



Financial Planning for LGBT Couples After *U.S. v. Windsor* and *Obergefell v. Hodges*

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A Post-*Windsor*, Post-*Obergefell* Checklist

Here's a quick checklist for same-sex married couples in the wake of the Supreme Court's *United States v. Windsor* and *Obergefell v. Hodges* rulings.

WORKPLACE BENEFITS: HEALTHCARE

- **Spousal healthcare.** Check to see whether you or your spouse can receive better or less expensive healthcare benefits by joining the other's workplace plan.
- **Tax-favored healthcare accounts.** Consider using Flexible Spending Accounts (FSAs), Health Reimbursement Arrangements (HRAs), and Health Savings Accounts (HSAs) for qualified healthcare expenses of a same-sex spouse.

WORKPLACE BENEFITS: RETIREMENT PLANS

- **Defined benefit pension plans.** If you participate in a defined benefit pension plan at work, review your beneficiary designation to ensure it reflects your current intention. If you have named a non-spouse beneficiary, your spouse must provide written consent, as non-spouse beneficiary designations done without consent will be deemed invalid.
- **Defined contribution plans (e.g., 401(k)s).** Review your beneficiary designation to ensure it reflects your current intention. If you have named a non-spouse beneficiary, your spouse must provide written consent, as non-spouse beneficiary designations done without consent will be deemed invalid.

WORKPLACE BENEFITS: OTHER

- **Group life insurance.** Consider enrolling your spouse for voluntary group life insurance if your employer makes it available.
- **Dependent Care Flexible Spending Accounts.** If you and your spouse both utilize these accounts, recognize that the maximum that can be deposited each year is reduced from \$10,000 (for two single individuals) to \$5,000 (for a married couple).
- **Miscellaneous benefits.** Review additional employee benefits such as retirement planning services, employee discounts, and the use of certain employer-provided athletic facilities, to see if your spouse can utilize them.

FINANCIAL PLANNING: HEALTHCARE

- **Individual healthcare.** If applying for a policy through an exchange because your employer does not offer coverage, and your spouse's employer does not offer coverage to workers' spouses, calculate your eligibility for premium tax credits and subsidies based on your combined income.
- **Medicare.** If one spouse will not have the minimum of 40 quarters to qualify for coverage at age 65, recognize that Medicare coverage can become available based on the other spouse's work history.

FINANCIAL PLANNING: SOCIAL SECURITY

- **Social Security filing status.** If you are ready to file for spousal or survivor benefits, look for ways to optimize your benefits as a married couple.

FINANCIAL PLANNING: IRAS, TAXES, AND LIFE INSURANCE

- **Regular IRAs.** If you have a regular IRA, consider updating your beneficiary to your spouse, if you have not already done so. If you wish to contribute to a regular IRA, determine whether you can make deductible contributions based on the combined income and workplace retirement plan availability of both spouses.
- **Roth IRAs.** If you have a Roth IRA, consider updating your beneficiary to your spouse, if you have not already done so. If you wish to contribute to a Roth IRA, determine whether you can make contributions based on the combined income of both spouses.
- **Spousal IRAs.** If you file a joint tax return, consider contributing to a spousal IRA. If neither spouse has a retirement plan at work, contributions will be tax deductible.
- **Estate and gift planning.** When creating an estate plan, consider that same-sex married couples (and both spouses are U.S. citizens) can now use the unlimited estate tax marital deduction to pass assets to a surviving spouse without incurring federal estate taxes. When considering making gifts, recognize that gifts and property can be transferred to each other without paying federal income or gift taxes. Same-sex married couples will now also qualify for gift-splitting, meaning each spouse is treated as giving half the property gifted by the other.
- **Tax planning.** Same-sex married couples can/must now file federal tax returns using the "married filing jointly" or "married filing separately" options.
- **Life insurance.** Same-sex married couples may wish to revisit their life insurance needs. While estate planning needs may now be deemphasized, life insurance can be used to mitigate the financial risk of lost earnings, fund a spouse's retirement, or pay for the education of a child.

Financial Planning for LGBT Couples After *U.S. v. Windsor* and *Obergefell v. Hodges*

In June 2013, the U.S. Supreme Court overturned Section 3 of the 1996 Defense of Marriage Act, which had effectively banned federal benefits for same-sex married couples. In a subsequent case, the Supreme Court ruled in June 2015 that every state must permit same-sex marriages. As a result of these new rulings, employee benefits and financial planning strategies once available only to opposite-sex married couples are now available to same-sex married couples. This paper highlights several of the changes that have taken place, including changes to Social Security eligibility, and details how same-sex couples may wish to incorporate them into their financial planning.

