

## MEMORANDUM

**To:** Clients & Friends  
**From:** Anna Elento-Sneed, Esq.  
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**Date:** November 23, 2015  
**Subject:** **Internal Revenue Service Issues Proposed Regulations – “Husband and Wife” includes Same-Sex Spouses**

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On October 22, 2015, the Internal Revenue Service (“IRS”) issued proposed Treasury Regulations addressing how the terms “husband,” “wife,” and “spouse” will be interpreted for federal tax purposes, in response to the United States Supreme Court’s decision in Obergefell v. Hodges,<sup>1</sup> which legalized same-sex marriage in all states. The proposed regulations were published in the Federal Register on October 23, 2015, and are open to comment from the public until December 7, 2015. After the comment period, the IRS will likely finalize the regulations, after which, they become enforceable law.<sup>2</sup>

### **I. What the Proposed Treasury Regulations Say**

Under the proposed regulations, the terms “husband,” “wife,” and “spouse” in the Internal Revenue Code and the IRS’s previously issued regulations will be gender neutral and read as “an individual lawfully married to another individual.” Furthermore, the term “husband and wife” will mean two individuals lawfully married to each other.

The IRS again clarifies that civil unions, domestic partners, and other marriage-like relationships are not considered marriage under federal tax law.

### **II. Significance of the Proposed Treasury Regulation**

The effects of the proposed regulations mirror Notice 2013-61 and Rev. Rul. 2013-17, previously issued by the IRS. Under Notice 2013-61 and Rev. Rul. 2013-17, employers nation-wide should have begun treating employees in lawfully-entered same-sex marriages as married for federal tax purposes as of September 16, 2013. The proposed Treasury Regulation, if finalized after December 7, 2015, is a higher legal authority than the IRS’s other issued guidance. Specifically, the IRS may not take positions contrary to its finalized regulations, though it may take positions contrary to its other guidance; this provides consistency when the IRS changes commissioners or when political powers change in Congress. If the IRS adopts the proposed Treasury Regulation, then the IRS is bound by the regulation and cannot later assert that same-sex spouses are not married.

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<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> The IRS may also amend or withdraw its proposed regulations. However, these regulations are consistent with guidance issued by the IRS in 2014, and will therefore likely be finalized.

### III. What this Means for Employers

If you have any employees in civil unions who are not married, they will still be treated as unmarried for federal tax purposes, but married for Hawaii law purposes.

Your payroll and benefits practices should have already been updated to reflect the following for employees in same-sex marriages:

- **Employment Taxes/Social Security.** Employers and employees will owe lower payroll taxes for employees in same-sex marriages.
- **Income Tax Withholdings.** Lower tax withholdings for employees in same-sex marriages.
- **Qualified Retirement Plans.** Same-sex spouses have Qualified Joint and Survivor Annuity (“QJSA”) rights, and may be entitled to retirement benefits upon divorce under a Qualified Domestic Relations Order (“QDRO”).
- **Health Insurance.** Health plans that offer coverage to spouses must also offer coverage to same-sex spouses.
- **Income Taxes.** Non-taxable employee benefits offered to spouses (such as health coverage) are non-taxable for same-sex spouses.

### IV. Follow-Up With Your Payroll and Benefits Service Providers

A. Confirm with your payroll service provider:

- (1) That your employees in same-sex marriages are being treated the same as your opposite sex employees; and
- (2) If you have employees in civil unions, that they are being treated as married for state law purposes, and unmarried for federal law purposes.

B. Confirm with your Third Party Administrators that:

- (1) Your plans were updated to provide benefits to same-sex spouses; and
- (2) Your plans are being administered appropriately to provide benefits to same-sex spouses.

If you have any follow-up questions about this memo, please do not hesitate to contact us.