



December 31, 2013

Labor & Employment Update

POST-WINDSOR GUIDANCE ISSUED FOR CAFETERIA PLANS AND FLEXIBLE SPENDING ARRANGEMENTS

On June 26, 2013, the U.S. Supreme Court issued the Windsor decision. Previously, a provision of the Defense of Marriage Act (DOMA) had prohibited the recognition of same-sex marriages for purposes of Federal tax law. Windsor found that provision to be unconstitutional.

On December 16, 2013, the IRS issued Notice 2014-1, which provides guidance on the impact of the Windsor decision on cafeteria plans, medical flexible spending accounts (Medical FSAs), health savings accounts (HSAs), and dependent care flexible spending accounts (Dependent Care FSAs). The most significant aspects of that guidance, and suggested action steps, are described below.

CAFETERIA PLANS

Applicable Rules Prior to Windsor. Prior to the Windsor decision, the employee's share of the coverage for a same-sex spouse had to be paid on an after-tax basis, except in the limited circumstance where the spouse otherwise qualified as a tax dependent of the employee. It was unclear after the decision was issued whether employees could make mid-year changes to their cafeteria plan elections in light of the decision.

Permitted Mid-Year Elections. Notice 2014-1 provides that a cafeteria plan may permit an employee who marries a same-sex spouse after June 26, 2013 to make a mid-year election change due to a change in legal marital status. A cafeteria plan may also permit an employee who was married to a same-sex spouse on June 26, 2013 to make a mid-year election change as if the employee had a change in marital status.

Timing of Election. The election change must be filed during the cafeteria plan year that includes June 26, 2013 or December 16, 2013.

Prospective. On a going forward basis, a legal marriage between same-sex spouses may be treated as a change of marital status, so that the employee can make a mid-year change.

When Mid-Year Elections Take Effect. A cafeteria plan election with respect to a same-sex spouse as a result of the Windsor decision will generally take effect as of the date any other change in coverage would be effective. However, in the case of a change in status election made as a result of the Windsor decision between June 26 and December 16, 2013, due to the uncertainty of the rules following



If you have any questions about the issues addressed here, or any other matters involving Labor & Employment law issues, please feel free to contact:

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Windsor, a cafeteria plan is not treated as having violated the cafeteria plan rules if coverage under the cafeteria plan becomes effective no later than the later of (1) the date that coverage under the cafeteria plan would be added under the usual procedures maintained by the cafeteria plan, or (2) a reasonable period of time after December 16, 2013.

When an Employer Must Begin to Treat After-Tax Amounts as Pre-Tax. The notice posits the situation where an employee is paying for his or her own coverage on a pre-tax basis, but is paying for his or her same-sex spouse's coverage on an after-tax basis. In such case, if an employer receives notice before the end of the cafeteria plan year including December 16, 2013, that such employee is married to a same-sex spouse, the employer must begin treating the amount that the employee pays for spousal coverage as pre-tax. This must occur no later than the later of (1) the date that a change in legal marital status would be required to be reflected for income tax withholding purposes, or (2) a reasonable period of time after December 16, 2013. Notice may be provided by the employee by making an election to pay for spousal coverage pre-tax through the cafeteria plan, or by filing a revised Form W-4 representing that the employee is married.

Impact on Tax Treatment. If an employee elected to pay his or her own cost on a pre-tax basis under a cafeteria plan, then the amount that an employee pays for a same-sex spouse on an after-tax basis will nevertheless be excluded from the employee's income, even if the employer reports the amounts as taxable income and wages to the employee. This applies to the cafeteria plan year that includes December 16, 2013 (2013 for calendar year plans), and any years that remain open under the applicable limitations period (typically three years).

Mid-Year Elections Based Upon Change in Tax Treatment. Generally, a change in the tax treatment of a benefit under a cafeteria plan will not constitute a "significant change" in the cost of coverage under the cafeteria plan rules allowing certain mid-year election changes. However, due to the uncertainty surrounding the Windsor decision, if a cafeteria plan permitted a participant to make a mid-year election change between June 26 and December 31, 2013 as a result of the plan administrator's interpretation that the change in tax treatment resulted in a significant change in the cost of health coverage, the cafeteria plan will not be treated as having violated the cafeteria plan rules.

MEDICAL FSAs

Reimbursements for Same-Sex Spouses. The Medical FSA can permit an employee to be reimbursed for covered expenses incurred by the same-sex spouse or the same-sex spouse's dependent.

Timing of Incurred Expenses. Reimbursements may be permitted if the expenses were incurred in a time period no earlier than (1) the beginning of the cafeteria plan year that includes the date of the Windsor decision (January 1, 2013 for calendar year plans) or (2) the date of marriage, if later.

HSAs

Annual Contributions. The joint annual contribution limit for HSA contributions is the same for legally married same-sex couples as it is for opposite-sex couples.

The basic limit for 2013 for a married couple, either of whom elects family coverage under a high deductible health plan, is \$6,450.

Correction of Excess. If the combined contributions for both same-sex spouses exceed the applicable HSA contribution limit for a married couple, contributions for either or both spouses may be reduced in order to avoid exceeding the limit. Any excess (plus attributable income) may be distributed from the HSAs of one or both spouses by the tax return due date (including extensions) in order to avoid an excise tax on excess contributions.

DEPENDENT CARE FSAs

Applicable Limit. The limit on contributions for married couples to Dependent Care FSAs, \$5,000, applies to same-sex spouses.

Correction of Excess. If same-sex spouses contribute separately to dependent care FSAs and the combined total exceeds the limit, the excess can be corrected by reducing contributions for one or both of the spouses for the balance of the year. If the contributions exceed the limit at the end of the year, the excess will be included in their income for that year.

ACTION STEPS

Cafeteria Plan Amendments. A cafeteria plan containing terms permitting a change in election upon a change in legal marital status will generally not be required to be amended to permit a change in status election in connection with the Windsor decision. Otherwise, the written cafeteria plan must be amended to allow for such election changes. However, the IRS has given employers until the last day of the first plan year beginning on or after December 16, 2013 to make such amendments (for calendar year plans, that date is December 31, 2014). Such amendments may be effective retroactively to the plan year that includes December 16, 2013.

Cafeteria Plan Operations. The operation of a cafeteria plan will have to be reviewed and modified in light of the notice.

Notification. Employers should notify employees of these rules, including the cafeteria plan change in marital status rules and how the HSA and Dependent Care FSA limits apply to employees with same-sex spouses.

If you have any questions about the issues addressed here or the changes made by Notice 2014-1, please contact Bill Keenan: 860.240.6028/wkeenan@murthalaw.com or Lissa Paris: 860.240.6032/lparis@murthalaw.com.

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