The Rulings

In *United States v. Windsor*, the Supreme Court ruled that Section 3 of the Defense of Marriage Act was unconstitutional. That section of the law had provided that whenever a federal law used the term “spouse,” it meant a person of the opposite sex who was a husband or wife. Further, whenever a federal law referred to “marriage,” it meant only a legal union between one man and one woman. With the *Windsor* decision, the Supreme Court allowed same-sex marriages to be recognized as marriages at the federal level. This federal recognition applies only to same-sex marriages, not to domestic partnerships or civil unions.

Although many states passed legislation to allow for same-sex marriages, many others initially did not. The Supreme Court’s subsequent decision in June 2015 in *Obergefell v. Hodges* requires all states to allow same-sex marriages.

The highlights of what same-sex couples should consider as a result of these rulings are reviewed on the following pages and divided into two categories: workplace benefits and financial planning.

Workplace Benefits

Health Insurance

As a result of being recognized as a spouse, individuals in same-sex marriages—and perhaps their children—may now be eligible for healthcare insurance provided by their spouse’s employer. This type of coverage is common in the workplace. In a 2012 survey by the Society for Human Resources Management, 80% of surveyed employers offered healthcare coverage to spouses of employees, while 30% offered coverage to same-sex domestic partners.¹ Increasingly, individuals in a same-sex marriage will now have the choice of being covered under their own employer’s plan or their spouse’s plan.

In the latter case, those individuals also will be able, for the first time, to pay the insurance premiums for their spouse’s coverage with pre-tax dollars. Prior to the *Windsor* decision, the value of healthcare benefits provided to a state-recognized, same-sex spouse—often several thousand dollars per year—counted as taxable income to the employee for federal income tax purposes. This will no longer be the case. In fact, since *Windsor* struck down DOMA Section 3 as unconstitutional, it’s as if that provision of the law were never in place. Furthermore, the IRS and Department of Labor ruled on August 29, 2013, that same-sex couples who were legally married in any state that recognizes such marriages (also referred to as state of celebration) will now be treated as married for federal tax purposes, regardless of where they live. As a result of the *Obergefell* decision, all same-sex married couples, no matter where they reside, are now treated as married for federal and state tax purposes.

It bears noting that with same-sex marriages now being recognized, some employers may stop making healthcare benefits available to domestic partners.² When the ERISA Industry Committee polled its members in late August 2013, 29% of the surveyed respondents indicated they were planning to change their benefits coverage for same-sex domestic partners as a result of *Windsor*. Another 25% said they were undecided.³

Windsor also prompts two additional changes relating to healthcare coverage. The first centers on tax-favored healthcare accounts such as flexible spending accounts, health reimbursement arrangements and health savings accounts. Post-*Windsor*, an employee’s same-sex spouse can now have his or her healthcare expenses reimbursed from one of those accounts. Note, though, that for health savings accounts, the maximum contributions are actually slightly higher for two individuals (\$6,700 total in 2015) than for a family (\$6,650).⁴

The second change relates to the Consolidated Omnibus Budget Reconciliation Act of 1986. More commonly known as COBRA, this law provides employees, their spouses and certain others the right to temporarily remain covered under an employer’s health insurance plan at the employer’s group rate after termination of employment, provided the individual takes over payment of the premiums. With the *Windsor* decision, a worker’s same-sex spouse now has the same COBRA rights that an opposite-sex spouse has always had, both while married and, in the event of divorce, afterward.

The implications of healthcare reform for married couples are discussed in the Financial Planning section of this paper.

Retirement Plans

There are two basic types of qualified retirement plans available in the workplace: defined benefit plans and defined contribution plans. In the private sector, defined benefit plans, also known as pension plans, are usually funded by employers and typically pay a retirement benefit based on a formula defined by the employer. Defined contribution, or “DC” plans, such as 401(k)s, are individual accounts to which employees and often employers contribute. In a DC plan, the sum of money available to a worker at retirement is based on the amounts contributed to the plan plus investment returns. Typically, the worker is responsible for converting those accumulated assets into retirement income. The *Windsor* ruling will impact both types of plans, since spousal rights with respect to them are strictly protected under the Employee Retirement Income Security Act of 1974 (ERISA).

