



Same-Sex Marriage Issues Complicate Employee Benefit Plan Administration

California recently became the second state after Massachusetts to legalize same-sex marriage, but without a residency requirement. Last week, Massachusetts repealed a law that generally limited same-sex marriage to its residents, effectively opening the door for same-sex couples throughout the U.S. to marry on both coasts. This changing legal landscape is complicating plan administration for many employers across the country.

Background

Despite California's strong domestic partnership law giving same-sex couples nearly all the rights of married heterosexual couples, the California Supreme Court said it did not go far enough and lifted the state's long-standing statutory bar to same-sex marriage for both residents and non-residents. In November, California voters will decide whether to reverse this [ruling](#) by approving a constitutional ban on same-sex marriage and its recognition in California.

More recently, Massachusetts repealed a 95-year old law that blocked out-of-state same-sex couples from marrying unless their unions would be legal in their home states. Some states have addressed how they will treat same-sex marriages. For example, New York Governor David Paterson said that New York will recognize same-sex marriages lawfully entered into elsewhere, and the New Jersey Attorney General has indicated that same-sex marriages and other relationships validly entered into in other jurisdictions will be treated as civil unions under New Jersey law. Other states have yet to decide how they will treat these relationships. In any event, as out-of-state couples return home with valid California or Massachusetts marriage licenses, employers will have to decide whether and how to accommodate their new status.

The Federal Definition of Marriage

Even though California and Massachusetts recognize same-sex marriage, federal law does not. The federal [Defense of Marriage Act](#) (DOMA) defines marriage as a heterosexual union and spouse as "a person of the opposite sex who is a husband or a wife" for purposes of all federal laws, including ERISA and the Internal Revenue Code. DOMA also relieves states of any obligation to recognize same-sex marriages performed elsewhere, although it does not bar them from doing so. In contrast to California and Massachusetts, more than

forty states have laws or constitutional provisions (commonly referred to as mini-DOMAs) limiting in-state marriage to opposite-sex couples.

Implications for Employers

Many, if not most, private sector employee benefit plans are governed by ERISA, which generally preempts state and local laws purporting to govern the terms of employee benefit plans. Because ERISA plans are also subject to DOMA, state laws and regulations on same-sex marriage do not generally affect them. However, important exceptions apply for state insurance laws and certain other state laws.

Benefit plans and programs that are not subject to ERISA (e.g., governmental plans or church plans that do not elect to be covered by ERISA) will have to look to applicable state law to determine whether they must recognize same-sex marriages or provide spousal benefits for same-sex couples. Although states that have a mini-DOMA would generally not require these plans to recognize same-sex marriage for plan eligibility purposes, others may.

BUCK COMMENT. *A plan that does not define “marriage” or “spouse” or simply incorporates a definition by reference to state law, common law, or DOMA may inadvertently extend or fail to extend coverage or benefits to certain individuals. To ensure that intended coverage is provided and to safeguard their tax qualified status, plans should explicitly include or exclude “same-sex” within these definitions and clarify by plan amendment when, if at all, same-sex marriages will be recognized and when they will not.*

Retirement Plan Issues

Private sector employers are not required to offer retirement benefits, but those that do must comply with ERISA and satisfy relevant Internal Revenue Code provisions to maintain their qualified status. ERISA preemption and DOMA prevent California and Massachusetts from requiring tax-qualified pension plans to treat same-sex spouses in the same manner as opposite-sex spouses. However, employers can voluntarily amend their qualified plans to provide same-sex spouses with benefits that generally mirror federal spousal benefits. Still, certain spousal benefits cannot be made available without compromising the tax qualification of the plan.

Under DOMA, a participant in a same-sex marriage would be treated as not married for purposes of –

- qualified joint and survivor annuities (QJSA) and spousal consent
- qualified optional survivor annuities (QOSA)
- qualified pre-retirement survivor annuities (QPSA)
- calculation of minimum required distributions
- beneficiary rollover rules.

Among other complex issues employers will have to address are how plans will handle same-sex divorces (including domestic relations orders) and whether a same-sex surviving spouse may be treated as a surviving spouse for purposes of a plan's preference beneficiary rules.

