

Tax Considerations for Same-Sex Couples

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The pursuit of marriage equality for same-sex couples brings much-needed focus to the everyday needs of lesbian and gay couples. Without full legal recognition and protections, same-sex couples confront a variety of complicated legal and financial issues—including numerous tax matters. Lambda Legal has assembled this general information to assist same-sex couples as they meet with professionals for legal and tax advice specific to their situation. Lambda Legal recommends that your life and financial planning team include an attorney with experience addressing legal issues impacting same-sex and/or unmarried different-sex couples, a financial advisor, and, depending upon your circumstances, a Certified Public Accountant. Unless specifically stated, the following information applies only to federal taxation.

NOTE: This information is not legal or tax advice. Consult a professional regarding your specific tax and other potential legal obligations¹.

Marriage

Federal Income Tax Filings

The federal so-called Defense of Marriage Act (“DOMA”) restricts the term “marriage” for federal purposes to the legal union of a heterosexual couple. As a consequence, the federal government does not respect the actual legal status of married same-sex couples and individuals who have been married to a same-sex spouse for any purpose, including federal income taxation and estate and gift tax considerations, regardless of whether their home states honor their unions. Same-sex married couples thus are required to file separate individual federal income tax returns, each with a filing status of “single,” even when they must file their state returns with a “married” status (whether filing jointly or separately).

Because taxpayers can face legal liability if they knowingly file a tax return that is false or misleading and the federal tax return form presently offers no way for same-sex married couples to identify their legal status accurately, some worry that they could risk a penalty no matter how they prepare their federal return. Accordingly, tax professionals sometimes advise that, when filing their individual returns as “single,” taxpayers who have a same-sex spouse consider disclosing in some way that they are married². For example, a taxpayer can check the “single” filing status box on the tax form and then place an asterisk next to the box and note on the form or in a cover letter that the taxpayer is married to a same-sex partner and is filing as “single” in light of DOMA. Lambda Legal has developed a sample disclosure statement for federal tax filings, available as a downloadable PDF below. In addition to alleviating any anxiety about the accuracy of one’s federal return, this approach also may help protect

¹ To ensure compliance with Treasury Department regulations, we advise you that information contained in this bulletin was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein. Also, please note that this information pertains to 2011 personal income tax filings and may not apply to future tax filings.

² Marriage to a same-sex spouse may create special legal vulnerability for immigrants who lack permanent legal status in the United States. These individuals should seek advice from counsel with expertise in the relevant area of law, such as Immigration Equality (www.ImmigrationEquality.org) at (212) 714-2904. Same-sex couples considering adoption from a foreign country also should consult with experts regarding the potential impact of marriage upon such adoptions.

against assertions that one disclaimed the legal validity of one's marriage if the issue were to arise in non-tax context, such as in connection with applying for a joint mortgage or spousal insurance benefits.

[View/print the sample disclosure statement for federal tax filings as a pdf.](#)

State Income Tax Filings

State tax treatment of same-sex couples who are married or who have entered into a civil union or registered with the state as domestic partners varies by state. Same-sex couples in such legal unions should consult with a local tax practitioner to evaluate their options under state law.

Sharing a Financial Life

Same-sex couples may own together some or all of their assets, such as their home, bank accounts, investments, etc. Almost any asset may be owned jointly by any two U.S. citizens, except retirement accounts.

Joint ownership of assets can make life simpler in many ways and potentially can expedite transfer of property upon death of one partner. However, it is important for same-sex couples with joint checking and/or investment accounts to understand that assets transferred between them possibly can become subject to federal gift taxation. Due to the discriminatory language of the federal DOMA, the IRS considers some property transfers between same-sex spouses and registered partners as taxable gifts when such would not be the case for heterosexual spouses. In particular, gift taxes potentially may be due if one partner is deemed to have given more than \$13,000 per year to the other partner (exclusive of certain medical and educational expenses). You should consult your tax advisor and financial planner for more information about whether you are likely to be subject to gift taxation, and about how to structure your joint accounts and otherwise manage your property in light of this possibility.

Property

To safeguard shared interest in real property, such as a house, between same-sex partners, appropriate titling is vital. If a couple titles the house in a single name only (that is, to indicate that the named partner owns it outright), upon that partner's death, ownership of the house will pass as designated in the deceased's will (if there is one) or as provided by state law (if there is no will); either way, it will go through probate. If the survivor stands to inherit the house through the will or under state law, that right may be subject to contest by other family members during the probate process³. Some couples attempt to safeguard against those concerns by sharing ownership as Joint Tenants with Rights of Survivorship ("JTWROS"). If the house is titled JTWROS, and one partner dies, the other should receive ownership of the house automatically regardless of the will, state inheritance law or any claims by outside parties.

