

---

## Same-Sex Marriage Impacts Texas Retirement Plans

Gray Reed & McGraw Legal Alert

September 9, 2013

By [Jason Luter](#)

On June 26, 2013, the United States Supreme Court issued a decision in the case of *Windsor v. United States* holding the Federal Defense of Marriage Act (“DOMA”) unconstitutional. This decision will have implications for employee benefit plans and, specifically, benefit plans governed by the Employee Retirement Income Security Act of 1974 (“ERISA”), including 401(k) Plans and pension plans. This client alert addresses newly issued Internal Revenue Service (“IRS”) rules that impact retirement plans in Texas, taking effect on September 16, 2013.

While the ruling in *Windsor v. United States* will have a significant impact upon the administration of ERISA benefit plans in states that recognize same-sex marriages (there are currently twelve such states), it was previously unclear what impact the ruling will have on states that do not recognize same-sex marriages. Texas does not recognize same-sex marriages – the Texas Defense of Marriage Act, signed by Governor Perry in 2003, mirrors DOMA and stipulates that Texas does not recognize a marriage or civil union between persons of the same sex, regardless of the jurisdiction in which it is created. Further, the Texas Constitution defines marriage as a union between a man and a woman. However, the IRS recently issued new rules that require qualified retirement plans (e.g., 401(k) Plans) to recognize same-sex spouses, regardless of whether the state recognizes same-sex marriage.

The new IRS rules extend federal benefits and protections to same-sex spouses that were previously offered only to opposite-sex spouses, and employers must comply as of September 16, 2013. Note that we are only talking about “marriage” here – *i.e.*, the decision does not apply to same-sex couples who have entered into civil unions or domestic partnerships. As of September 16, 2013, all qualified retirement plans:

1. Must treat a same-sex spouse as a spouse for purposes of satisfying plan-related federal tax law requirements; and
2. Must recognize a same-sex marriage that was validly entered into in a jurisdiction whose laws authorize the marriage, even if the couple lives in a domestic or foreign jurisdiction that does not recognize the validity of same-sex marriages (e.g., Texas).



---

For example, where a 401(k) Plan provides that a participant's account must be paid to his or her spouse upon the participant's death unless the spouse consents to a different beneficiary, the 401(k) Plan must now pay a death benefit to the same-sex surviving spouse of any deceased participant when the same-sex spouse has not consented otherwise. However, the 401(k) Plan is not required to pay a death benefit to a surviving registered domestic partner of a deceased participant.

Texas employers must take action now to operate in compliance with these newly issued rules. Retirement plans will ultimately need to be amended according to IRS guidance to be issued later and new election forms may be required for a number of retirement plan features, including the spousal right to a qualified joint and survivor annuity, spousal consent to retirement plan payments to non-spouse beneficiaries, and spousal consent to certain plan-related actions like participant loans.

Please contact the Gray Reed & McGraw Employee Benefits attorneys if you have any questions regarding compliance with these new and important changes in law.