With the *Windsor* decision, a worker’s same-sex spouse now has the same COBRA rights that an opposite-sex spouse has always had, both while married and, in the event of divorce, afterward.

In the meantime, here are the headline changes prompted by *Windsor* with respect to retirement plans:

Survivor benefit protection.

For defined benefit plans, same-sex spouses now enjoy survivor benefit protection. If a plan participant dies prior to retirement, his or her spouse is entitled to a qualified preretirement survivor

annuity, or QPSA. This is an immediate annuity payable to a surviving spouse, and must be made available no later than the month the deceased participant would have attained the earliest retirement age under the plan.⁵ Spousal approval is needed to waive the QPSA benefit and designate another beneficiary.⁶

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Assuming a participant in a defined benefit plan does not die prior to retiring, the plan sponsor must offer him or her an immediate life annuity, with a survivor benefit (if married), upon retirement. Known as a qualified joint and survivor annuity, or QJSA, this type of annuity pays benefits not only for the life of the plan participant but also for the life of the participant's spouse. If a married participant wishes to elect another form of pension benefit, the spouse must provide notarized written consent that the survivor benefit is being waived. The survivor benefit in a QJSA must be at least 50%, but not more than 100%, of the annuity payable when both spouses are alive.⁷ Same-sex spouses of workers who have a defined benefit plan will now benefit from this QPSA and QJSA pension coverage.

Some defined contribution plans also provide immediate annuity payouts at retirement. For these plans, similar rules regarding survivor benefits apply. If an annuity is not a payout option—if, for example, the plan provides a lump-sum distribution option only—and the participant dies, the plan will pay the balance of the participant's account to his or her spouse, unless the spouse had earlier consented to a waiver.⁸ In short, as a result of the *Windsor* decision, same-sex spouses are now covered under the same survivor benefit rules for defined contribution plans that apply to opposite-sex spouses.

In fact, for same-sex couples now being recognized as married, all non-spouse beneficiary designations for both types of retirement plans would now be deemed invalid until the spouse has consented. As a result, all same-sex married couples should revisit

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their retirement plan beneficiary designations to ensure they reflect the plan participant's current intentions, and, if necessary, have the proper spousal consent.

Hardship withdrawals.

Some defined contribution plans allow plan participants to take hardship withdrawals from their plans based on immediate and heavy financial needs. Those needs have always included certain expenses for opposite-sex spouses, such as medical or tuition bills or funeral expenses.⁹ With *Windsor*, that now applies to expenses for same-sex spouses, too.

Consent for withdrawals and loans from retirement plans.

In addition to allowing for hardship withdrawals, most defined contribution plans—as well as some defined benefit plans—also allow participants to take loans from their accounts. Post-*Windsor*, if a plan is subject to spousal annuity requirements, a participant's same-sex spouse will now need to provide written consent for participant distributions or loans over a certain amount.¹⁰

Divorce.

When a same-sex marriage results in a divorce, each spouse will now have rights to the other spouse's benefits under any qualified retirement plan governed by ERISA. If the participant has not elected an annuity with survivor benefits, these benefits are transferred to the other spouse through a qualified domestic relations order, or QDRO, which is initiated by the non-participant spouse.

Group Life Insurance

According to a 2012 survey of human resource professionals, more than half of employers give workers the option of purchasing voluntary life insurance on their spouse through a group policy.¹¹ With the recognition of same-sex marriages, this option will now become available to a same-sex spouse.

The *Windsor* decision impacts how much same-sex married couples can contribute to a dependent care flexible spending account, a tax-advantaged tool for paying eligible out-of-pocket expenses for dependents.

Dependent Care and Flexible Spending Accounts

The *Windsor* decision impacts how much same-sex married couples can contribute to a dependent care flexible spending account, a tax-advantaged tool for paying eligible out-of-pocket expenses for dependents. Individuals can contribute \$5,000 per year. Couples recognized as being married for federal tax purposes can contribute only \$5,000 combined. By contrast, couples using healthcare flexible spending accounts will not see their contribution limits impacted. Limits for those accounts were already \$2,500 per individual and \$5,000 per married couple, and that has not changed.¹²

Other Employee Benefits

Some employers provide spouses with various additional benefits that receive favorable federal tax treatment. These benefits, long enjoyed by opposite-sex spouses, will now be available to same-sex spouses as well. Two examples of these types of benefits are retirement planning services and employee discounts.¹³

Financial Planning

In addition to new workplace benefit opportunities, same-sex married couples should consider the new financial planning options available to them as a result of the *Windsor* decision.

