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New York State's Marriage Equality Act: Top 10 Questions (and Answers) Regarding Impact on Employer-Sponsored Health & Welfare Plans

New York State's Marriage Equality Act, ("Act"), became effective last week on July 24, 2011. The Act had been signed into law one month earlier, on June 24, 2011 by New York governor Andrew Cuomo. The Act amends New York's Domestic Relations Law to provide that same-sex couples may obtain a marriage license in New York, and to require that a same-sex marriage be treated the same as an opposite-sex marriage "in all respects under [New York] law."[1] New York is the sixth state to adopt such a law, in addition to the District of Columbia.

The Act's impact on employer-sponsored health and welfare benefit plans has generated many questions from clients. This article sets forth the top 10 questions we have received on this topic from employers with employees who live in New York State and provides our views on the answers, based on information available to date.

1. **Is an employer who sponsors a group health plan that is self-funded and subject to ERISA now required to offer group health coverage to an employee's same-sex spouse in New York State?**

No. ERISA does not contain a definition of "spouse," and the employer therefore has flexibility concerning how to define "spouse" in the written plan document. ERISA preempts all state laws "insofar as they . . . relate to any employee benefit plan." ERISA § 514(a). Thus, self-funded group health plans that are subject to ERISA are not required to comply with state law to the extent that preemption applies. Although an exception to this rule, referred to as the "savings clause," applies to any law of any state which regulates insurance, banking or securities, ERISA prohibits a state from "deeming" a self-funded health plan to be an insurance company, bank, trust company or investment company for purposes of state law. ERISA § 514(b)(2)(A); (B).

Therefore, with respect to a self-funded group health plan that is subject to ERISA, the employer continues to have the ability to define "spouse" in the written plan document. The employer should not be required to define "spouse" to include an individual of the same-sex because the Act should be preempted under ERISA's general preemption provision. ERISA § 514(a). However, self-funded group health plans are also not precluded from voluntarily extending benefits under their plans to an employee's same-sex spouse.

[1] The Act specifically provides, "[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility related 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. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law." Act § 3 (adding new § 10-a(2) to New York's Domestic Relations Law).

2. Is it necessary for an employer to make any changes with respect to the definition of "spouse" in its written self-funded ERISA group health plan because of the Act?

Possibly. If an employer has not explicitly defined spouse in its group health plan, or has defined spouse by reference to state law, it should consider amending the definition of spouse to clearly specify how spouse is defined, particularly if the employer intends to exclude a same-sex individual from the definition of spouse. If a plan grants the plan administrator discretion to interpret the terms of the plan, a court considering this issue would likely apply a deferential standard of review rather than a de novo standard of review and uphold a plan's determination of who constitutes a spouse. See Firestone Tire & Rubber Co. v. Bruch, 489, U.S. 101 (1989). However, if the employer does not explicitly clarify the term "spouse" in the plan, a court could consider the definition of spouse under the Act to be controlling and conclude that spouse includes a same sex spouse. If this is not intended, the better approach would be for the employer to resolve the ambiguity in advance of a claim for eligibility or benefits by supplying a clear definition of the term spouse through a formal amendment to the plan document. This is also an issue that employers should consider with respect to retirement plans.

3. Is an employer who sponsors a group health plan that is insured by a policy issued in New York State and subject to ERISA now required to offer group health coverage to an employee's same-sex spouse in New York State?

Yes. As noted in Q&A #1 above, the Act should not be preempted as to insured arrangements because of ERISA's "savings clause." Therefore, a fully insured group health plan insured by a policy issued in New York should be required to comply with the Act and treat any individual who is married under New York State law as a spouse for all purposes under the policy. In addition, the insurer should also be required to offer state-mandated continuation coverage to a same-sex spouse just as it would for an opposite-sex spouse. Employers who sponsor a fully insured group health plan should review their underlying insurance policies to determine whether their policy states that it will comply with New York law.

4. If an employee requests to add his/her same sex spouse to group health plan coverage following marriage in New York, can the employer allow the employee to change his/her cafeteria plan election to add the spouse?

Probably. The Code § 125 cafeteria plan mid-year change in election regulations generally restrict the circumstances under which an employer is permitted to allow an individual to make a change in his or her salary reduction election under a cafeteria plan. Treas. Reg. § 1.125-4. However, changes are permitted in certain specified circumstances identified in the regulations. These circumstances include a "change in status" event, as well as a "change in cost or coverage" under the plan. Treas. Reg. § 1.125-4(c); (f). The change in status events do consider a "marriage" to be a change in status event, but the issue is complicated by the fact that federal tax law needs to be interpreted in a manner that is consistent with the federal "Defense of Marriage Act," which provides that the term "marriage" shall be construed for purposes of federal law as constituting a legal union between a man and woman.[2] Therefore, the marriage of a same sex couple may not be considered a change in status event under the federal cafeteria plan regulations. Nevertheless, if coverage under a group health plan first becomes available to a same sex spouse after

[2] The Defense of Marriage Act specifically provides, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. sec. 7.

the start of the plan year, the employer may be able to take the position that the change is allowable because it is an addition of a new coverage option for the same-sex spouse (assuming the written cafeteria plan incorporates this rule as a permissible mid-year change in election event). Treas. Reg. § 1.125-4(f)(3)(iii). Alternatively, an employer may be able to take the position that because the coverage is paid for on an after-tax basis for federal tax purposes, the mid-year change in election regulations, which generally restrict changes to an employee's *pre-tax* salary reduction election, do not apply.

