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Spousal Benefits

Plan Administrators Face Beneficiary Hurdles After IRS *Windsor* Guidance, Attorneys Say

Retirement plan sponsors should check beneficiary designations for participants' same-sex spouses in light of recent Treasury Department and Internal Revenue Service guidance on the applicability of the U.S. Supreme Court's *Windsor* decision to retirement plans, if they haven't already done so, benefits attorneys told Bloomberg BNA.

The most significant area under the new guidance, posted to the IRS website April 4 in the form of answers to frequently asked questions, is beneficiary designations, said Todd A. Solomon, a partner in the Chicago office of McDermott Will & Emery. Unfortunately, many plan participants might not even know that their spouse—whether opposite-sex or same-sex—is automatically considered to be the rightful beneficiary upon a participant's death, he said.

An example of a situation in which beneficiary designation rules can now be problematic, Solomon said, is one in which a participant designated his or her child as a beneficiary four years ago, then married a same-sex spouse within the past year. In the post-*Windsor* world, the beneficiary designation of the child is trumped, he said.

As a result of such situations, many plan sponsors have been reaching out to participants about the beneficiary rules to let them know what the new rules are and the implications for beneficiary designations, Solomon said.

Consent. Another major issue plan sponsors will need to deal with is making sure that there is consent by a same-sex spouse in cases in which the spouse isn't listed as a beneficiary, said Joy M. Napier-Joyce, a shareholder in the Baltimore office of Jackson Lewis PC and leader of the firm's employee benefits practice group.

''That begs the question of how do we know if somebody is legally married. That's the most perplexing question for a lot of employers,'' Napier-Joyce said. Sponsors will need to do some information gathering to determine where potential pitfalls lie, she said.

Guidance on such information gathering isn't likely to come from the IRS or the Department of Labor, Napier-Joyce said.

She said that her firm's advice to employers has been to tell employees that they are following the rules of the post-*Windsor* world and that they are striving to make sure all plan participants are properly taken care of, and that therefore, employees should volunteer information on whether they are legally married or have a spouse.

The IRS guidance included six questions and answers in which the IRS addressed how the Supreme Court's June 2013 in *United States v. Windsor*, 133 S.Ct. 2675, 57 EBC 1577 (2013) (124 PBD, 6/27/13; 40 BPR 1589, 7/2/13), which struck down a key part of the Defense of Marriage Act, applies to retirement plans.

The agency answered questions regarding Section 403(b) plans, multiemployer plans, and profit-sharing and stock bonus plans, addressing such issues as beneficiary designations, plans' recognition of same-sex marriages and plan amendments.

The IRS posted the guidance the same day the agency and Treasury issued Notice 2014-19, which said that retirement plans can apply guidance on the application of the Supreme Court decision prospectively as of June 26, 2013, the date of the *Windsor* ruling (66 PBD, 4/7/14; 41 BPR 769, 4/8/14).

Plan Language. The rule that provides that beneficiary rights are automatically given to a spouse provides another quirk for plans to consider when they have divorced participants, Napier-Joyce said.

In a 2009 decision, *Kennedy v. Plan Adm'r of the DuPont Savings and Inv. Plan* (15 PBD, 1/27/09; 36 BPR 242, 2/3/09), the Supreme Court applied the ''plan documents'' rule in determining that a plan administrator properly paid benefits to the ex-wife of a plan participant who had waived her right to such benefits in a divorce agreement but who was still named as the participant's beneficiary at the time of his death, Napier-Joyce said.

Under the ''plan documents'' rule at Section 404(a)(1)(D) of the Employee Retirement Income Security Act, plan administrators are required to act ''in accordance with the documents and instruments governing the plan.''

In the wake of the decision, ''there was renewed focus by plans in checking beneficiary designations and adding plan language, if none existed before, to provide that the designation of a spouse as a beneficiary is automatically revoked following a divorce (in an attempt to avoid multiple parties fighting over the benefit),'' Napier-Joyce said in an e-mail.

As a best practice, plan sponsors should amend their plans now to clarify the definition of spouse and make clear which rights are available, despite the fact that the IRS has provided them with more time to make their amendments, Solomon said.

Even sponsors that don't need an amendment should provide ''soft participant communications'' about the new rules, Napier-Joyce said. Plan sponsors should

make sure that documents and information distributed during open enrollment or to new hires reflect the new rules, she said.