Healthcare

The *Windsor* decision was handed down just as new options for individual health insurance coverage became available in 2014 under the Patient Protection and Affordable Care Act. To understand how *Windsor* impacts healthcare benefits under this new law—commonly called the Affordable Care Act, or ACA—it helps to understand some of the law's key components.

The ACA provides financial aid to low-income Americans in the form of premium assistance tax credits, which can be applied toward the purchase of a private health insurance plan through any of the health insurance exchanges created by the ACA. (States can run their own exchanges, partner with other states to run one, or choose not to run an exchange at all—in which case their residents would use the federal government's exchange, the Health Insurance Marketplace.) Premium assistance tax credits are available to anyone who has enrolled in an exchange plan, does not have an employer-provided health plan (see discussion below), and has household income between 100% and 400% of the federal poverty level.¹⁴ For 2015 couples, that income range is \$24,250 to \$97,000, respectively, for a family of four.¹⁵

Health insurance plans offered through exchanges are slotted into one of four categories based on the level of benefits they provide. The least generous bronze plans are designed to pay, on average, 60% of covered medical expenses. Silver plans are designed to pay 70% of covered expenses, gold plans 80%, and platinum plans 90%.¹⁶

In addition to premium assistance tax credits, anyone who signs up for a silver plan and falls within prescribed income limits also may qualify for cost-sharing subsidies that can be even more lucrative than premium assistance tax credits. For households with income up to 250% of the federal poverty level, which equates to \$60,625 for a family of four for 2015 coverage, the subsidies lower deductibles and co-payments. In addition, total out-of-pocket spending limits for in-network medical expenses are lower than the limits of non-subsidized plans.¹⁷ The net result is that, for individuals receiving the subsidies, a silver insurance plan covers more than the usual 70% of qualified medical expenses.

Whether or not an individual is married may impact his or her ability to receive premium tax credits and cost-sharing subsidies in either of two ways:

Access to a spouse's plan.

If an individual is married and eligible to be covered under his or her employer's health insurance plan, or a spouse's plan, then the premium tax credits and subsidies are not available. This means that a single person who was receiving the credits, and perhaps cost-sharing subsidies too, would lose them by marrying someone whose employer offers healthcare coverage to spouses.

Combined income exceeds thresholds.

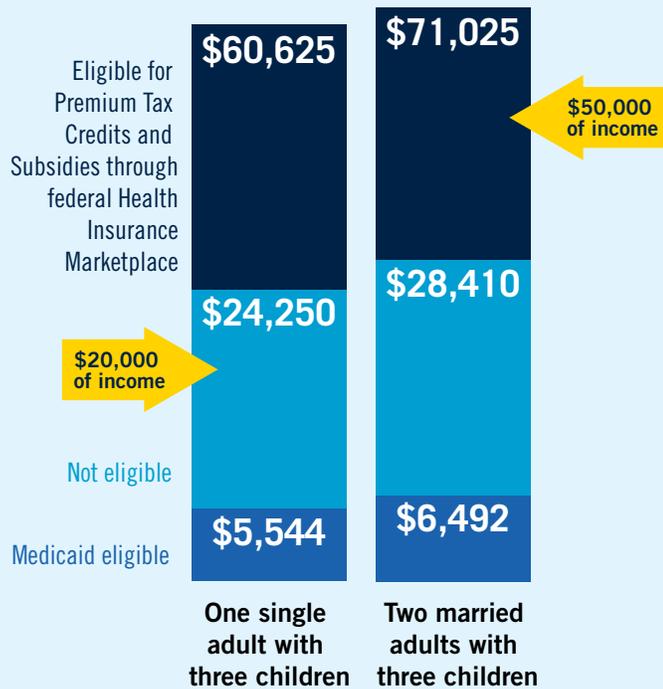
Married couples are ineligible for premium assistance tax credits and cost-sharing subsidiaries if their combined income exceeds the qualifying income threshold for the tax credits. So, a lower-earning individual may be eligible for the credits and subsidies, but lose them by marrying—even if their spouse's employer does not offer healthcare coverage to spouses. (Note: Married couples must file a joint tax return to qualify for the premium credit.)

