



Q&A

TRS issues related to same-sex spouses effect of the United States Supreme Court's decision in *Obergefell v. Hodges*

On June 26, 2015, the United States Supreme Court (Court) issued its decision in *Obergefell v. Hodges*, which establishes that every state must license same sex marriages, must recognize same sex marriages performed in other states, and must treat opposite-sex and same-sex spouses equally. As a result of the *Obergefell* decision, governmental pension plans cannot make distinctions between opposite-sex and same-sex spouses. It is important that TRS members and employers understand the application of the *Obergefell* decision to TRS benefits and administrative processes in order to ensure that same-sex spouses of TRS members receive the same treatment as opposite-sex spouses in TRS's provision of retirement benefits and related services.

Specifically, this memo will address the following:

1. How will TRS define "spouse" and "marriage" for purposes of applying the *Obergefell* decision?
2. Are new or different retirement benefits payable to a same-sex spouse?
3. Has the tax treatment of any amount payable by TRS to a same-sex spouse changed?
4. Will a member or same-sex spouse be required to prove marital status when claiming same-sex spouse status?
5. If a TRS member is in a same-sex marriage, what will TRS require as proof of termination of the marriage, and can a family law order be entered with TRS on behalf of same-sex ex-spouse?
6. Will TRS retroactively apply the rights of a legal spouse to a same-sex spouse?
7. Is a domestic partner the same as a same-sex spouse, and if a member has previously designated a beneficiary who is his/her same-sex domestic partner, will TRS now treat that person as a same-sex spouse?
8. What should a TRS member who is in a same-sex marriage do to ensure correct treatment of his/her spouse with respect to his/her TRS benefits?

How will TRS define "spouse" and "marriage" for purposes of applying the *Obergefell* decision?

TRS law does not currently include a specific definition of "spouse." Montana law defines "marriage" as a "personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential." Montana law recognizes a marriage as valid if it is entered into in any of the following manners:

- by solemnization
- by declaration
- by application of common law

Marriage by solemnization or by declaration require legal registration of the marriage — a completed and witnessed marriage license or declaration is filed with a clerk of district court in Montana. A common law marriage is not registered, but is proven by facts and circumstances, including the representations of the parties, evidencing a marital relationship. Of course, Montana law also recognizes marriages that are legal under the laws of another state in which the marriage was formalized as long as the marriage is not prohibited by Montana law. Montana law currently prohibits

marriage between persons of the same sex.

The *Obergefell* decision may lead to legislative changes to current Montana law pertaining to marriage, unless and until those changes are made, TRS will apply the *Obergefell* decision in conformity with the current Montana law on marriage. In other words, TRS will recognize a same-sex spouse where the individual is the spouse of the TRS member, whether by marriage validated by solemnization, by declaration, by common law, or by the laws of another state in which the marriage occurred.

Are new or different retirement benefits payable to a same-sex spouse?

For the most part, the answer is “no.” TRS law does not provide specific benefits only to the spouse of a member nor is eligibility for benefits as a beneficiary or joint annuitant of a TRS member based on marital status or gender. TRS law does not require that a member’s spouse must be his/her beneficiary. Rather, TRS law allows a TRS member to designate any individual as a beneficiary or joint annuitant. Therefore, if a TRS member has been in a same-sex marriage (or a domestic partnership), the same-sex spouse or domestic partner was eligible to receive the same types and, with one possible exception (described in #3 below), the same amount in benefit payments from TRS on behalf of the member as an opposite sex spouse would have been entitled to receive, even though Montana law has does not recognize same-sex marriages or domestic partnerships.

Has the tax treatment of any amount payable by TRS to a same-sex spouse changed?

A United States Supreme Court decision in 2013 extended the definitions of “marriage” and “spouse” to same-sex persons. The Court’s decision in *United States v. Windsor* equalized the treatment of opposite-sex and same-sex spouses under federal tax law, including the treatment of

- eligible rollover distribution
- minimum required distributions, and
- the testing of survivor benefit limits.

However, the Windsor decision didn’t require states’ tax laws to provide equal treatment of pension distributions payable to opposite-sex and same-sex spouses. The *Obergefell* decision, however, does mandate that state tax laws must be applied equally.

TRS assumes that state tax law will be amended, if necessary, to comply with the *Obergefell* decision and/or that state tax law will be applied by the state of Montana in the interim, if necessary, in conformity with the *Obergefell* decision. If and/or how state tax law and TRS’s withholding responsibilities under state tax law will change in light of the *Obergefell* decision will be determined by the Montana legislature and the Montana Department of Revenue.

In every instance, TRS will comply with the withholding requirements and other state and federal tax laws and rules as set forth by the appropriate tax agencies with the only change being that TRS will apply the laws and rules equally to all legal spouses whether opposite-sex or same-sex.

Will a member or same-sex spouse be required to prove marital status when claiming same-sex spouse status?

TRS does not currently require proof of marital status for opposite-sex spouses for purposes of benefit distribution or

for other administrative purposes, and will not require proof of marital status for same-sex spouses unless other applicable state or federal law requires proof of marital status for other purposes (such as for the favorable tax treatment of eligible rollovers). If any applicable state or federal law, now or in the future, requires proof of marital status, the requirement to prove marital status will be applied to both opposite-sex and same-sex marriages.

