



# Spouse or Not a Spouse: That is the Question...of the Week

## Facts

Our company has sponsored a 401(k) plan for a while and although it's not new to us that certain situations - from beneficiary designations to annual nondiscrimination testing - might require us to provide information about spousal relationships, we are seeing that different types of relationships, and statuses, are becoming more commonplace.

## Question

Can you provide any insight as to when someone is or is not considered a spouse for purposes of the 401(k) plan?

## Answer

That is a big question and one that can be challenging to answer...which is probably why you asked it. One of the reasons it is so challenging is that the concept of marriage carries many deeply held personal beliefs that extend to areas such as religion, culture, and geography – just to name a few. When it comes to applying the retirement plan rules, however, it is necessary to set aside those beliefs and focus on the regulatory definitions and requirements.

You mentioned a couple areas where identifying a participant's spouse is necessary. Here is a quick rundown:

- **Ownership Attribution:** IRS rules require that an individual's ownership interest in a company be attributed to certain family members, including spouses.
- **Nondiscrimination Testing:** One of the criteria used to identify highly compensated and key employees for testing is an individual's ownership interest in the company. That includes ownership attributed from employee to spouse.
- **Related Companies:** When there is a sufficient level of overlapping ownership between two companies, they are considered related and must be combined for many plan purposes. You guessed it...that includes attributed ownership.
- **Spousal Consent:** Congress was concerned about protecting rights spouses might have with respect to retirement benefits. As a result, there are certain elections a plan participant might make that require written consent from his/her spouse. These can include elections such as **beneficiary designations**, form of distribution (lump sum vs. an annuity), and even the decision to take a participant loan.
- **Domestic Relations Orders:** Normally, retirement plan accounts cannot be assigned to another party or used as collateral. One exception is that a participant can assign retirement benefits to a former spouse in a divorce.

With that as context, let's get back to the question at hand. How do we deal with different types of relationships?



## Same-Gender Marriages

This is actually one of the most straight-forward situations. The Supreme Court's 2015 *Obergefell* decision, and subsequent guidance from various government agencies, made it clear that same-gender marriages are the law of the land and must be recognized. So, if a same-gender couple is married, they are spouses.

## Divorce and Separation

The divorce part is also pretty easy. Once a couple is legally divorced, they are no longer spouses for retirement plan purposes. Separations can be a little trickier, however. If a couple is having difficulty and one is relegated to sleeping on the sofa, that is not an official separation that would break the spousal connection. However, if that same couple applies to the court to be recognized as legally separated, that does break the connection...mostly. Since spousal rights come into play in divorce proceedings, a separation in lieu or in advance of a divorce does not eliminate those rights. That means a separated spouse might still be required to consent to a distribution or change in beneficiary until such time as the actual divorce is finalized.

## Engagement and Domestic Partnership

Going in the other direction, there are situations when a "pre-marital" relationship can make for a difficult determination. A couple is not considered spouses solely by virtue of them getting engaged. However, the facts and circumstances sometimes require looking a little further. The reason is that certain states have laws that treat certain domestic partner type situations as so-called common law marriages, depending on how long the domestic partners have been together. Since those determinations vary by state and can be based on subjective criteria, we can't really provide a "bright line" test for this determination. If you are faced with a situation like this, we would recommend consulting an attorney for assistance.

## Timing

Since weddings, divorces, separations, etc. don't always happen on the first day of the year, how do we handle the spousal rules when there is a mid-year relationship change? That answer depends on the specific reason for the question. When it comes to identifying highly compensated employees (HCEs), anyone who meets the ownership requirements (including attributed ownership) at any time during the current or immediately preceding plan year is an HCE for that year. However, when it comes to beneficiary designations and other types of spousal consent, those rules do not kick in until the couple are first recognized as spouses.

Although many of these rules are relatively straight-forward, the times when they are not often involve more emotionally charged situations – either positive (excitement over an upcoming marriage) or negative (angst over a pending divorce). Those are exactly the times when emotions should be put aside to ensure any decisions involving the retirement plan are correct. When in doubt, give us a call.

## Related Resources

■ [Topic Archive: Spousal Consent](#)

■ [Topic Archive: Beneficiary Designation](#)



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