

IRS Releases Q&A on Elections and Reimbursements in Cafeteria Plans Post-DOMA

On December 16, the IRS released [Notice 2014-1](#), providing additional guidance on administration of employee benefit plans in light of the Supreme Court's June 26, 2013 decision in *United States v. Windsor*. *Windsor* invalidated a key provision of the 1996 Defense of Marriage Act ("DOMA") and held that same-sex married couples will be treated as married under federal tax law. The new guidance consists of questions, answers and examples relating to elections and reimbursements under cafeteria plans, flexible spending arrangements, and health savings accounts.

The guidance provides that:

- Participants lawfully married to a same-sex spouse at the time of the *Windsor* decision may be treated as though they experienced a change in legal marital status and are permitted to make mid-year elections during a cafeteria plan year that includes either June 26, 2013 or December 16, 2013. (Generally a change in the tax treatment of a benefit is not sufficient to permit a midyear election due to a change in the cost of coverage of that benefit, although a plan that permitted a change in election on that basis between June 26 and December 31, 2013 will not be treated as having failed to meet the requirements of Code section 125 or the regulations thereunder.)
 - A change in status election made by a participant between June 26 and December 16, 2013 will be deemed to meet the requirements of Code section 125 or Treas. Reg. § 1.125-4 to the extent that coverage becomes effective no later than the later of (a) the date that coverage under the cafeteria plan would be added under the cafeteria plan's usual procedures for change in status elections or (b) a reasonable period of time after December 16, 2013.
 - No written amendment is needed unless the cafeteria plan sponsor is changing the basis on which election changes are permitted under the plan. In other words, if the cafeteria plan already permits midyear changes due to a change in legal marital status, no amendment would be necessary.
- For the remainder of the current cafeteria plan year, a participant married to a same-sex individual may choose to pay for the employee cost of same-sex spouse coverage on a pre-tax basis by providing notice of his or her marital status to the employer or to the cafeteria plan, or to continue paying for these benefits on an after-tax basis.
 - If an employer receives notice that an employee is married to a same-sex individual whose coverage is being paid for on an after-tax basis, the employer must begin treating the amount paid for such coverage as a pre-tax salary reduction no later than the later of (a) the date the employer is required to change withholding for an employee with a change in legal marital status who has provided the employer with a new Form W-4 or (b) a reasonable period of time after December 16, 2013.
 - Employees may seek a refund of federal income or employment taxes on amounts that were paid on an after-tax basis for the periods still open under the statute of limitations (generally 3 years).
- Expenses incurred by a participant's same-sex spouse or his or her dependent(s) may be reimbursed by the participant's health, dependent care, or adoption assistance FSA if the expenses were incurred during a period beginning on the date that is no earlier than (a) the beginning of the cafeteria plan year that includes June 26, 2013 or (b) the date of marriage, if later. In other words, a calendar year

health FSA can permit reimbursement of a same-sex spouse's medical expenses that were incurred on or after January 1, 2013, assuming the couple was legally married on January 1.

- Same-sex married couples are subject to the joint limits on contributions to Health Savings Accounts and Dependent Care Assistance Programs for the 2013 taxable year. Examples 6 and 7 in the Notice illustrate methods for couples who are over the joint limit to address any excess contributions made to an HSA or DCAP.

For more information about the Notice or the impact of the DOMA decision generally on employee benefits, please contact your usual Ropes & Gray advisor or a member of the [employee benefits](#) practice group.