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New York's Marriage Equality Act extends the same legal rights to same-sex spouses as opposite-sex spouses under state law, with varying implications for employee benefit plans.

The Marriage Equality Act: How Will New York's Same-Sex Marriage Law Impact Employee Benefits?

By Steven Friedman and Ilyse Schuman

On June 24, 2011, New York became the sixth state to legalize same-sex marriage when Governor Cuomo signed into law the Marriage Equality Act ("the Act"). By extending the same legal rights to same-sex spouses as opposite-sex spouses under New York law, the Act has implications in many areas, including rights under employee benefit plans. The Marriage Equality Act amends the New York domestic relations law to provide that: "No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex." The Act plainly states that: "It is the intent of the legislature that marriages of same-sex and different-sex couples be treated equally in all respects under the law." On its face, these rules would appear to prohibit those aspects of any employee benefit plan that is governed by New York law from distinguishing between same-sex and opposite-sex spouses. Employers with operations in New York need to understand how the Act will impact their benefit plans to ensure compliance with the new law, which is effective on July 24, 2011.

Impact of ERISA and DOMA

Employee benefit plans are governed by the Employee Retirement Income Security Act (ERISA), a federal statute that preempts state laws subject to benefit plans. ERISA is governed by the federal Defense of Marriage Act (DOMA), which defines marriage as a union of one man and one woman. As a result, plans that are not governed by state laws will not need to comply with New York's Marriage Equality Act (or, for that matter, similar legislation that has been passed in other states).

Health Insurance

ERISA does not preempt state laws that regulate insurance. Therefore, in New York, group health insurance policies that provide for spousal coverage must cover both same-sex and opposite sex unions. Same-sex spouses in marriages legally performed outside of New York were already eligible for spousal health insurance coverage in New York. The New York Insurance Department, pursuant to a directive from then-Governor Paterson, issued an opinion in 2008 stating that: "where an employer offers group health

insurance to employees and their spouses, the same-sex spouse of a New York employee who legally married his or her spouse out-of-state is entitled to health insurance coverage to the same extent as any opposite-sex spouse.” So the Marriage Equality Act merely extends this same protection to same-sex spouses legally married in New York.

Self-funded group health plans, however, are not subject to state insurance laws, including the coverage mandate under the Act. The Office of General Counsel of the New York Insurance Department has, in fact, opined that self-funded group health plans do not have to extend spousal coverage to same-sex spouses legally married in other jurisdictions. Although this opinion was written prior to enactment of the Marriage Equality Act, the same analysis is expected to apply to health coverage for same-sex spouses married in New York.

For self-funded group health plans, the terms of the benefit plan will dictate whether same-sex spouses of employees are eligible for coverage. Although self-funded group health plans are not required by the Act to extend spousal coverage to same-sex spouses, some employers may choose to do so. Employers also should consider whether applicable state or local anti-discrimination laws would prohibit denying spousal coverage to same-sex spouses. Plan documents should define the term “spouse” clearly to express the employer’s intent to include same-sex spouses in coverage under the self-funded group health plan.

Retirement Plan Benefits

Spouses enjoy certain rights under retirement plans, such as the right to be named as a plan beneficiary and to receive enhanced forms of annuity benefits and pre-retirement benefits under certain types of plans. Currently, state laws governing marriage will not have any impact on ERISA-covered retirement plans in light of DOMA. Further, because of DOMA, any change in a retirement plan’s definition of spouse could jeopardize the plan’s status as a qualified plan.

Tax Consequences

Because of DOMA, the value of any employer-provided health coverage for a same-sex spouse of an employee who is not otherwise a federal tax dependent of the employee must be included in the employee’s income for federal tax purposes. Employees are not taxed on the value of the health coverage for opposite-sex spouses. Additionally, any employee-paid premium for same-sex spouse coverage must be paid with after-tax dollars. To compensate for this disparity, some employers have grossed-up the pay to employees to account for the additional federal taxes that must be paid for covering their same-sex spouses. Additionally, if a same-sex spouse is also a tax dependent of the employee and therefore eligible for favorable federal tax treatment, the employer can seek an affidavit from the employee verifying such status.

The tax treatment of health coverage for same-sex spouses is different for federal and New York state income tax purposes. Pursuant to the Marriage Equality Act, the adverse tax treatment required under federal law will not apply for New York income tax purposes. New York employers will need to ensure that their payroll practices account for the divergent federal and state tax treatment of same-sex spouse health coverage.

Adding to the complexity of these issues, the Department of Justice has announced that it will no longer defend the constitutionality of DOMA. Should DOMA be ruled unconstitutional, federally-governed employee benefits and favorable tax treatment now only available to opposite-sex spouses may be extended to same-sex spouses. As DOMA faces challenges in the courts and Congress, employers in New York and elsewhere should recognize that the legal and legislative landscape for employee benefits with respect to same-sex spouses continues to evolve at both the state and federal level.

Practical Steps for Employers

- Review benefit plan documents and summary plan descriptions with respect to the definition of “spouse” for purposes of eligibility and terms of coverage for same-sex-spouses;
- Reconsider whether existing policies that may provide coverage for “domestic partners” but not same-sex spouses should be revised. Some employers are revisiting whether domestic partner coverage, which had been instituted by many employers because marriage was not an option for same-sex couples, should continue in states where same-sex marriages are now recognized;
- Make any necessary changes to benefit plan documents and summary plan descriptions with respect to coverage for same-sex spouses to comply with the Marriage Equality Act;

- Review and revise payroll practices to comply with the different treatment of same-sex spouse health coverage for federal and New York state income tax purposes; and
- Ensure than any benefits plan changes made pursuant to the Marriage Equality Act are communicated to employees.

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