Rhonda G. Migdail, of counsel to Keightley & Ashner LLP in Washington and a former Employee Plans manager at the IRS, pointed out some other questions that remain with regard to same-sex divorce.

Offering a hypothetical situation in which an employer has an employee who was married in a state that recognizes same-sex marriages but now resides in a state that doesn't recognize such marriages, she said, ''The IRS guidance has talked about the state-of-celebration rule for determining whether they are as married for federal law purposes. But what if they want to get divorced and they're living in a state that doesn't permit it? How do you determine that? What if they want a qualified domestic relations order, how do they even go about getting one? What state do they need to do it in? How is the plan going to determine whether it's valid or not?''

'Devil Is in the Administration.' Under FAQ-5 in the IRS guidance, as well as Notice 2014-19, most Section 403(b) plans don't have to be amended before Dec. 31, but sponsors must begin now to operate and administer their plans in accordance with the *Windsor* ruling, said Robert A. Browning, a partner at Spencer Fane Britt & Browne LLP in Overland Park, Kan.

In FAQ-5, the IRS said that the remedial plan amendment deadlines in tax code Section 401(b) and in Revenue Procedure 2007-44 don't apply to 403(b) plans, and that therefore, neither does the deadline specified in Notice 2014-19.

Plan sponsors should also be aware that although FAQ-5 gave 403(b) plans an extended amendment period, they don't have a transition period for administrative compliance, Napier-Joyce said.

''What we don't want to happen is for plans to think that just because we have an extension on the formal plan amendment piece that we have some sort of transition for the administrative piece as well,'' Napier-Joyce said. ''And so, for the timing of it, where the devil is in the administration, that's equally applicable to a 403(b) plan now as it is to a [Section] 401(k) plan,'' she said.

Most plans, especially those offered by major providers, won't need to be amended to comply with the new requirements because the definition of a spouse in their plan documents is legally ambiguous, defining a spouse only as a person who is ''legally married,'' Napier-Joyce said.

A Section 403(b) plan is a special type of retirement previous plan under which a public school or private tax-exempt organization purchases annuity contracts or contributes to custodial accounts for its employees. If the employer is a church, a 403(b) plan also may be funded through retirement income accounts. Section 403(b) plan can be used as an alternative to a pension or profit-sharing plan or to supplement benefits from other employer-sponsored plans.

In the FAQs, the agency said that Section 403(b) plans that aren't subject to ERISA are exempt from the qualified joint and survivor annuity (QJSA) and qualified pre-retirement survivor annuity (QPSA) requirements in ERISA and the tax code. However, most tax-exempt organizations that offer 403(b) plans, such as hospitals and nonprofits, are going to be subject to the same rules that apply to other defined contribution plans, which means that the distribution rules under tax code Section 401(a)(11) will apply, Napier-Joyce said.

Multiemployer Plans. The last answer in the guidance addressed the question of whether an amendment to a multiemployer defined benefit plan to conform with the *Windsor* decision and post-*Windsor* guidance is subject to the benefit increase limitations in tax code Section 432.

Under the requirements of Section 432 on additional funding requirements for endangered or critical status multiemployer plans, amendments that increase liabilities through changes to benefits, benefit accruals or vesting schedules generally aren't allowed unless certain conditions are met, the IRS said. However, Section 432 also states that such an amendment is permitted during the funding improvement adoption period or rehabilitation plan adoption period if the amendment is required as a condition of qualification under the tax code or to comply with other applicable law, it said.

The agency said that the same exception is applicable to similar limitations during a multiemployer plan's funding improvement period or rehabilitation period with respect to an amendment to bring a plan's definition of spouse into conformity with the *Windsor* decision and post-*Windsor* guidance.

Migdail said that in this answer, the IRS clarified that multiemployer plans that are required as a matter of law to be amended won't be treated as if they had violated otherwise applicable restrictions.

The most salient aspect multiemployer defined benefit plan administrators need to keep in mind is that they will have QJSA options for which same-sex spouses must be taken into account for benefit distributions, Napier-Joyce said.

''Accounting for same-sex spouses in this regard may be more involved from an administrative standpoint than recognizing the same-sex spouse as the default death beneficiary under a defined contribution plan,'' she said.

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Text of the FAQs is in the Text section.

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