McDermott Will & Emery

Same-Sex Marriage Legalized in New York: Implications for Employee Benefit Plans

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Now that same-sex marriage has been legalized in the state of New York, employers should expect to begin seeing an increase in requests for spousal benefit coverage from employees who have legally married their same-sex partners. The new law takes effect on July 24, 2011.

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New York became the sixth—and largest—state to legalize same-sex marriage after Governor Andrew Cuomo signed the Marriage Equality Act into law on June 24, 2011. The New York Marriage Equality Act provides that "[a] marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex." In addition, the law provides 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.

Same-sex marriage is already legal in Connecticut, Iowa, Massachusetts, New Hampshire and Vermont, as well as in Washington, D.C. (In addition, California continues to recognize same-sex marriages performed between June 16 and November 4, 2008, the period during which same-sex marriage was legal in California.)

Same-sex marriages performed in other states where same-sex marriage has been legalized will continue to be recognized in New York. Such unions were already recognized in New York pursuant to both a February 2008 appellate court order mandating such recognition and an October 2008 directive from former Governor David Paterson to state agencies calling for same-sex spouses to receive equal rights, benefits and responsibilities as opposite-sex spouses under state law.

What Employers Should Do Now

Employers may want to review their employee benefit plans to prepare for requests for benefits coverage from employees who marry their same-sex partner once the New York law takes effect on July 24, 2011. Even employers headquartered outside of New York are likely to see an increase in such requests from employees who live in New York. The most common requests for benefits for a same-sex spouse are likely to be coverage under an employer's medical, dental and vision plans, and survivor annuity coverage under defined benefit pension plans that do not allow participants to designate a beneficiary.

If an employee resides in New York or another state where same-sex marriage is legal, whether the employer is required to recognize a same-sex marriage for health plan eligibility purposes may depend upon whether the plan is self-insured or fully insured. Insured plans are subject to state law benefit mandates and must recognize same-sex marriages if the insurance policy is issued in New York. In contrast, self-insured plans are governed only by federal laws and technically have flexibility on whether to recognize other valid same-sex marriages, although given the publicity of the New York change, it may present challenging HR issues for plan sponsors to deny coverage to individuals validly married under state law.

Employers that extend certain welfare benefits to same-sex spouses and partners need to be aware of the corresponding tax implications of doing so. Because marriage is defined by the federal Defense of Marriage Act as a union between one man and one woman for all purposes of federal law, employers must impute income to the employee for federal income tax purposes equal to the fair market value of the health care coverage given an employee's same-sex spouse, unless the same-sex spouse otherwise qualifies as a "dependent" of the employee spouse. In addition, the employee may not make pre-tax contributions to a section 125 cafeteria plan on behalf of the same-sex spouse (*i.e.,* contributions for the spouse must be after tax) and may not receive reimbursement for expenses of the same-sex spouse from flexible spending accounts (FSAs), health reimbursement accounts (HRAs) or health savings accounts (HSAs). States have adopted conflicting approaches to the treatment of domestic partner benefits for state income tax purposes.

Employers that offer domestic partner benefits therefore need to confirm whether income will similarly need to be imputed for state income tax purposes. The New York tax code currently tracks the federal tax code for purposes of calculating an individual's income that is subject to state income taxation. However, the Marriage Equality Act requires the state tax code to be amended to exempt employer-provided benefits for a same-sex spouse in order to equalize the state tax treatment of benefits for all spouses. The New York State Department of Taxation and Finance has indicated that it expects the state tax code to be in compliance with the Marriage Equality Act by the time the new law takes effect on July 24, 2011, which presumably will include equalizing the tax treatment of spousal benefits. Employers should continue to watch for official guidance from the Department of Taxation and Finance before changing their policies and practices with respect to state taxation of benefits for same-sex spouses.

In short, even though several states have signed legislation authorizing civil unions (including Delaware, Hawaii and Illinois earlier this year, and Rhode Island earlier this month), most plans (particularly pension plans) do not utilize the term or concept “civil unions” in their plans. As a result, up until now, plan administrators may have had a fair amount of leeway as to if/how to apply the plan to civil unions (and if the plan is properly drafted, the plan administrator's interpretation of an ambiguous concept should be granted a fair amount of judicial deference). In contrast, many, if not most, of an employer’s employee benefit plans (including non-ERISA plans such as leave programs, etc.) may reference the term “spouse.” Given the number of employers with a presence in New York state, those employers will be well-served to begin the admittedly tedious but important job of reviewing the use of “spouse” in each of their benefit programs to determine whether it is desirable or required to cover same-sex spouses, and then implementing any necessary administrative procedures to reflect the appropriate treatment.