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Just Because Your Plan Does Not Say DOMA May Not Mean No Amendment Should be Made

05.12.14

It has been fairly clear that if your retirement referenced the definition of spouse to be defined by section 3 of the Defense of Marriage Act, that the U.S. Supreme Court's decision in *Windsor v. U.S.* required you to amend your plan to change your definition. Many plans do not include a definition of spouse at all, but that does not mean that those plans should not be concerned with the *Windsor* decision because many of those plans include choice of law provisions for interpretation and construction of the plan and there are still many state laws and constitutions that define marriage in a manner that is not consistent with *Windsor* and not consistent with the current Internal Revenue Service ("Service") guidance on the requirements for plan qualification after *Windsor.*

The Service recently provided additional insight on when plans must be updated to continue to be qualified considering the *Windsor* decision. Generally, the deadline for amending your plan is by December 31, 2014, with certain exceptions for certain governmental plans, if your retirement plan uses a definition of spouse that references DOMA section 3 or if it does not include recognition of same sex marriages that were celebrated in a state recognizing the marriage. Those are the cases where it is clear and obvious that a plan amendment is required. However, if a plan does not include a definition of a spouse, the Service did not state that such plan required amendment, but those plans still may need to be amended if they include a provision that would require consideration of a state law for the definition of a spouse by including a governing law provision drafted in a manner that would require use of the state law to define who is a spouse for determining rights under the plan and the state law used does not recognize spouses regardless of their gender. For example, your plan does not define who is a spouse, but it states that the construction and interpretation of the plan shall be governed by the law of the state of Texas and Texas law currently prohibits the recognition of same sex marriages. Whether your plan may require an amendment depends on the exact language of your plan and a careful review of the plan's various provisions to consider both what it says and what it does not say and how it defines how it should be construed.

So plan sponsors should review not only your plan's definition section, but also consider other plan provisions that may bring in state laws that do not conform to the federal tax law requirements for the plan to remain qualified when analyzing whether to amend the plan.

The Service's recent guidance also clarified the many aspects of the tax law that consider spouses with respect to qualified retirement plans and these far exceed the standard ones that come to mind with respect to beneficiaries upon death and the qualified joint and survivor annuities, qualified pre-retirement survivor annuities, etc. The plan amendment must be carefully drafted considering the recent guidance and effective dates so that there are not unintended consequences under the tax law governing the retirement plan.

Keeping Track of Your Retirement Plan's Participants

In the past many plans had availed themselves of both the Service's and the Social Security Administration's ("SSA") letter forwarding programs to contact lost or missing participants and beneficiaries. The Service's program previously ended and now effective as of May 16, 2014, the SSA's letter forwarding program is ending. This means employers need to make more fervent efforts to keep after participants and beneficiaries for updated addresses because the cost of locating these missing parties is now going to be higher because the only options will be the internet services and the private search firms. This is something to consider as you work with your plan's vendors in contracting and in preparing for the next plan year.

Rollover Approvals Further Relaxed

In a recent Revenue Ruling, the Service accepted a plan sponsor's acceptance of a rollover check issued for a plan participant from a prior employer's plan when the plan sponsor verified the plan was qualified by going to the Department of Labor's website and checking the most recently filed Form 5500 and verifying that it did not include a code that indicated the plan was not intended to be a qualified plan under the tax laws. This provides a simpler way for plan sponsors to verify that the plan from which it receives a rollover is qualified so it can accept the rollover. The same rule would apply if the funds had been transferred directly from the prior employer's plan instead via a check payable to the employer's plan for the benefit of the employee. This ruling is effective when issued. There was also a modified rule for rollovers from an individual retirement account maintained for the benefit of Employee A.

New IRS Temporary Pilot Program for Penalty Relief for Late Filed Forms 5500 in Effect for One Year for Non-ERISA Plans

This new program permits plans that are not subject to ERISA (i.e., solo-401(k) plans, plans covering only the self-employed individual) and certain foreign plans not subject to ERISA, but subject to the Form 5500 filing requirement to correct failures to file the applicable version of the Form 5500 series without paying the $25 per day up to $15,000 per return penalty and instead paying a $1,000 per failure penalty. This is not for failures to file by employers subject to ERISA, those employers still need to use the U.S. Department of Labor's Delinquent Filer Voluntary Compliance Program or DFVC and IRS Notice 2014-35.

Tax Penalty Relief Extension for DFVC Program Users That are ERISA Plans

If you plan to use the DFVC Program to correct a missed Form 5500 or related form filing, the Service issued updated requirements for relief from the tax penalties on failure to file. In a separate ruling, the Service stated it will continue to not impose penalties for failure to file the Form 5500, 5500-SF or 8955-SSA or the required actuarial reports on plan administrators/employers who are eligible for and who satisfy the requirements of the DFVC Program with respect to the delinquent form if the plan administrator/employer files separately with the Service also the Form 8955-SSA for the year in paper format (even if completed on line) within 30 calendar days of filing the DFVC filing electronically on EFAST 2. The Form 8955-SSA must be marked per the requirements of the IRS Notice to qualify for the relief from the penalties.

Retirement Plan Payments of Health Insurance Premiums Are Generally Taxable- Except for 401(h) Account Payments

The Service finished its recent guidance with the final regulations indicating that payments from a qualified defined contribution retirement plan to cover the cost of an employee's or retiree's health insurance are taxable to the employee, but that payments of health insurance premiums from a 401(h) account which is part of a defined benefit plan are not taxable to the retiree . These regulations apply to tax years beginning on or after January 1, 2015, but taxpayers may elect to apply these to earlier tax years. This is not guidance that changes any of the prior guidance from 2005 and earlier years on the viability of "dual purpose plans" or profit sharing plans with a medical benefits account that were previously indicated to be problematic for tax qualification.

401(h) accounts which are part of a defined benefit plan are treated differently for health insurance payments. The final regulations clarify that distributions from 401(h) accounts to pay health insurance premiums for retirees continue to be excluded from the retirees' income provided the health benefits meet the tax code's nondiscrimination requirements. The regulation also expands the exclusion for coverage of premiums for eligible dependents to conform to health reform's requirements for group health plans to provide coverage through age 26. This change is helpful because many retiree plans, even if exempt from health reform as a retiree only plan, conformed the age of their dependent coverage to match that of the plans covering active employees to avoid dropping coverage of a retiring employee's dependents from the retiree plan just because the employee retired.

There is a special rule for use of plan funds to purchase disability insurance, when certain requirements are satisfied, which permits exclusion of these amounts from the employee's income. If your plan wants to use plan funds to purchase disability insurance, the requirements should be carefully reviewed because the disability benefits still must be "incidental" to the retirement benefits. There is also a special rule for payment of insurance premiums for certain retired public safety officers which permits exclusion of such payments from income of the retired public safety officer for a governmental plan. Distributions from unallocated contributions to defined contribution plans to pay employee health insurance costs will be treated as if the contributions were allocated to the employees' accounts in the plan and then distributed and taxed to the employees. This same rule applies to payment of long term care insurance premiums from a retirement plan which is a defined contribution plan (e.g., a 401(k) plan, money purchase pension plan or profit sharing plan or stock bonus plan or ESOP).

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