

IRS Issues Guidance Addressing the Impact of the Supreme Court's *Obergefell* Decision on Qualified Retirement and Health and Welfare Plans

ROBERT R. GOWER AND ERIC J. SCHILLINGER

On December 9, 2015, the Internal Revenue Service ("IRS") issued [Notice 2015-86](#), providing guidance on the application of the June 26, 2015 United States Supreme Court decision in *Obergefell v. Hodges* ("*Obergefell*") to qualified retirement plans under Internal Revenue Code ("Code") section 401(a) and health and welfare plans, including cafeteria plans under Code section 125. *Obergefell* requires state marriage laws to apply equally to same-sex and opposite-sex couples, expanding on the 2013 Supreme Court decision in *United States v. Windsor*, in which the federal government was required to recognize same-sex marriages entered into under state law. *Obergefell* simply expanded the availability of same-sex marriages; it did not impact federal tax rights for couples in existing same-sex marriages.

Obergefell's impact on qualified retirement plans is minimal. Following [Notice 2014-19](#), qualified retirement plans were required to be amended by December 31, 2014 to recognize same-sex marriage for any and all plan purposes for which opposite-sex marriages were recognized. Nevertheless, in Notice 2015-86, the IRS issued several helpful clarifications for sponsors of qualified retirement plans. The clarifications include:

- Confirming that plan sponsors that properly amended their plans following Notice 2014-19 are not required to amend their plans as a result of *Obergefell*.
- Providing that plan sponsors may elect to amend their plans in order to make-up for benefits or benefit options not previously available to participants in same-sex marriages (for example, allowing participants in same-sex marriages to convert their benefits into a qualified joint and survivor annuity). The IRS had previously provided that such amendments were permissible in Notice 2014-19. For more information, please see our [April 2014 article](#).
- Clarifying that discretionary amendments made to single-employer defined benefit plans in the wake of either *Windsor* or *Obergefell* are subject to the funding requirements of Code section 436(c).

With regard to health and welfare plans, Notice 2015-86 provides the following guidance:

- Because the Code generally does not require health and welfare plans to offer any specific rights or benefits to a participant's spouse, no changes to the terms of a health or

welfare plan are required as a result of *Obergefell*. To the extent that a health or welfare plan offers benefits to same-sex spouses, the treatment of those benefits under the Code was addressed in prior IRS guidance (see our [January 2014](#) and [August 2013](#) articles).

- Changes to the administration of a health or welfare plan might be necessary as a result of *Obergefell*. For example, if a plan document provides for coverage of a participant's spouse as defined under applicable state law and a state's law has expanded to include same-sex spouses as a result of *Obergefell*, then the plan's operation must be changed to cover same-sex spouses as of the date of the change in state law (generally the date of the *Obergefell* decision).
- If the terms or operation of a health or welfare plan (other than a health FSA) paid through a cafeteria plan change midyear to permit coverage of same-sex spouses (e.g., due to a change in an applicable state law), affected participants can make an election change under the cafeteria plan in accordance with the election change rules for a "significant improvement in coverage under an existing coverage option." Such a change would only be permitted if the cafeteria plan's terms allow election changes for a significant improvement in coverage. For this purpose, Notice 2015-86 provides that a cafeteria plan can be amended at any time if the amendment is adopted no later than the last day of the plan year including the later of (i) the date same-sex spouses first became eligible for coverage under the plan, or (ii) December 9, 2015 (the date Notice 2015-86 was issued). That amendment can be retroactive to the date same-sex spouses first became eligible for coverage under the plan.