

Steps Employers Should Take To Ensure Employee Benefit Plans Comply With New York's New Law On Same-Sex Marriages

On June 24, 2011, New York State Governor Andrew Cuomo signed into law the Marriage Equality Act (the "Legislation") which will allow same-sex couples to be married in New York State and to have, with certain exceptions, the same legal protections as are available to opposite-sex couples married in New York State. The effective date of the Legislation is July 24, 2011. Employers with employees in New York State have only been given 30 days to comply with the Legislation, and should immediately start taking the following steps to help ensure that their employee benefit plans, programs and policies (collectively, "Benefit Plans") will comply with the Legislation:

- the requirements imposed by the Legislation should be reviewed to determine how they will affect an employer's existing Benefit Plans;
- to the extent an employer decides that any of its Benefit Plans have to be changed or that it wishes to make certain changes as a result of the Legislation, the necessary steps to implement those changes should be taken (including, but not limited to, preparing any necessary amendments to the affected Benefit Plans, coordinating with any applicable insurer or third party administrator about the changes being made, obtaining any necessary approval of the applicable Board of Directors or Board of Trustees, and preparing any necessary summary of material modification(s) or revised summary plan description(s));
- all other materials describing employee benefits (benefit summaries, benefit web pages, benefit forms, employee handbooks, etc.) that need to be revised as a result of the Legislation should be identified and revised; and
- a review should be made of any domestic partner policy, and any other employer policy that might be affected by the Legislation, to determine whether any changes might be needed (including an analysis of whether any changes are needed to help address potential discrimination claims, such as those that might be brought by opposite-sex domestic partners in certain circumstances).

What Are the Major Changes Made By the Legislation?

The major changes made by the Legislation include the following:

- no application for a marriage license in New York State will be denied on the ground that the parties are of the same sex;
- a marriage that is otherwise valid will be valid regardless of whether the parties to the marriage are of the same sex or different sex; and
- no government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage in New York State will differ based on the parties to the marriage being or having been of the same sex rather than a different sex.

As part of the compromise that led to the enactment of the Legislation, special compliance exceptions were added for religious entities, benevolent organizations, and not-for-profit corporations that are operated, supervised or controlled by religious entities as defined in the Legislation (collectively, "Religious Organizations"). Religious Organizations and their employees will not be required to, among other things, provide any accommodations, advantages, facilities or privileges related to the solemnization or celebration of a marriage.

How Does the Legislation Affect Retirement Plans?

Spouses of participants in certain types of retirement plans that are subject to the requirements of the Internal Revenue Code ("Code") and the Employee Retirement Income Security Act ("ERISA") are entitled to special protections. These protections include the right to receive a qualified joint and survivor annuity or a qualified pre-retirement survivor annuity, if specified requirements are satisfied. With the enactment of the Legislation, an issue arises as to whether these spousal protections must be provided to a same-sex spouse of a New York participant in such retirement plans. For the reasons described below, the answer currently is no.

The Federal Defense of Marriage Act ("DOMA") provides that, for purposes of all federal laws, "spouse" only refers to a person of the opposite sex who is a husband or wife. Under DOMA, the term "spouse" for Code and ERISA purposes will not include a same-sex spouse. In addition, ERISA generally preempts state laws, other than insurance laws and certain other laws.

Retirement plans that are subject to the requirements of the Code and ERISA, therefore, will not be subject to the new requirements imposed by the Legislation. However, employers still should verify that any definition of spouse in such plans will not inadvertently include same-sex spouses in a manner that creates issues under the Code or ERISA. Such retirement plans are required to be administered in accordance with their written terms, and employers with such plans will want to make sure that the change in the definition of spouse in the Legislation will not result in any inconsistency between how spouse is defined in the plan and how that definition is administered.

What Impact Does the Legislation Have on Insured Health Plans and Other Insured Welfare Benefit Plans?

In 2008, the New York State Insurance Department ("Insurance Department") issued a Circular Letter and an opinion directing that same-sex spouses legally married outside of New York State must be treated the same as opposite-sex spouses for purposes of insured health, group long-term disability, group short-term disability, and group term life insurance plans that are subject to the requirements of the New York Insurance Law (collectively, "Insured Plans"). (This Insurance Department guidance is summarized in a January 2009 Bond, Schoeneck & King Employee Benefits Law Information Memo.) Effective July 24, 2011, same-sex spouses who are married in New York State will have the same rights under Insured Plans that were provided in 2008 to same-sex married spouses legally married outside of New York State.

Employers with Insured Plans, therefore, should review the language in their plan documents, summary plan descriptions, and insurance policies to see whether the definition of spouse will need any revision to include same-sex spouses who are married in New York State.

