# Year-End Health and Retirement Plan Guidance Grab Bag

## 12.23.13

**Same-Sex Marriage and Other Relationship Recognition**
**Internal Revenue Service (IRS) Guidance**
*FICA and Medicare Tax Refunds*
Following Hawaii's enactment of legislation recognizing same-sex marriage as of and after December 2, 2013 a number of additional pieces of guidance were also issued. Internal Revenue Service's Frequently Asked Questions regarding individuals who are same-sex married were expanded by adding questions and answers 21 through 23 dealing with an individual's ability to claim a refund of Social Security and Medicare taxes even if the employer was not filing for a refund of such taxes. For more information see the IRS website http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples
*Cafeteria Plan or Flexible Benefit Plans*
Election Changes
The Internal Revenue Service provided guidance regarding cafeteria plan elections for health coverage and dependent care and health flexible spending accounts and health savings accounts. An individual who was lawfully married to a same-sex spouse as of June 26, 2013 could make a mid-year change in their election under a cafeteria plan as a result of a change in their legal marital status. This would allow them to change their election to cover their same-sex spouse as a spouse. The election would have to be filed during the cafeteria plan year that includes either June 26, 2013 or December 16, 2013 or during 2013 for a calendar year cafeteria plan. The cafeteria plan may permit an individual who got married to a same-sex spouse after June 26, 2013 to make a mid-year change due to a change in marital status. The guidance also clarifies that the mere change in the tax treatment of the health care coverage for the same-sex spouse is not a significant change in the cost of coverage permitting a change. A change in an election due to recognition of the same-sex spouse as a result of the *Windsor* decision becomes effective as of the date that any other change in coverage would become effective for a benefit that is offered through the cafeteria plan. Election changes made between June 26, 2013 and December 16, 2013, as long as the change in coverage election is effective no later than the date that the coverage under the plan would have been added under the cafeteria plan's usual rules and procedures for a change of status election or a reasonable period of time after December 16, 2013 will be treated as a compliant change in coverage.

What Employers Must Consider to be Notice of Marital Status Change to Trigger Pre-Tax Treatment of Same-Sex Spouse's Health Coverage
If an employer receives notice before the end of the cafeteria plan year that includes December 16, 2013, or by December 31, 2013 for calendar year cafeteria plans that an employee is married to a same-sex spouse, the employer's cafeteria plan must begin treating the amount that the employee is paying for the spousal coverage as a pre-tax salary reduction under the plan no later than the later of the date that the change in their legal marital status would be required to reflect for income tax withholding purposes under Section 3402, or within a reasonable period of time after December 16, 2013. The key here is what the IRS considers to be notice to the employer of the employee's marital status. The guidance provides the notice may be either a notice to the employer to change the spousal coverage through salary reduction election change under the cafeteria plan, or notice to the employer can be merely the employee filing a revised Form W-4 representing that the participant is married for purposes of payroll tax withholding elections. Employers may be surprised to find that an employee merely filing a revised Form W-4 representing that the participant is married is considered notice of a change in marital status and the related change in the payroll deductions for the health care coverage for the same-sex spouse. The Form W-4 does not require the employee to indicate there is any change to his/her previously filed status, it only asks for the current status for withholding so on its face there is no notice that there has been a change in marital status and that can only be determined by comparing it the last filed Form W-4, assuming it can be easily located. Coordination between payroll departments and their human resources departments is necessary to

be sure that appropriate election forms to change the benefit cost deductions are completed and the changes implemented by the human resources department when a revised Form W-4 may be filed with the payroll department and this is likely to be a new coordination process that will need to be set up. Capturing this type of a notice to the employer and considering how the employer might use this information to enhance and increase its compliance procedures and records for other benefits, plans or executive compensation impacted by a change in marital status or plan beneficiary may help other plans, benefits or compensation arrangements with compliance and to avoid interpleader actions among competing beneficiaries, spouses or claimants.

Flexible Spending Accounts, Dependent Care FSA Limits and HSA Limits

A Health Flexible Spending Account may permit reimbursement of a participant's same-sex spouse or the same-sex spouse's dependent that were incurred during a period beginning on a date that is no earlier than the cafeteria plan year end includes June 26, 2013 or the date of the marriage if it is later. The contribution limits for both Health Savings Accounts and Dependent Care Assistance Programs apply to a married couple. The same-sex married couple will be subject to the joint deduction limit for contributions to health savings accounts for the taxable year that includes the 2013 taxable year and any excess amount in excess of that limit must be refunded by the filing due date of the individual's tax return. Dependent Care Flexible Spending Account is also subject to the $5,000 limit for the married couple. Thus any amounts in excess of that by each of the parties must be included in the individual's income for the plan year. Employers should consider reminding employees of the impact of these limits on all married couples when reminding employees to update their marital status and beneficiary designations on file with the employer. It may be too late in 2013 to adjust payroll deductions for some employees which means limit violations will need to be addressed in a different manner.