Health and Welfare Plan Issues

As with retirement plans, welfare benefit plans maintained by private sector employers are subject to ERISA. This means that ERISA plans generally do not have to recognize same-sex marriages, and a same-sex spouse does not have to receive the same coverage as an opposite-sex spouse. Nonetheless, many employers voluntarily extend this coverage to same-sex partners.

However, welfare plans may be indirectly affected if they provide benefits through an insurance contract that is subject to the insurance laws of a state that recognizes same-sex marriage. State insurance law may require same sex-spouses to be treated the same as opposite sex spouses for coverage purposes.

In addition, welfare plans maintained by governmental or church employers are often exempt from ERISA, and so may be subject to local definitions of "marriage" and "spouse".

BUCK COMMENT. *Because California insurers have been required for some time to treat employees' spouses and registered domestic partners equally with respect to benefits, the legalization of same-sex marriage will have little, if any, impact on employers that provide insured coverage written in California.*

Income Tax Consequences. Under federal tax law, a same-sex spouse is not considered a spouse, but may be a tax dependent if specific statutory requirements are met. If the same-sex spouse is a tax dependent, the federal tax treatment is the same as for any other dependent – e.g., health coverage is nontaxable.

If a same-sex spouse does not qualify as a tax dependent, the value of any benefit coverage is "imputed" (or treated as taxable income) to the employee for federal tax purposes. Because this is the same rule that applies to domestic partner coverage, many employers are already familiar with this calculation.

State income tax treatment will vary, depending on specific state tax law.

Cafeteria Plans. A cafeteria plan may permit an employee to purchase coverage for a same-sex spouse. If contributions are made on a pre-tax basis, the full value of the coverage (including the pre-tax contributions) will be imputed to the employee for federal tax purposes. If after-tax contributions are used, only the value of the employer's share is imputed income.

Tax Advantaged Accounts for Health Costs. A health flexible spending account (FSA), health reimbursement account (HRA) or health savings account (HSA) can reimburse medical expenses incurred by the employee, the employee's spouse (as defined under DOMA) or a federal tax dependent. Whether medical expenses may be paid from each of these accounts to a same-sex spouse or domestic partner who does not qualify as a federal tax dependent varies –

- A health FSA may not reimburse the same-sex spouse's medical expenses.

- An HRA may reimburse the expenses, but the payment will be included in the employee's income.
- Reimbursement may be made from an HSA, but would not be a qualifying expense, and thus any amount paid out of the HSA for the same-sex spouse would be taxable and may be subject to an additional 10 percent tax.

Dependent Care FSAs. Dependent care FSAs may not make payments to certain caregivers who are related individuals (e.g., a spouse), but the FSA may be able to compensate a same-sex spouse or domestic partner who is not a tax dependent for caring for the employee's children. However, expenses to care for the same-sex partner, if he or she is incapable of self-care, may not be reimbursed from the FSA unless the same-sex spouse qualifies as a tax dependent.

COBRA. Although same-sex spouses and domestic partners are not entitled to continue health coverage under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), employers may choose to extend COBRA-like benefits to them through their group health plans. Both California and Massachusetts have certain continuation mandates for insured plans.

Additional Issues

Family and Medical Leave. Both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) allow employees to take up to 12 weeks of unpaid leave to care for a seriously ill child, spouse or parent. Because leave to care for a domestic partner or same-sex spouse would be recognized for CFRA but not FMLA purposes, a California employee who uses his or her full CFRA entitlement to care for a same-sex spouse may still be entitled to 12 weeks of FMLA leave to care for a seriously ill child or parent.

Other Programs and Policies. Other benefit programs and employer policies, such as adoption assistance, garnishments, child support, and relocation benefits, may have to be redefined in light of same-sex marriage.

Conclusion

Now that two states have legalized same-sex marriage, other states may follow. The law in this area is evolving, and there will likely be no consensus anytime soon. In the meantime, employers should review their employee benefit plans, insurance contracts, leave policies, payroll practices and plan documents to see if, and how, they may be affected by this changing legal landscape. Because same-sex couples can now marry in California and Massachusetts regardless of where they live, plan sponsors and employers without a connection to either state should consider whether and how to accommodate same-sex spouses under their plans. Buck's consultants would be pleased to assist you in reviewing and amending your plans to ensure they provide the coverage you intend.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.