How Does the Legislation Affect Self-Insured Health Plans and Other Self-Insured Welfare Benefit Plans?

Self-insured health plans and other self-insured welfare benefit plans that are subject to ERISA will not be subject to the new requirements imposed by the Legislation. ERISA preempts the Legislation insofar as it applies to self-insured ERISA plans (ERISA's preemption provisions, however, generally do not apply to insured plans, which is why the Legislation will affect insured plans differently than self-insured ERISA plans). If no changes are desired in how a self-insured ERISA plan operates, an employer should still review any definition of spouse that appears in that plan in order to make sure it does not need to be revised. ERISA plans are required to be administered in accordance with their written terms, and employers will want to make sure any definition of spouse conforms to how each such plan is operated.

Even though a self-insured ERISA plan is not subject to the requirements of the Legislation, an employer with such a plan can voluntarily decide to provide comparable benefits to same-sex spouses. The tax status of such benefits generally will not be identical to the tax status of the benefits provided to opposite-sex spouses under such a plan, because the Code provides favorable tax treatment for eligible opposite-sex spouses but not for same-sex spouses (an exception applies if the same-sex spouse satisfies the Code requirements for being a dependent of the participating employee, but that exception can be difficult to satisfy). If an employer does decide to provide comparable benefits to same-sex spouses, the language of the applicable plan should be revised accordingly.

Certain governmental and church self-insured plans are exempt from ERISA. Such plans will not be covered by ERISA's preemption provisions and, therefore, will have to comply with the Legislation (subject to a possible exception for plans maintained by Religious Organizations). Such plans should, therefore, be reviewed to determine whether the definition of spouse may need to be amended to include same-sex spouses who are married in New York State.

What Impact Does the Legislation Have on Other Benefit-Related Rights That Arise Out of Federal Law?

Under DOMA, any other benefit-related right that arises out of federal law generally will not be subject to the requirements of the Legislation, as long as the applicable federal law does not incorporate the definition of spouse used under state law. This would mean, for example, that the COBRA health continuation coverage rights for spouses generally will apply to eligible opposite-sex spouses rather than same-sex spouses. An exception to the preceding sentence could apply if an employer voluntarily decides to provide similar rights to the extent permitted by COBRA.

How Does the Legislation Affect Other Benefits That Are Exempt From ERISA?

If a benefit is exempt from ERISA, it generally will have to comply with the new requirements imposed by the Legislation (subject to any requirement in the Code or other federal statute that provides otherwise). Examples include, but are not limited to:

- certain governmental and church plans that are exempt from ERISA (subject to a possible exception for plans maintained by Religious Organizations);
- plans without any employees (e.g., a plan that only covers a sole proprietor and his or her spouse, or that only covers partners and their spouses);
- certain voluntary group or group-type insurance plans that are paid for solely by participating employees;
- unfunded educational benefit programs (e.g., unfunded tuition reduction programs at universities and colleges that cover spouses, and other unfunded educational benefit programs that benefit spouses);
- employee discount programs that provide benefits for spouses;
- on-premise recreation or dining facilities;
- expense reimbursement programs that cover certain spousal expenses; and
- remembrance funds.

Such benefit plans and programs should, therefore, be reviewed to determine whether the definition of spouse may need to be amended to include same-sex spouses who are married in New York State.

Will the Legislation Change How Benefits For Same-Sex Spouses Are Taxed?

Under DOMA, a same-sex spouse will not be treated as a spouse for Code purposes. Therefore, even if a same-sex spouse becomes eligible for benefits as a result of the Legislation, he or she generally will not be eligible for any favorable tax treatment that applies to spouses under the Code (an exception will apply if the same-sex spouse qualifies as a "dependent" of the participating employee under the Code).

Guidance is still pending on the extent to which the tax status of same-sex spouses under New York's tax laws will change as a result of the Legislation. Section 607(b) of the New York State Tax Law currently provides that a taxpayer's marital status for New York State tax purposes will be the same as the taxpayer's marital status "for purposes of establishing the applicable federal income tax rates." As a result of this statute, same-sex spouses generally are treated the same for New York State income tax purposes as they are treated for federal income tax purposes under the Code. However, Section 2 of the Legislation provides that "[t]he legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act." It is anticipated that the New York State Department of Taxation and Finance will be issuing guidance on how same-sex spouses should be treated for New York State Tax Law purposes, and employers should wait until that guidance is issued before changing how same-sex spouses are taxed for New York State tax purposes.

If you have any questions about this memorandum, please contact Ted Lewkowicz in our Syracuse office (315.218.8000, tlewkowicz@bsk.com) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below:

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