



ERISA Group Benefits Newsletter

May 2015

Same Sex Marriage Compliance Issues

As you may know, Florida began issuing marriage licenses to same-sex couples on January 6, 2015. As a result, this may be a good time to review your employee benefits plans to ensure they are in compliance with federal and state laws regarding same-sex marriage.

On June 26, 2013, the U.S. Supreme Court struck down the section of the Defense of Marriage Act ("DOMA") that defined marriage as between one man and one woman. The IRS subsequently issued guidance that provided that spouses in same sex marriages that were recognized in a state or foreign jurisdiction where the ceremony took place ("state of celebration" rule) had to be treated the same as opposite sex spouses for federal tax purposes. However, the IRS stated that the term "marriage" does not include domestic partnerships or civil unions. In September 2013, the Department of Labor adopted similar guidance for plans subject to ERISA.

How does this affect your employee benefit plans? The answer is somewhat complex. First, your retirement plan documents and summary plan descriptions may need to be updated to ensure that the terms "spouse" and/or "married", if defined, are not limited to opposite sex spouses or marriages. Nothing in ERISA or the DOMA decision requires employers to cover same sex spouses in health and welfare plans, since eligibility for spouses is not required. However, a failure to cover same sex spouses may raise state law claims in states that already prohibit discrimination based on sexual orientation. There are also steps in motion to revise the federal nondiscrimination rules to include sexual orientation. Based on the foregoing, we generally recommend that health and welfare plans treat same-sex spouses that hold a marriage license from any state that recognizes the marriage the same as opposite sex spouses.

1. Benefits to consider under Retirement Plans:

- a) Qualified Joint and Survivor Annuity ("QJSA") and Qualified Pre-Retirement Survivor Annuity (QPSA), if applicable - the survivor annuity must be paid to a same sex spouse, or if the participant wants to waive the QJSA or the QPSA, then the same sex spouse must consent to the waiver.
- b) Death Benefits - for plans exempt from QJSA/QPSA rules, benefits must be paid to the same sex spouse, unless another beneficiary is designated.

- c) Beneficiaries - Beneficiary designation forms may need to indicate that spouse or marriage includes same sex spouses and marriages. Also, the forms may need to clarify that civil unions and domestic partnerships are not considered marriage for this purpose. A same sex spouse is no longer considered a non-spouse beneficiary, and therefore if the plan's default beneficiary is the surviving spouse, a same sex spouse would be entitled to the benefit. A same-sex spouse must consent to the designation of another beneficiary. Plan sponsors may want to encourage participants to update their beneficiary designation forms, if necessary, to reflect the new guidance.
- d) Hardship distributions, if applicable - a participant can request a hardship distribution for the expenses (such as medical, educational, or funeral) of a same sex spouse.
- e) Loans, if applicable - if spousal consent is required, the participant's same sex spouse would need to consent to the loan.
- f) Rollover - if a same sex spouse receives a lump sum distribution, the amount can be rolled over to his/her own IRA or retirement plan.
- g) Required Minimum Distributions - special timing and calculation rules that apply when the spouse is the sole beneficiary apply to a same sex spouse.
- h) Qualified Domestic Relations Order ("QDRO") - if a QDRO is received for a same sex couple it should be reviewed in the same manner as if it applied to an opposite sex couple. This could include payments made to the same sex couple's children or dependents.
- i) Claims for benefits - a same sex spouse has the right to make a claim for benefits. If benefits were paid on or after June 26, 2013 and before September 16, 2013, which did not consider a same sex spouse, a same sex spouse may be entitled to additional benefits if the marriage was legally recognized in the state of domicile at the time the benefits were paid.
- j) Key Employees - shares owned by a same sex spouse must be considered when determining ownership for key employees.
- k) ESOPs - a same sex spouse is a spouse and/or family member for purposes of determining restrictions on allocations of employer securities.

2) Benefits to consider under Health and Welfare Plans:

- a) Cafeteria Plans - employees can make pre-tax salary reduction elections for federal income tax purposes of health coverage for same-sex spouses. At the state income tax level, the applicable state tax laws may vary.
- b) Health Flexible Spending Accounts and Health Reimbursement Accounts - Qualified medical expenses of same-sex spouses are reimbursable without imputation of income.

- c) Dependent Care Flexible Spending Account - Care for same-sex spouses may be reimbursable without imputation of income.
- d) COBRA - Same-sex spouses may elect continuation coverage.

Please note that this *Benefits Alert* only highlights the most significant changes in the law. The details of these changes are complex and beyond the scope of this Alert. We look forward to discussing these changes and how they may impact your plans with you. Please do not hesitate to contact any of the following members of our Employee Benefits and Executive Compensation Practice if you have any questions or if you would like additional information.



Al Ward
al.ward@hwhlaw.com
813.222.8703



Dennis Tweed
dennis.tweed@hwhlaw.com
813.222.8707



Bret Hamlin
bret.hamlin@hwhlaw.com
813.222.8717



Kirsten Vignec
kirsten.vignec@hwhlaw.com
813.222.8731



Melanie Hancock
melanie.hancock@hwhlaw.com
813.222.3138



Mary Snyder
mary.snyder@hwhlaw.com
813.222.8709



Eric Hall
ehall@hwhlaw.com
813.227.8408