

ERISA Industry Committee

DOMA Task Force Call

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Overview of Today's Discussion

- Tax Implications
- Tax-Qualified Plans
- Executive Compensation

Effect of *Windsor* on Taxation of Health Coverage

- Prospectively, non-dependent same-sex spouse health coverage is no longer subject to federal income and FICA taxes
- Retrospectively, tax refunds available for coverage for non-dependent same-sex spouse
 - *Windsor* clearly applies to IRS, so retroactive refunds are available subject to statute of limitations
 - Employer portion of FICA
 - Employee portion of FICA
 - Employee's federal income tax

Prospective Effect of Windsor on Tax-Qualified Retirement Plans

- Surviving Spouse Benefits
 - QJSA/QOSA
 - QPSA
 - Death benefits for individual account plans
- Waiver of Spousal Rights
 - Consider continuing validity of prior beneficiary designations

Other Tax-Qualified Plan Issues

- Required Minimum Distributions (Code § 401(a)(9))
 - pre-retirement death benefit
 - joint vs. single life expectancy
 - incidental death benefit rules
 - conversion to JSA for benefits in pay status
- 415(b) limit on plan benefits (extra value in QJSA ignored)
- QDROs
- Rollovers

More Tax-Qualified Plan Issues

- Hardship Distributions
 - medical, education, funeral expenses for spouses
 - consider availability of resources of spouse
- Family Aggregation Rules
 - for determining control group members, top-heavy key employees, and prohibited transactions
- Pension Funding
 - funding requirements and benefit restrictions

Retroactive Effect of *Windsor* on Tax-Qualified Retirement Plans

- Note that *Windsor* holding binds the federal government but not private parties
- Might your plan document create contractual liability for benefits due to same sex spouses pre-*Windsor*?
 - e.g., what if plan determines spouse under federal law
 - look at claims process, plan interpretation, Firestone deference
- Might your plan be required to provide statutorily mandated spousal rights and benefits pre-*Windsor*?
 - question of available ERISA remedies
 - courts might not grant retroactive relief

Effect of *Windsor* on Executive Compensation

- Code § 409A: “Unforeseeable Emergency”
 - includes hardship on account of illness or accident of spouse, plus 401(k) hardship rules
- Code § 280G: Family Aggregation
 - shareholder voting
 - definition of disqualified individual
- Transfers of Options to Spouses