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Issues for same-sex couples

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Key questions remain unanswered, such as the scope of the decision (e.g., whether it covers only same-sex couples married in a state allowing same-sex marriages and residing in that state) and when it goes into effect for various purposes. Pending IRS guidance, employers should review which of their benefit plans need to be changed to reflect the decision. Affected employees also need to consider how their benefits may be changed.

Following are major employer-provided benefits that are affected by the Supreme Court's decision. In most cases, it will be beneficial for an employee to be treated as married to his/her same-sex spouse. However, in some cases, such treatment can be detrimental. For example, an employee will need consent from his/her same-sex spouse to make certain types of qualified plan payouts, where no such consent requirement existed before.

Spousal coverage under employer-provided health plan. An employee can exclude from gross income amounts received from his employer, directly or indirectly, as reimbursement for expenses for medical care. But the exclusion is available only for the medical expenses of the employee, his/her spouse, and his/her dependents. The exclusion also applies to any child of an employee who hasn't attained age 27 as of

the end of the year. (Code Sec. 105(b)) (These amounts are excludable even where a

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systems to eliminate the income for months in the current year before the ruling came down. It is also not clear whether employees may qualify for refunds of any such tax imposed in prior years that remain open.

Spousal entitlement to health plan coverage under COBRA continuation rules. Employers generally must provide qualified beneficiaries with the opportunity to participate for a specified period of time in the employer's health plan after that participation otherwise would have terminated due to a qualifying event (e.g., termination of employment). (Code Sec. 4980B(f)(4))

The qualified beneficiary pays for the post-termination coverage. The general COBRA rule is that a qualified beneficiary is the spouse or dependent child of the covered employee. (Code Sec. 4980B(g)(1)) The health care continuation rules generally don't apply to employers that normally employed fewer than 20 employees on a typical business day in the preceding calendar year. (Code Sec. 4980B(d)(1))

Spousal right to a qualified joint and survivor annuity from an employer-sponsored pension plan. A pension plan (and certain other plans) must in general pay a married participant's benefits in the form of a qualified joint and survivor annuity (QJSA), unless the participant elects otherwise. If the participant is married, his/her spouse must consent in writing to the participant's election out. (Code Sec. 417(b))

Spousal consent necessary for qualified plan payments to nonspouse beneficiary. A participant in a defined contribution plan (e.g., 401(k) plan) can choose to leave the remaining balance in his/her account at death to any beneficiary. However, if the participant is married, he/she can leave the account balance to a nonspouse beneficiary only if the participant's spouse consents in writing. (Code Sec. 401(a)(11))

Spousal consent necessary for certain plan-related actions. A qualified plan

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conditions. However, if the present value of a QJSA or qualified pre-retirement survivor annuity is more than \$5,000, a lump-sum distribution can only be made with the participant's (and spouse's, if applicable) written consent. (Code Sec. 417(e)(2))

More favorable distribution options apply. In general, the required minimum distribution (RMD) rules are more liberal for defined contribution plan participants who are married than for defined contribution plan participants who are not married. For example:

... A uniform table generally is used to calculate lifetime RMDs whether or not the participant's designated beneficiary is the participant's spouse, and regardless of the age differential between the IRA owner and designated beneficiary. However, if the participant's spouse is the sole designated beneficiary of the account, and the spouse *is more than 10 years younger* than the owner, the distribution period is the longer of: (1) the distribution period found by using the regular uniform table, or (2) the distribution period measured by the joint life and last survivor life expectancy of the IRA owner and the owner's spouse, determined by using the IRA owner's and spouse's attained ages in the distribution year. (Reg. § 1.401(a)(9)-5, Q&A 4(b)(1))

... The spouse of a deceased employee can roll over a distribution attributable to the employee made by a qualified trust under a Code Sec. 401(a) qualified plan subject to the same rollover rules as if the spouse were the employee. (Code Sec. 402(c)(9))

... If the plan account owner dies after required distributions begin, and his spouse is the account's sole designated beneficiary, the rules for RMDs to the spouse are similar to, but more liberal than, the rules that apply to nonspouse beneficiaries. (Reg. § 1.401(a)(9)-5, Q&A 5(a)(1) and Q&A 5(a)(2))

QDRO eligibility. A spouse's pension benefits are often part of a property settlement.

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