If a TRS member is in a same-sex marriage, what will TRS require as proof of termination of the marriage, and can a family law order be entered with TRS on behalf of same-sex ex-spouse?

Because Montana (and other states') courts must now treat a same-sex marriage in the same manner as an opposite-sex marriage and an opposite-sex spouse. Therefore, same-sex marriages are equally subject to the rights and obligations of all law pertaining to marriage, including the requirement for a court order (divorce decree) to terminate the marriage, and all laws pertaining to distribution of marital property, spousal support, etc. As well, while TRS law does not create statutory beneficiary or joint annuitant rights in a member's spouse, a married member's spouse, once designated as a beneficiary, may not be removed as a beneficiary while a divorce is pending. A married member's spouse must also acknowledge the member's retirement benefit election.

A TRS member with a same-sex spouse will be required to obtain a divorce decree from a court of competent jurisdiction in order to establish that the marriage has been terminated. For both opposite-sex and same-sex spouses, the requirement for a formal divorce applies whether the marriage was entered into by solemnization, by declaration, or by common law.

A family law order (FLO), as it pertains to the spouse of a TRS member, is a court order that may be issued by a court of competent jurisdiction, and which may require TRS to directly distribute some portion of the retirement benefits or other amounts payable by TRS on behalf of the member to the spouse or ex-spouse of the member as marital property or as spousal maintenance. The option for and requirements pertaining to a family law order will apply equally to opposite-sex and same-sex spouses of TRS members.

Will TRS retroactively apply the rights of a legal spouse to a same-sex spouse?

No, unless further law or legal precedent applicable to TRS requires it to do so. The Court in *Obergefell* provided no guidance regarding whether its decision could or should or must be applied retroactively. In other words, the Court did not expressly determine or provide guidance on whether governmental entities must recalculate benefits or allow changes to benefit elections effectively made before the date of issuance of the *Obergefell* decision. Therefore, unless further legal authority requires a different application, TRS will apply the holding in *Obergefell* prospectively only.

Except for the federal tax treatment of TRS benefits and distributions as required under Windsor, TRS will treat same-sex spouses of TRS members the same as opposite-sex spouses effective June 26, 2015. If a TRS member was married to a same-sex spouse prior to that date, whether in another state or in Montana, in a manner that would be recognized by Montana law as a valid marriage notwithstanding that the parties to the marriage are of the same sex, TRS will treat such marriage as if the date of marriage were June 26, 2015.

TRS will not apply the *Obergefell* decision to allow modification of benefit elections or designations of joint annuitants, elections to withdraw, or calculations of benefit amounts made on or before June 26, 2015.

Is a domestic partner the same as a same-sex spouse, and if a member has previously desig-

nated a beneficiary who is his/her same-sex domestic partner, will TRS now treat that person as a same-sex spouse?

Many domestic partnerships were entered into as a substitute for a legal marriage between same sex spouses when federal law and most states' laws did not recognize same-sex marriages as valid. As well, many employers and governmental entities authorize the provision of employment benefits to domestic partners through statute, rule, or policy that is specific and limited in scope. However, a domestic partnership is a relationship that is expressly understood not to be a legal marriage. While some same-sex domestic partners are also married, most are not.

If a TRS member has previously identified an individual to his/her employer or to TRS as his/her domestic partner, such designation will not establish that individual's status as the member's legal spouse. If the domestic partner is also, now, the legal spouse of the TRS member, the TRS member needs to clarify his/her marital status and the identity of his/her spouse to TRS as described in #8.

What should a TRS member who is in a same-sex marriage do to ensure correct treatment of his/her spouse with respect to his/her TRS benefits?

An active or inactive TRS member with a same-sex spouse should immediately review his/her beneficiary designations with TRS and update those designations, if necessary, to identify the relationship status of a same-sex spouse designated as a beneficiary as "spouse." The correct designation of a beneficiary as the member's spouse on documentation with TRS will help expedite the correct processing and the correct tax treatment of refunds or benefits payable to the spouse/beneficiary upon the death of the member.

A TRS member with a same-sex spouse who is retiring and making an irrevocable retirement benefit election on or after June 26, 2015, if designating his/her spouse as his/her joint annuitant (under Option A, B, or C) or as a beneficiary under any other benefit election, must identify the relationship status of the same-sex spouse as "spouse." As well, the same-sex spouse of a retiring member must sign, with notarization, the spousal acknowledgment of benefit election and designation of beneficiary contained in the retirement application.

A new or current TRS member with a same-sex spouse must, for all other TRS administrative purposes, correctly identify the member's relationship status as "married," identify the spouse by name where required by TRS, and obtain the acknowledgment/signature of his/her spouse on documentation when and as required by TRS.

Conclusion

As stated above, additional legislation and/or litigation may further refine the law regarding the treatment of same-sex marriages and same-sex spouses related to the provision of public pension benefits in general and TRS benefits in specific. TRS will continue to advise TRS members and employers as the law develops. Whatever the current or developing status of the law, it is always TRS's objective and effort to provide retirement security to its members and their beneficiaries, fully and efficiently, both in conformity with TRS's plan terms and in conformity with all other applicable law.

If you have questions regarding TRS's treatment of same-sex spouses, please contact Shawn Graham, Executive Director, at 406-444-3376 or via email at shawngraham@mt.gov.