to the annual limits for dependent care assistant programs. If each spouse elected a dependent care FSA for the family maximum of \$5,000, they need to reduce their contributions for the remaining portion of the tax year. If the combined contributions to the dependent care FSAs exceed the annual household limit, the excess contributions will be includable in the spouses' gross income.

So long as a cafeteria plan is already written to allow for election changes due to a change in legal marital status, no amendments are generally required to permit a change in election with regard to the Windsor decision. If the employer chooses to permit election changes that were not previously provided under their Plan, they must amend their documents to permit such changes on or before the last day of the first plan year beginning on or after December 16, 2013. An applicable amendment of this kind may be effective retroactively to the beginning of the plan year which includes December 16, 2013.