

SAME-SEX MARRIAGE AND EMPLOYEE BENEFITS

Both the 2004 presidential election campaign and the November 2003 Massachusetts's Supreme Judicial Court ruling that same-sex couples have a right to marry brought the same-sex marriage issue into the national spotlight. In the wake of that ruling, same-sex marriages were performed in a number of jurisdictions around the nation and in several towns in New York State, although the legality of such marriages is in question. Perhaps in response to these developments, a number of states passed constitutional amendments that would ban same-sex marriages. On the federal level, President Bush has proposed that the United States Constitution be amended to declare that a marriage may only be between a man and a woman.

These developments prompted many New York employers to question their obligations regarding the provision of employee benefits to same-sex partners. As it stands, employers under federal law aren't required to provide spousal benefits to the domestic partner of an employee, even if the employee and their partner have legally married or entered into a civil union under applicable state law. While an employer is generally not required to provide benefits to same-sex partners, employers may voluntarily extend certain benefits to the same-sex partners of their employees.

Federal Law Governs Definition of "Spouse" for Most Benefit Plans

In 1996, the Defense of Marriage Act (DOMA) was enacted. DOMA provides that, for purposes of all federal statutes, "marriage" means only a legal union between a man and a woman, and "spouse" refers only to a person of the opposite sex. Thus, under DOMA, same-sex partners, even if legally married, won't be considered "spouses" for purposes of any federal law. For this reason, the scope of federal laws and regulations governing Social Security Survival Benefits, Medicare, veteran's rights, 401-k plans, taxes and immigration won't be affected by same-sex marriages, even if it's recognized by certain states. The federal DOMA also exempts states from being forced to recognize same-sex marriages from other states.

The federal Employee Retirement Income Security Act (ERISA) governs most employee benefit plans, including self-

funded health plans and retirement plans. As a result of DOMA, a "spouse" under ERISA is exclusively a person of the opposite sex who is a husband or a wife. A state law that recognizes same-sex partners as spouses will have no effect on the definition of "spouse" for purposes of ERISA plans.

Generally, any state law that seeks to regulate or affect an ERISA-covered employee benefit plan is preempted and isn't enforceable with regard to the plan. This means that,

under current law, an ERISA-covered plan, such as an employer's self-funded health plan, generally may not be compelled to provide spousal benefits for a same-sex couple, even if the couple is legally married under state law.

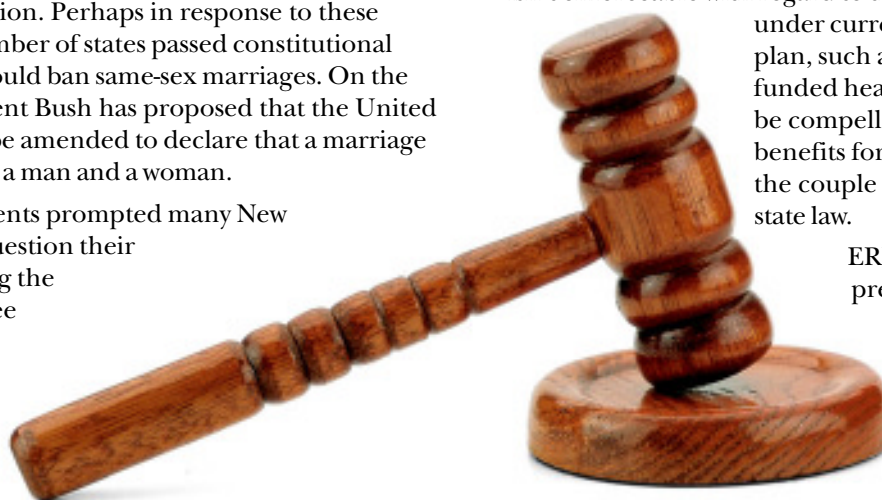
ERISA, however, doesn't preempt state insurance laws.

Thus, issues may arise regarding the proper interpretation of state insurance laws governing the rights under, for example, a group-insured health

plan existing in a state that permits same-sex partners to marry or enter into civil unions.

Tax Issues in Connection with Same-Sex Partner Benefits

The federal tax treatment of benefits provided to an employee's same-sex partner is governed by the Internal Revenue Code (Code). As a result of DOMA, as well as Internal Revenue Service guidance that predates DOMA, a same-sex domestic partner or spouse won't be treated as a spouse for federal tax purposes. As a result, the value of employer-paid same-sex partner benefits generally will be taxable to the employee (unless the employee's partner qualifies as the employee's dependent for federal tax purposes). For example, the value of health care benefits provided to an employee's same-sex spouse would generally be included in the taxable income of the employee. Any premium contribution paid by the employee for the health care coverage for the employee's same-sex partner may not be made on a pre-tax basis through a cafeteria plan and an employee may not receive tax-free reimbursement through a health flexible spending arrangement for medical expenses



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incurred by, or on behalf of, a domestic partner.

Many State Law Questions Remain Unanswered

Although the federal DOMA governs the treatment of benefits provided to same-sex spouses under ERISA and the Code, many questions remain regarding how same-sex spouses must be treated under state law. For example, if a same-sex couple that has been legally married in Massachusetts subsequently moves to New York, how should the same-sex marriage be treated for purposes of New York State laws that extend rights to spouses?

New York, unlike many other states, has not passed a “mini-DOMA” law that would ban the recognition of same-sex marriages in the state. Further, New York’s Sexual Orientation Non-Disclosure Act (“SONDA”), which became effective on January 16, 2003, amended the New York State Human Rights Law, Executive Law and Education Law to prohibit discrimination on the basis of sexual orientation. However, SONDA didn’t specifically prohibit discrimination in insurance or employee benefits on the basis of sexual orientation. Thus, same-sex spousal benefits availability is still unclear in New York.

As mentioned above, not all employee benefit plans are governed by ERISA. Traditional group health insurance plan benefits generally will be subject to state insurance laws. Likewise, non-federal or non-ERISA employer policies, such as certain severance plans, bereavement leave, and family medical leave policies may also be affected to extend rights to spouses. Furthermore, while the federal COBRA rules may or may not apply, New York employers are generally subject to the New York “mini-COBRA” statute that grants certain rights to employees, their “spouses” and dependents.

New York employers should also be aware that on March 3rd, 2004, the NY Attorney General’s Office issued an opinion on the legal issues surrounding same-sex marriages in New York. While the analysis held that New York officials shouldn’t issue same-sex marriage licenses until the courts resolve it, it did state that that same-sex marriages and civil unions lawfully entered in other jurisdictions outside New York, should be recognized in New York. Thus, any existing company policy involving “spouses” will need to be carefully examined to see if they are controlled by federal or state law for application purposes. Employers should consult with their

counsel and insurance companies.

At present, it’s unclear as to the extent of benefits to be afforded to married same-sex spouses. Employers most likely will have to wait for the legislature or the courts to resolve these issues.

Conclusion

Those employers who operate in Massachusetts have presumably already started reassessing its benefit plans. Now its sister state employers must do the same. Employers should review their benefit plans and related documents, summary plan descriptions, insurance contracts and company policies in order to understand how such plans refer to a “spouse.” Employers should also consider the tax and withholding issues that exist if they provide coverage to same-sex spouses. Finally, employers should closely monitor developments under New York law regarding the treatment of married same-sex spouses in order to keep apprised of their obligations with respect to the rights of same-sex spouses under non-ERISA covered benefit plans. □

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