In addition to providing options for health care coverage through exchanges, the ACA also permits states to expand Medicaid coverage to more citizens by loosening the eligibility criteria. As of June 2015, 30 states and Washington D.C., had chosen to do this.¹⁸ In those states, eligibility for premium assistance tax credits begins at the income level where an individual no longer qualifies for Medicaid.¹⁹ Post-*Windsor*, however, a low-income individual in a same-sex relationship could find their eligibility for Medicaid impacted simply by getting married. Even if they qualified while single, they could be disqualified if their income, plus their new spouse's income, exceeds the Medicaid limit for married couples.

This issue becomes even more complex in states that have chosen not to expand Medicaid eligibility. Some individuals will find themselves in the unfortunate situation of having income that is too high to qualify for Medicaid, but too low to qualify for premium assistance tax credits or subsidies.²⁰ In these situations, marriage might boost household income to a level that qualifies for premium assistance tax credits and cost-sharing subsidies. By way of example, Exhibit A compares a single Mississippi resident who is the head of a four-person household with \$20,000 of annual income to a married Mississippi couple with a five-person household and \$50,000 of income. The single individual does not qualify for Medicaid or for tax credits or subsidies; the married couple, while making too much to qualify for Medicaid, is eligible for tax credits and subsidies.

Exhibit A

Example reflects a family of four, single parent as head of household in Mississippi with \$20,000 of income compared to eligibility of that same family when the parent marries and joint income becomes \$50,000. Income amounts are for 2015 coverage.



Source: Mississippi Division of Medicaid and Healthcare.gov

With respect to Medicare eligibility at age 65, individuals in a same-sex marriage may now qualify for Medicare coverage as a spouse if they don't have enough credits based on their own work history.

Social Security

As a result of the *Windsor* and *Obergefell* decisions, all same-sex married couples are now eligible for Social Security spousal and survivor benefits.

Spousal benefits.

Individuals who do not have the minimum 40 quarters of work history required to qualify for Social Security benefits on their own may qualify based on their spouse's work record. In addition, even if a spouse has enough work history to qualify for a worker benefit, an additional spousal benefit may be payable. This will occur when the lower-earning spouse's benefit at Full Retirement Age—the age at which he or she is eligible for a full, or unreduced, benefit—is less than half the spouse's benefit at Full Retirement Age. The difference is payable as a spousal benefit.

Survivor benefits.

Married couples are entitled to survivor benefits during retirement. Quite simply, when one spouse in a married couple dies, the Social Security Administration looks to see which spouse was receiving the higher benefit at that time. The lower benefit drops off and the higher benefit continues to be paid to the surviving spouse. This has important planning consequences. A decision by the higher-earning spouse to delay initial claiming builds a higher monthly benefit not only for that person but also, potentially, for a surviving spouse. Additional strategies married couples can use to optimize benefits are outlined in the Prudential paper, "Innovative Strategies to Help Maximize Social Security Benefits."

Since the marriage of a same-sex couple is recognized by the Social Security Administration, a subsequent divorce will be recognized as well. Generally speaking, divorced spouses who were married at least 10 years are eligible for the same benefits as currently married individuals.

In addition to marriage, if a state recognizes spousal inheritance rights for a domestic partnership, civil union, or reciprocal beneficiary relationship, the Social Security Administration now treats a couple as married. With spousal inheritance rights, a same-sex partner who is in a relationship recognized by the state is treated as a spouse when the other spouse dies and there is no will in place.

Individual Retirement Accounts (IRAs)

With marriage now an option for same-sex couples, more favorable planning options emerge with respect to accumulated IRA wealth when one partner dies.

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It is helpful to first understand what happens if a couple is not married, or, in the case of some same-sex couples prior to *Windsor*, not recognized at the federal level as being married. If a couple is not married and a surviving partner is named the beneficiary of an IRA, the most favorable strategy is usually for the beneficiary to roll the assets into an Inherited IRA. The non-spouse beneficiary must then begin withdrawing assets in the calendar year immediately following the year of death of the original IRA holder.²¹ The amount withdrawn must at least equal the required minimum distribution amount as determined by an IRS formula based on the beneficiary's age.²²

The surviving spouse in a married couple can set up the same sort of Inherited IRA, but now required minimum distributions can be delayed until the deceased spouse would have turned 70½ (assuming that date is later than the calendar year following the year of death).²³ Withdrawals in this instance must at least equal the required minimum distribution amount based on the attained age of the beneficiary at the time withdrawals are made.²⁴

Another option for a surviving-spouse beneficiary is to roll the IRA assets of the deceased into his or her own IRA.²⁵ This strategy allows required minimum distributions to be based on the age of the surviving spouse, which means distributions will not have to begin until the surviving spouse reaches age 70½. This would allow tax-deferred IRA wealth to continue to grow for the widow or widower's later retirement years. Required

minimum distribution amounts may also be smaller than with an Inherited IRA, as a different table used for determining the amount—known as the Uniform table—can be used.

