



IRS clarifies application of *Obergefell* decision to employer-sponsored retirement plans

On December 28, 2015, the IRS published additional guidance on the application of the *Obergefell* same-sex marriage decision to employer-sponsored retirement and health and welfare plans.

[IRS Notice 2015-86](#) contains five Q&As related to coverage of same-sex spouses by qualified retirement plans following the [June 26, 2015 *Obergefell* decision](#) by the U.S. Supreme Court. In that decision, the Court ruled that all states must license same-sex marriages and must recognize same-sex marriages performed in other states. This additional guidance simply provides clarification regarding plan amendments. It does not require plan sponsors to take any action.

Required plan amendments

No additional plan amendments are required in order for an employer-sponsored plan to comply with the *Obergefell* decision. Any amendments that may have been needed should already have been adopted in response to the Supreme Court's [Windsor decision](#), which recognized same-sex marriages and spouses for federal tax law purposes, and the related [IRS Notice 2014-19](#).

Optional plan amendments

Plan sponsors **may adopt optional amendments** as a result of *Obergefell*, as long as those amendments satisfy all applicable qualification requirements, such as nondiscrimination requirements. Optional amendments include:

- An extension of new rights or benefits to participants with same-sex spouses. *For example, an amendment that allows participants who had begun receiving single life annuities to elect a qualified joint and survivor annuity (QJSA) form of payment as of a new annuity starting date.*
- Recognition of same-sex marriages as of a date earlier than the June 26, 2013 *Windsor* decision.

Limitations on amendment adoption for single employer defined benefit plans

Any amendment that provides rights or benefits to same-sex spouses beyond the minimum legal requirements (such as those described above) that is adopted for a single employer defined benefit plan is subject to the [requirements of Internal Revenue Code section 436\(c\)](#). As a result, the amendment may only be adopted if the plan's adjusted funding target attainment percentage (AFTAP) is sufficient, or the plan sponsor makes the required additional contribution.

Amendment deadlines

Any discretionary amendments made in response to this guidance **generally must be adopted by the end of the plan year in which the amendment is operationally effective**. An amendment to a **governmental plan** must be adopted by the later of (1) the end of the plan year in which the amendment is operationally effective, or (2) the last day of the next regular legislative session beginning after the amendment effective date in which the governing body with authority to amend the plan can legally consider the plan amendment.

Before adopting any discretionary amendments, a plan sponsor should carefully consider the impact on plan administration. Plan sponsors should consult with both their plan document provider and recordkeeper to ensure that the amendment can be accommodated. In addition, sponsors of defined benefit plans should consult the plan's enrolled actuary to ensure compliance with the Code section 436(c) requirements.

Compliance Bulletin by Prudential Retirement

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