Retirement Plan Same-Sex Marriage Guidance, Liberalizing Plan Rollovers, Keeping Track of Former Employees, and Law Change for Small-Employer Insured Health Plans

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IRS GUIDANCE REGARDING RETIREMENT PLANS AND SAME-SEX MARRIAGE

As previously discussed in this column, the United States Supreme Court ruled in the *Windsor v. United States* decision that retirement plans would need to recognize same-sex marriage in certain circumstances. Many questions remained, especially with regard to whether this recognition had to occur retroactively.

On April 4, 2014, the IRS issued Rev. Rul. 2014-19, which addressed many of these questions. On the same day, it also posted questions and answers on its Web site.

First of all, a qualified retirement plan must recognize a same-sex marriage to the extent that the state in which the participant resides recognizes same-sex marriage as of June 26, 2013 (the date of the Windsor decision) or thereafter. Second, as of September 16, 2013, or thereafter, a retirement plan must recognize same-sex marriage to the extent the marriage occurred in a state that recognizes same-sex marriage (referred to as the state of celebration).

The rule, which started September 16, 2013, is stated as follows:

> *For Federal tax purposes, effective as of September 16, 2013 . . . [the IRS] adopts a general rule recognizing a marriage of same-sex individuals that is validly entered into in a state whose laws authorize the marriage of two individuals of the same sex, even if the individuals are domiciled in a state that does not recognize the validity of same-sex marriages.*

If these default provisions are recognized and the plan document itself refers only to "spouse" without a reference to same sex or opposite sex, then no amendment is required, and the plan just needs to be administered accordingly. To the extent a plan sponsor wants to recognize same-sex marriages at an earlier date, a plan amendment would be required. In addition, if a plan document makes reference to the Defense of Marriage Act, then a plan amendment would be required.

Why is the recognition of who is a spouse important? Not only do certain plans need to recognize the status of spouse because the default form of payment is a joint and surviving spouse form of payment (i.e., a defined benefit pension plan, a money purchase pension plan, and certain defined contribution plans), but also certain plans require spouse consent before a loan can be obtained, only spouses can submit a qualified domestic relations order to the plan if the marriage is later dissolved, only spouses are entitled to special treatment with regard to rollovers, and the status as a spouse is relevant to minimum required distributions and the determination of a controlled group. This list is just illustrative and not exhaustive.

It should be noted that the above discussion only applies to same-sex marriage under state law and not to domestic partnership or civil unions or similar status that does not rise to the level of marriage.

THE IMPORTANCE OF KEEPING TRACK OF FORMER PLAN PARTICIPANTS

Often an employee who is a plan participant will terminate employment but not request a distribution from the employer retirement plan. In some cases, years later the plan will want to make a distribution—such as upon attainment of "normal retirement age," upon age 70½ when the

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minimum required distribution requirements are triggered, or when a plan is being terminated—and the plan administrator does not know where the plan participant lives.

In the past, help could be obtained from either the IRS or Social Security in the form of letters being forwarded to the affected individual informing him or her of the retirement benefits. In 2012, the IRS stopped its letter forwarding program that allowed a plan sponsor that could not locate a former employee to have a letter forwarded to the employee informing him or her of benefits. Now Social Security has taken the same position. Social Security announced on April 17, 2014, in 79 Fed Reg 21831, that effective May 19, 2014, it would no longer forward letters from a plan administrator to a plan participant for whom the employer no longer had a current address.

While plan administrators can still attempt to locate former employees through private services, such services can be expensive. Hence to avoid such costs, plan administrators should continue to communicate to former employees the importance of keeping the plan informed of any address changes. It would certainly be prudent for a plan administrator to insert an address reminder in plan communications such as the benefits statement.

HIRING A NEW EMPLOYEE AND ACCEPTING A ROLLOVER

Often when an employer wants to hire a new employee, it offers the opportunity for the new employee to roll into the hiring employer's retirement plan (the recipient plan) the account balance from the qualified retirement plan of the new employee's former employer (the prior plan). There has always been a concern about accepting assets from an unknown plan that could have qualification issues. Theoretically, if the recipient plan accepts "tainted" assets, the recipient plan could also be compromised and its qualified status jeopardized. While in past years, it has been the case that the recipient plan could place reasonable reliance on certain facts such as the prior plan's IRS determination letter, the recipient plan still had to assure itself of these facts. In Rev. Rul. 2014-09, the IRS has made reliance even easier.

In accordance with this new guidance, the recipient plan can now merely check the prior plan's annual report (Form 5500), which is available online; and as long as that annual report does not claim Code 3C (which is an indication that the plan does not purport to be a qualified plan under Code Sections 401, 403, or 408), the recipient plan can assume the prior plan is a qualified plan and accepting assets from it would pose no risk to the recipient plan. Similar liberalizing rules apply to rollovers from an individual retirement account (IRA). As long as the IRA check or transfer indicates it is from the IRA of the named employee and the employee affirms there are no after-tax amounts and the employee will not attain age 70½ by the end of the year in question, the recipient plan will not be at risk.

AFFORDABLE CARE ACT AMENDMENT ASSISTS SMALL EMPLOYERS

Important relief has been granted to small-employer group health plans through legislation that amended the Affordable Care Act (ACA). Legislation entitled "The Protecting Access to Medicare Act of 2014," signed by President Obama on April 1, 2014, included a provision that repealed the maximum annual deductible limits on insured group health plans issued to small employers. What is a small employer? Under the ACA, each state can define the size of a small group market. The choice of a state is either 1 to 50 employees or 1 to 100 employees. Starting in 2016, all states must allow employers with 1 to 100 employees to participate in small group market plans.

Under the ACA as originally enacted, group health insurance policies issued to the small group insurance market could not contain an annual deductible of more than \$2000 for an individual or \$4000 for a family. Employers lobbied Congress to remove these limits since they would increase plans costs and the subsequent premiums paid by employees. In particular, the ACA as originally enacted would prevent an employer from offering a high-deductible group health insurance plan with the employer while also providing assistance to an employee through a health reimbursement arrangement, health savings account, or cafeteria plan flexible spending account. Such accounts under the ACA as originally enacted were not allowed to be counted in meeting the deductible limits, meaning a small employer could not offer, for example, a group health plan with a \$5000 deductible even though the employer funded a reimbursement account to cover much of that deductible.

Now under the revised law, a small employer can offer a high-deductible group health plan while helping employees meet the deductible. This means premiums should be lower than otherwise would be the case, and employees can be encouraged to carefully monitor healthcare expenses through the use of one of the various types of reimbursement accounts.

It should be noted that even under the revised law, a high-deductible plan must still meet the minimum value requirements of the ACA, meaning that the plan (and not the employees) must pay at least 60% of expected costs determined against a national utilization database. In addition, even though the deductible limits have been eliminated for small group plans, other limits such as the out-of-pocket cost limit (in 2014 \$6350 for an individual and \$12,700 for a family) still apply.

The above discussion is intended to briefly summarize certain recent legal developments in employee benefits, but is not intended to be legal advice and must not be relied upon as such. All readers are urged to raise any concerns they may have based on matters discussed in this column with experienced benefits legal counsel.