The *Windsor* decision has a few other implications for IRA investors. For example, a same-sex married couple that files a joint tax return can now contribute to a spousal IRA. The contribution can be as much as \$5,500 in 2015 (\$6,500 if age 50 or older), with the maximum allowable deduction for contributions dependent on whether either spouse has a workplace retirement plan.

Conversely, some individuals may find their ability to make IRA contributions becomes more limited when they are considered married. For example, eligibility to make contributions to a Roth IRA is income dependent. As a result, an individual who made Roth IRA contributions in the past when single, may find that combining his or her income with a spouse makes the individual ineligible to make Roth IRA contributions going forward.²⁶

Similarly, an individual who made deductible IRA contributions in the past may find his or her ability to make deductible contributions limited in the future when recognized as being married. This can be due to exceeding income limits and/or the spouse having a retirement plan at work.²⁷

Estate and Gift Planning

Estate planning has always been simpler for married couples than for non-married couples. As estate and gift planning is governed by the IRS and the Department of the Treasury, same-sex marriages are now recognized. In those cases, same-sex married couples, in which both spouses are U.S. citizens, are now able to use the unlimited estate tax marital deduction at death to pass assets to a surviving spouse without incurring federal estate taxes.²⁸ They also are able to pass any unused estate tax exemption, as well as any gift tax exemption, to a surviving spouse.²⁹ In addition, a same-sex married spouse can now make a gift or transfer property to the other spouse without incurring federal income tax or gift tax.³⁰ Finally, a same-sex married couple can now utilize gift splitting, whereby each spouse is treated as giving one-half of the property gifted by the other spouse.³¹

Tax Planning

Federal income taxes are regulated by the IRS and the Department of the Treasury. Same-sex married couples must now file federal tax returns using the “married filing jointly” or “married filing separately” filing options.³² However, filing as a married couple may result in higher, not lower, federal taxes, since the combination of the couple’s salaries may push the couple into a higher tax bracket. This will often be the case when both spouses are high earners.³³ As a result of the *Obergefell* decision, same-sex married couples residing in any state must file their state returns as married as well.

Higher income married couples are more likely to be subject to what is often referred to as the “marriage penalty.” This relates to the structure of the tax rate tables whereby, for higher incomes, the brackets for married couples are less than twice those of a single individual. As a result, the combined income of both spouses pushes the couple into a higher tax bracket. Some other examples of tax results that negatively impact married couples include the new Medicare taxes on wages and on investment income, since the wage and Adjusted Gross Income (AGI) limits for married couples are only \$50,000 higher than the amounts for single taxpayer³⁴; a phase-out of itemized deductions and dependent exemptions; and loss of medical expense deductions and miscellaneous deductions, as these are based on an amount in excess of a percentage of AGI.

Individual Life Insurance

In the wake of the *Windsor* decision, same-sex married couples will no longer pay higher federal taxes on inherited assets and other property when one spouse dies. Accordingly, they may no longer need life insurance for this purpose. However, same-sex married couples now face the same issues opposite-sex couples face when trying to insure against the premature loss of either spouse. Life insurance not only has the ability to replace lost earnings, but can be used to pay for the college education of children in the event of a spouse’s death. Life insurance also can be used to ensure an adequate level of wealth for the retirement of a widow or widower. This may be important if a deceased spouse has not had time to accumulate enough assets in a 401(k), or build up a sufficient Social Security benefit, to ensure the spouse’s financial security in retirement.

College Planning

As of the 2014-2015 academic year, legal parents of any gender who live together will both be considered in the Federal Methodology of calculating financial aid. It won’t matter whether a couple is married or not, as both incomes will be counted if a couple resides together and the individuals are the student’s legal parents.

Conclusion

The *Windsor* and *Obergefell* decisions help level the playing field for same-sex married couples. With same-sex marriage now recognized at both a federal and state level, some employers may begin to eliminate benefit offerings for domestic partners. With so many changes taking place, those who are impacted by *Windsor* and *Obergefell* may wish to seek the counsel of professional advisors.

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