However, JTWROS has several potentially negative tax implications that should be taken into account. First, the entire house's value will be considered in the federal estate tax calculation. The burden will be on the surviving partner to prove contribution to the asset up to 50% of the fair market value of the house. If the survivor cannot prove having made such a contribution, the entire value will be included in the estate tax calculation, which could trigger estate taxes. Second, if the house was not originally titled JTWROS and a partner with sole title re-titles it to JTWROS, the other partner may have to provide proof of contribution to the asset or the IRS might look upon the re-titling as a "gift" of half the value of the house, which could trigger gift tax liability. (See above for more information about gift taxation.) Consult with your attorney about what form of titling is best for your situation, and how you can show each of your contributions should the need arise.

³ If the partner should die without a will or other estate plan in place, depending on state law, the surviving partner may have no rights to inherit the house.

There also may be significant capital gains issues with property titled in one partner's name if that partner then re-titles ownership with her or his spouse/partner. Be sure to discuss capital gains issues with your life planning team before making changes to title.

Retirement Assets

In almost all cases regarding retirement income and assets, which usually are governed in key respects by federal law, same-sex spouses and all domestic partners are considered "non-spouse" beneficiaries. This can affect a couple's retirement plans in significant ways. The most important of the assets affected are:

- **Social Security benefits:** Same-sex spouses and all domestic partners do not qualify as "spouses" for federal purposes and thus will not receive a spousal continuation of social security benefits at the death of the first spouse or partner.
- **401k plans:** Beginning January 1, 2010, non-spousal beneficiaries of 401(k) plans (including domestic partners and same-sex spouses) are able to roll a lump-sum distribution into their own "inherited" IRA account. Previously, only federally-recognized spouses were permitted to roll-over in this way absent a specific non-spousal roll-over provision in the employer's 401(k) plan. Non-spousal beneficiaries still will have to start taking distributions immediately (unlike federally-recognized spouses), but will no longer be subject to the high tax burden of taking the funds in a mandatory, immediate lump sum distribution.
- **IRA Distributions:** A non-spousal beneficiary such as a partner or same-sex spouse may roll-over inherited IRA assets into his or her own "Inherited IRA," thereby entitling the beneficiary to receive payments over his or her lifetime rather than having to take a lump-sum distribution as was required prior to 2007. The roll-over rules are not as favorable for a non-spousal beneficiary as for a federally recognized spouse – for example, distributions must begin prior to the end of the year following the plan-holder's death, where a recognized spouse can hold off until age 70 ½ to begin taking distributions—but are substantially more favorable than under previous law. Consult your tax professional and financial advisor to determine the best way to structure your distributions.
- **Beneficiary designations:** Retirement assets such as IRAs, 401(k) plans, 403(b) plans, etc., provide the owner the ability to select a beneficiary for the asset(s) after death. If the owner does not select a beneficiary, or the selected beneficiary dies before the owner, the asset(s) will revert to the owner's estate and be distributed through the probate process. If the owner did not have a valid will, state law will determine who receives the asset(s)—and that may not be the owner's same-sex partner or other intended beneficiaries. Be certain to designate your beneficiary(ies), and check all of your beneficiary designations once a year to ensure they accurately reflect your current intentions.

Health Insurance

Health insurance provided by employers to their employees, their employees' federally-recognized spouses, and their employees' children is considered a non-taxable fringe benefit under federal law. Health insurance for an employee's domestic partner or same-sex spouse also is a fringe benefit, but is not deemed exempt from income tax liability by the Internal Revenue Code. For federal tax purposes, but not in all states (e.g., California), employers who provide insurance for the domestic partners and/or same-sex spouses of their employees must report the value of those benefits as taxable income imputed to their employees.

Children

If a same-sex couple has a child, and each member of the couple is a legal parent (biological or adoptive), either may claim the child as a dependent for federal income tax purposes. In addition, the presence of a dependent child may entitle a parent to use the “head of household” filing status, which generally is more advantageous than using the “single” filing status. To qualify as a “head of household,” a parent must provide more than 50% of a child’s support. If a same-sex couple has two children, each partner may be able to file as a “head of household” by claiming one child as a dependent. Consult your tax professional about what qualifies as support and eligibility to claim a dependent.

Adoption Credit

Taxpayers may claim a one-time federal adoption credit of up to \$13,360 for qualified adoption expenses for each eligible child. The credit is phased out for taxpayers with adjusted gross income (“AGI”) in excess of \$185,210 and cannot be claimed by those with AGIs exceeding \$225,210. The phase-out limitation will disqualify more couples filing joint returns than same-sex couples filing individually with “single” status.

Child Tax Credit

The federal child tax credit is available to taxpayers with a dependent child age 16 or younger. This \$1,000 per-child credit phases out when a “single” or “head of household” filing status taxpayer’s AGI exceeds \$75,000.

Seek counsel from your own professional advisors when making tax, estate and/or financial planning decisions.