5. For federal tax purposes, is an employer required to add to an employee's wages the value of employer-provided health coverage for the same-sex spouse?

Yes. Because of the federal Defense of Marriage Act, the fair market value of the coverage provided to an employee's same sex spouse must be imputed into the employee's income as wages for federal tax purposes. Fair market value is determined based on facts and circumstances, but the IRS has informally stated in the past that the single rate charged to an individual under the plan for COBRA continuation coverage could be used.

6. For New York State tax purposes, is an employer required to add to an employee's wages the value of employer-provided health coverage for the same-sex spouse?

No. On July 21, 2011, the New York State Department of Taxation and Finance posted guidance for employers on its website indicating that employers should not withhold New York tax on certain benefits provided to a same-sex married employee. Specifically, the guidance states that employers do not need to withhold tax for New York State, New York City, or Yonkers income tax purposes on the value of certain benefits (e.g. domestic partner health benefit), even though that benefit is subject to federal withholding. The guidance states that this applies if the employee's federal taxable wages subject to withholding include the value of the benefits, and the value of these benefits wouldn't be included in taxable wages if provided to a different-sex married spouse. The guidance is available at: http://www.tax.ny.gov/pit/withholding_mea.htm.

This guidance is very helpful since the definition of "adjusted gross income" under the New York Tax Law is defined as "federal adjusted gross income as defined in the laws of the United States for the taxable year, with modifications specified in this section." McKinney's Tax Law § 612(a). Absent guidance to the contrary (such as described above), it would be difficult to reconcile the straightforward definition of adjusted gross income in the New York State Tax Law with the requirements of the Act.

7. Does the Act affect an individual's state tax filing status and estate tax in New York State?

Yes. On July 29, 2011, the New York State Department of Taxation and Finance, Taxpayer Guidance Division, issued a Technical Memorandum explaining that, as of July 24, 2011, same-sex married couples must file New York personal income tax returns as married, even though their marital status is not recognized for federal tax purposes. This first applies to 2011 tax returns, and is based on a couple's marital status on December 31, 2011. This guidance is very helpful since Section 607(b) of the New York State Tax Law specifically provides that an individual's marital status for state tax law is the same as the individual's marital status for federal rate-setting purposes, and under the federal Defense of Marriage Act, the IRS does not recognize same-sex marriage for federal income tax purposes, including for purposes of filing a joint return. In addition, the Technical Memorandum provides that, with respect to an individual

who dies on or after July 24, 2011, the New York taxable estate of an individual in a marriage with a same-sex spouse must be computed in the same manner as if the deceased individual were married for federal estate tax purposes. While the difference in federal-state filing status adds complexity, it likely will result in lower New York taxes for same-sex couples.

8. Does an employer need to make any changes with respect to non-ERISA benefits for New York State employees who have same-sex spouses?

Possibly. Now that a spouse for purposes of New York law includes a same-sex spouse, employers should review all non-ERISA benefits that may be extended to a spouse including leave policies (e.g., leave to care for a spouse, or bereavement leave), relocation policies, and employee discount programs to determine whether changes need to be made to comply with New York state and local laws that prohibit discrimination on the basis of marital status and sexual orientation. A benefit may be "non-ERISA" because it is not identified in ERISA §§ 3(1) or 3(2), because it is within a safe harbor described in Department of Labor regulations or guidance, or because the plan is not subject to ERISA (e.g., government plan, or church plan).

9. What are the other six jurisdictions that recognize same-sex marriage and how is an individual who is married in one of those jurisdictions treated under New York state law?

New York is the sixth state to adopt a same-sex marriage law. The other states which have adopted similar laws are: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont. The District of Columbia has also adopted a similar law. The Act is similar to the laws of New Hampshire, Vermont and the District of Columbia, which have also amended their domestic relations statutes to provide for same-sex marriages. Similarly, Connecticut has codified same-sex marriages in its general construction of statutes by allowing the terms such as "husband," "wife," "groom," "bride," etc. to include individuals of the same-sex. Although Iowa and Massachusetts also recognize same-sex marriages, it has yet to be codified in their statutes. Rather, each state's respective State Supreme Court has ruled that laws limiting marriage to opposite-sex couples are unconstitutional.

New York State law previously required same-sex spouses validly married in other jurisdictions that recognize same-sex marriage to be treated the same as opposite-sex spouses. This requirement was put into place through a directive issued by former Governor Paterson in 2008. The Act does not alter this requirement, nor does the Act impose any additional requirements.

10. What steps should employers take with respect to health and welfare plans now that the Act is effective?

Employers with employees in New York State should review their health and welfare plan documents, SPDs, participant communications materials, and open enrollment forms to determine the rights of same-sex spouses under the Act and consider whether they would like to make any changes. If an employer sponsoring a self-funded plan does not wish to cover same-sex spouses, the definition of "spouse" in the plan documents should make this exclusion clear. In addition, employers should speak with their insurance providers and third-party administrators regarding the Act's requirements, and work with their payroll department to address any New York State taxation issues. Finally, employers should make sure to communicate the rights of same-sex spouses under the Act, including any changes, to participants.