Cafeteria Plan Amendments

Any amendment regarding a change in election upon the change in marital status is not required to be in fact before the change in the election is permitted. If a cafeteria plan chooses to permit the election changes that were not previously provided for in their plan document, the cafeteria plan must be amended to permit such election changes on or before the last day of the first plan year beginning on or after December 16, 2013, or for calendar year cafeteria plans by the end of 2014 and such amendment has to be retroactively effective to the first plan year that includes December 16, 2013. The guidance did not address how to handle special enrollments under the Health Insurance Portability and Accountability Act which are required for addition of a dependent due to marriage. The Office of Personnel Management had previously permitted a 60-day special enrollment period in the Federal Employee Health Benefit Plan following June 26, 2013. However, the IRS guidance has not yet addressed special enrollment periods under Code section 9801 for employer sponsored health plans.

**PBGC Announcement**

The Pension Benefit Guaranty Corporation provided its first piece of guidance on how marriage would be defined via an email dated December 17, 2013. The PBGC merely indicated that it will change its policy to recognize same-sex marriage in its administration of benefits of the distress termination plans which they administer. The email referred individuals to the benefits section under Worker's and Retiree's page for additional information, which provided no information as to how the PBGC will define a spouse or which marriages would be recognized. Additional guidance will be needed for those plans administered by the PBGC.

**Ninth Circuit and a New Twist**

Some state statutes require treatment of registered domestic partners or civil unions to be treated as if the "the same rights and legal status as married persons" applied to the parties. The Ninth Circuit recently applied Oregon's similar statutory language to require the Oregon federal district court to treat a registered domestic partner as a spouse for health coverage costs using the Constitution's equal protection clause since this was a governmental employer. While this only applies to federal or state employers at this time, it is an area worth watching because the equal protection argument is what drove the changes in Windsor and some of the other subsequent decisions. The changes post-Windsor are just

beginning. (See *In the matter of Margaret Fonberg* (9th Cir. Nov. 25, 2013).

**Health Reform**

The Department of Health and Human Services has extended the time period for which individuals may enroll under the insurance marketplaces from the deadline of December 15, 2013 to December 23, 2013 for coverage effective January 1, 2014. This may result in individual employees seeking to change prior elections made during open enrollment if they procure coverage in the marketplace. Employers have not obligation to advise the employees of the extended period during which the marketplace is available for 2014 coverage, but may want to remind the employees their open enrollment elections are in effect for all of 2014, unless there is a qualifying status change event permitting an election change.

Special guidance was issued for small employers that could not enroll in a qualified health plan under the small business health options program exchange because their business was located in certain counties where there was no exchange available through 2014 calendar year. This was limited to certain counties in Washington and Wisconsin.

**The Supreme Court Decides Some Statutes of Limitation in Plans are Permissible**

The United States Supreme Court accepted a plan term provided statute of limitation on bringing claims which extended one year beyond the time period in which it took for the final administrative denial of the claim by the plan. In the case before the Court the individual had been engaged in the plan's internal review process for an extended period and after the final determination denying her disability benefits was issued, she then waited a year after the final decision and three years after her initial claim to file suit in federal court. The Court noted that the ERISA regulations don't require tolling during the internal review process, except if there is a voluntary internal appeal permitted under the regulations. The Court ultimately recognized the plan's limitations period was enforceable because the plan limitation period was provided in the plan and it did not contravene any other law.

Following this decision, plan sponsors should review their plans for whether the plans have a limitation period on filing of claims and when those limitation periods begin to run and how that coincides with the plan's internal claim and review procedures. It is important to not only have a period of limitations but to specify what causes such limitation period to begin to run and to be sure the plan's period does not conflict with any other applicable federal law that is not supplemented by ERISA. For retirement plans, the starting point other than a final benefit claim denial may prove a trickier question because such participants do not claim their benefit immediately when the benefit first becomes payable under the plan's terms.

**Retirement Plan Guidance**

Two pieces of guidance were recently issued. The first piece of guidance only applies to defined benefit plans that continue to permit the accrual of benefits for existing participants, but freeze who is eligible under the plan. Many defined benefit plans have adopted such soft freezes with respect to eligibility as a design strategy. Frequently the closing of the defined benefit plan to new participants is accompanied by a separate amendment to a defined contribution plan which then receives the benefit accruals for the employees who are not eligible for the defined benefit plan accruals. The guidance permits employers with a defined benefit plan frozen as to eligibility and which provided benefit accruals for new participants under the defined contribution plan to demonstrate that the aggregated plans comply with the non-discrimination requirements on the basis of providing equivalent benefits even if the aggregated plans don't satisfy the current conditions for testing on that basis. This provides needed relief for many defined benefit plans that are frozen as to eligibility, but not yet frozen as to benefit accruals for all participants.

The second piece of guidance addresses in-plan Roth conversions of pre-tax deferrals into Roth calculations. If your plan has opted for such in-plan conversions or if this is a feature you are considering adding to your 401(k) plan, then this guidance should be considered.

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