September 5, 2013

IRS Issues DOMA Guidance: Action Steps for Employers

On August 29, the Internal Revenue Service (IRS) issued Revenue Ruling 2013-17 providing guidance on the effect of the U.S. Supreme Court's decision in *United States v. Windsor*. In *Windsor*, the Supreme Court struck down the portion of the Defense of Marriage Act (DOMA) defining "marriage" as exclusively the union between a man and a woman and "spouse" as a person who is married to someone of the opposite sex. (See our prior Client Alert, DOMA Unconstitutional: Impact on Employee Benefits Plans.)

What Does Revenue Ruling 2013-17 Provide?

The Revenue Ruling provides much-anticipated answers to the question of how the *Windsor* decision affects tax administration. For federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" now include an individual married to a person of the same sex, and the term "marriage" now includes a marriage between individuals of the same sex, as long as the individuals were married under any domestic or foreign law that authorized the marriage of two individuals of the same sex, even if the couple now lives in a state that does not recognize same-sex marriages. For example, a same-sex couple who married in New York but now resides in New Jersey will be considered married for federal tax purposes. However, the term "same-sex couple" does not include individuals who have entered into a registered domestic partnership, civil union, or other similar form of relationship not denominated as a marriage under domestic or foreign law.

Action Steps for Sponsors of Employee Benefits Plans

The Revenue Ruling has broad, immediate implications for employers sponsoring group medical and qualified retirement plans --?e.g., Section 401(k) plans and pension plans.

With respect to *medical plans*, employers should immediately coordinate with payroll to do the following:

- Determine whether any federal tax withholdings have been made in 2013 with respect to imputed income of employees who cover their same-sex spouses. *If so, employers should cease such withholdings and reverse the withholdings for all of 2013*.
- Convert any after-tax premium payment withholdings from employees for their same-sex spouses' medical coverage to pretax withholdings, provided such employees are already making pretax premium payments for 2013 pursuant to a cafeteria plan.

In addition, for all prior years for which the statute of limitations is still open (generally, the later of three years from the date the return was filed or two years from the date the tax was paid), employers may claim refunds for any FICA taxes paid by the employer with respect to imputed income reported for employees with same-sex spouse coverage. *The IRS plans to issue guidance in the future regarding the special administrative procedure employers must follow in order to file such claims for refund*.

Similar refund opportunities will apply to impacted employees. For example, employees may file amended Forms 1040 for years in which the statute of limitations is still open, seeking a refund of taxes on the income imputed to the employees for

the medical coverage provided to their same-sex spouses.

With respect to *retirement plans*, effective September 16, 2013, same-sex spouses must be treated as spouses for all purposes including, but not limited to, consent requirements for plan distributions, survivor benefits and qualified domestic relations orders.

The Revenue Ruling, however, does not address the impact of *Windsor* on prior retirement plan operations. *In the Revenue Ruling, the IRS announced it will be issuing further guidance for qualified retirement plans, including required plan amendments and corrections relating to plan operations prior to the date the guidance is issued*.

Although the Revenue Ruling answers some of the many questions raised by the *Windsor* decision, it leaves many questions open. Thus, we recommend that employers begin preparing themselves for the anticipated document and administrative changes. Steps to be taken include the following:

- Revisiting the employee benefits offerings to determine what changes must be made (for example, cafeteria plan and spousal group health coverage issues).
- Preparing employee communications materials summarizing the extent to which the employee benefits offerings will change as a result of Windsor and the Revenue Ruling.
- Reviewing plan documents and identifying areas for revision (for example, the definition of a spouse).
- Reviewing administrative procedures and forms to identify potential areas for revision (for example, distribution and processing of consent and beneficiary designation forms).

Day Pitney's employee benefits attorneys can assist you with any of the above actions.