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New York State's Marriage Equality Act: Impact on Employee Benefit Plans

The New York State Marriage Equality Act (the "Marriage Act"), which legalizes same-sex marriage in New York State, went into effect on July 24, 2011. The Marriage Act requires same-sex marriages to be treated the same as opposite-sex marriages and provides:

"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 of the marriage being or having been of the same sex rather than a different sex."

Employers of employees working in New York need to understand the effect of the new law on their employee benefit plans.

ERISA Retirement Plans

Retirement plans that are subject to the Employee Retirement Income Security Act ("ERISA") provide protections to spouses of plan participants, including the right to receive a qualified joint and survivor annuity or a qualified pre-retirement survivor annuity under certain conditions. ERISA retirement plans will not be subject to the Marriage Act, however, as ERISA preempts state laws, other than insurance laws and certain other laws. In addition, the Federal Defense of Marriage Act ("DOMA") provides that, for purposes of all federal laws, "spouse" refers only to a person of the opposite sex who is a husband or wife. Employers should review retirement plan documents to ensure that the ERISA-required spousal benefits are not inadvertently offered to same-sex spouses. For example, if the definition of "spouse" in a plan is defined by reference to state law, under the Marriage Act the plan's definition would now include a same-sex spouse.

Insured Welfare Plans

Insured health and other welfare plans are *not* protected from state regulation by ERISA preemption. Same-sex spouses must be covered under an insured welfare plan (under an insurance policy governed by New York law) in the same manner as opposite-sex spouses.

Self-Insured Welfare Plans

Self-insured health plans and other self-insured welfare benefit plans covered by ERISA are not subject to the Marriage Act as, unlike insured plans, ERISA preempts the Marriage Act requirements. However, in order to avoid adverse HR issues, employers may wish to extend self-insured health and other welfare benefit plans to same-sex spouses (and are permitted to do so voluntarily). Employers should review the definition of "spouse" in plan documents to make sure it accurately reflects the intent to either include or exclude same-sex spouses from coverage.

Tax Consequences

Employers that extend welfare benefits to same-sex spouses should be aware of the tax consequences. As marriage is defined by DOMA as an opposite-sex union, including for purposes of the Internal Revenue Code, employers must impute income for federal income tax purposes to the employee for benefits provided to the same-sex spouse that are paid for by the employer (unless the same-sex spouse qualifies as the employee's dependent). In addition, employees will need to pay for their same-sex spouse's health benefits with after-tax dollars as deposits to a cafeteria plan for a same-sex spouse would be precluded by the Internal Revenue Code. The employee would also not be permitted to be reimbursed from a health flexible spending account for the same-sex spouse's medical expenses.

In contrast, New York State now provides the same state income tax treatment regarding same-sex spouses as with respect to opposite-sex spouses. The New York State Department of Taxation recently issued guidance advising employers not to withhold New York State, New York City or Yonkers taxes on benefits provided to same-sex spouses even if the benefits are subject to federal taxation. This recent guidance is important as the New York State income tax law generally follows the federal tax rules.

Other Non-ERISA Benefits

If a benefit is exempt from ERISA, it generally will have to comply with the new requirements of the Marriage Act. Examples of non-ERISA benefit plans include plans without employees (such as plans covering only sole proprietors or partners and their spouses) and unfunded educational tuition programs. Employers should review a number of their policies that implicate spouses, such as relocation policies and leave policies, to determine whether benefits under such policies will need to be extended to same-sex spouses as a result of the Marriage Act.

Recommended Employer Actions

We recommend that employers with New York employees take the following actions:

- ☑ Review employee benefit plans and related materials to determine if changes are needed to comply with the Marriage Act (or to not run afoul of DOMA now that the Marriage Act is in effect), and make any necessary amendments.
 - Make sure to review the definition of "spouse" in plan documents, summary plan descriptions, and other plan materials, and make amendments if necessary.
- ☑ Ensure that payroll practices are able to account for the differing tax treatment of benefits provided to same-sex spouses under federal and New York State law.
- ☑ Confer with insurers and third-party administrators regarding the requirements of the Marriage Act to ensure they are operating in compliance with all applicable law.
- ☑ Communicate any changes made as a result of the Marriage Act to employee benefit plan participants.

For Further Guidance

If you would like to discuss how your employee benefits may be impacted by the Marriage Act, please consult us for further guidance.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

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