

34TH ANNUAL ISCEBS
Employee Benefits

Symposium

Same-Sex Partner Benefits in the Era of Marriage Equality: Open Issues and Latest Trends

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Overview

- Background
- Retirement Plans
- Health and Welfare Plans
- Taxation of Benefits
- Transgender Benefits
- Unmarried Partner Benefits
- Other Benefits

Background—Federal Law

- Federal DOMA
 - Section 3 provided that, for purposes of federal law, “marriage” means only a legal union between one man and one woman as husband and wife, and “spouse” refers only to a person of the opposite sex.
 - Section 2 allows states to refuse to recognize other states’ same-sex marriages.
- *U.S. v. Windsor*
 - U.S. Supreme Court ruled Section 3 of DOMA was unconstitutional in June 2013. Section 2 was untouched.

Federal Recognition of Spouses

- Federal law generally defers to state law definitions of marriage.
- **Section 2 of DOMA remained valid law.** Section 2 of DOMA stipulates that no state shall be required to recognize a same-sex relationship that is considered a legal marriage in another state, or to recognize a right or claim arising from such a relationship.
 - A vast majority of states passed mini-DOMAs, which prevented the states from recognizing same-sex marriages performed in other states.
- Same-sex partners in a civil union or domestic partnership will not be recognized under federal law and will not be afforded federal spousal benefits or protections.

Same-Sex Marriage

- Supreme Court Decision

- On April 28, 2015, the U.S. Supreme Court heard oral arguments of four consolidated cases that challenged either a state's refusal to recognize same-sex marriages from other jurisdictions or a state's refusal to license same-sex marriages, or both
 - *Obergefell v. Hodges* (Ohio), *Tanco v. Haslam* (Tennessee), *DeBoer v. Snyder* (Michigan), *Bourke v. Beshear* (Kentucky)
- Two issues considered by Supreme Court
 - Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?
 - Does the Fourteenth Amendment require a state to recognize same-sex marriages performed in another state?
- The answer to both questions was yes!

Impact on Retirement Plans

- Beneficiaries

- A same-sex spouse must consent to a participant's designation of any beneficiary. A beneficiary designation without the spouse's consent is invalid.
- A participant's same-sex spouse will be the default beneficiary in the event the participant dies without having named a beneficiary.

- QDROs

- Same-sex spouses who divorce may enter into a qualified domestic relations order (QDRO) to divide retirement plan assets.

Impact on Retirement Plans (cont.)

- Retroactive Survivor Benefits
 - Defined benefit plans generally must offer participants payment in the form of a qualified joint and survivor annuity (QJSA) with pre-retirement spousal death benefit (QPSA) coverage.
 - Plan sponsors are receiving retroactive benefit claims from participants with a same-sex spouse who was not recognized at the time payments began or from surviving same-sex spouses.
- Plan Amendments
 - Amendments were required for plans that define “marriage” by reference to DOMA or “spouse” as an individual of the opposite-sex. Plans also must be amended if same-sex spouses will be recognized for plan purposes prior to June 26, 2013.
 - Amendments were not required for plans that define “marriage” or “spouse” in a manner that is not inconsistent with *Windsor*. But an amendment may be desirable depending on how retroactive claims will be handled.
 - All *Windsor* amendments generally must have been adopted by December 31, 2014.

Impact on Health and Welfare Plans

■ Insured Plans

- Same-sex spouses presumably must be extended spousal benefit coverage under insured medical, dental or vision plans in states that allow same-sex marriage.
- State law benefit mandates may require coverage to be extended to same-sex partners.
- HHS issued guidance in March 2014 requires insurers to offer the same coverage to same-sex spouses that is offered to opposite-sex spouses.

■ Self-Insured Plans

- Same-sex spouses technically are not required to be extended spousal benefit coverage under self-insured plans because federal law does not require spousal welfare benefit coverage and state insurance law mandates do not apply.
- Employers that continue to provide coverage only to opposite-sex spouses face significant risk of legal challenges under federal discrimination law.

Taxation of Benefits

- Federal Tax Issues

- Employees will no longer pay federal income and employment tax for income imputed on the fair market value of employer-provided benefit coverage for a same-sex spouse (regardless of whether the couple resides in a state where same-sex marriage is legal or recognized).
- Employees can pay for same-sex spouse's coverage using pre-tax contributions under a Section 125 cafeteria plan.
- Employees can take tax-free reimbursements from flexible spending accounts (FSAs), health reimbursement accounts (HRAs) and health savings accounts (HSAs).
- Favorable federal tax treatment will not extend to unmarried same-sex partners unless the partner meets the Internal Revenue Code definition of "dependent."

Taxation of Benefits (cont.)

- State Tax Issues

- **DOMA states:** Pre-Obergefell, in DOMA states that did not recognize same-sex relationships, employers needed to impute income for state tax purposes (as was previously required under federal law) for the fair market value of coverage for a same-sex spouse or partner. Employees in these state must pay for the same-sex spouse or partner's coverage using after-tax (for state purposes) dollars.
- **Other states:** In non-DOMA states that recognize same-sex marriages or that have special laws favoring same-sex couples, employees do not pay state income tax on the fair market value of coverage for a same-sex spouse or partner. Employees in these states may be permitted to pay for the same-sex spouse or partner's coverage using pre-tax (federal and state) dollars.
- **States without a state income tax:** Alaska, Florida, Nevada, New Hampshire, South Dakota, Texas, Tennessee, Washington and Wyoming

Taxation of Benefits (cont.)

- Retroactive Tax Implications

- Employers may request a refund or adjustment of payroll taxes paid on imputed income for same-sex spousal benefit coverage for open tax years (usually three years).
- Employees may elect to file amended tax returns to claim refunds on income and employment taxes paid on same-sex spousal benefits in prior open tax years (usually three years).
- Employers will likely receive employee requests for corrected W-2s or information about the amount imputed in their income in prior years.

- Gross Ups

- Some employers provided gross-ups to cover the employee portion of federal (and possibly state) income and employment taxes on benefits for same-sex spouses and partners.
- Will employers continue to provide gross-ups for unmarried partners or will they eliminate gross ups now that federal tax inequality is eliminated for same-sex spouses?

Transgender Benefits

- More and more employers are adding or considering this benefit.
- Human Rights Campaign Foundation's 2012 Corporate Equality Index requires health coverage to include transgender-specific treatments (mitigating "medically necessary" and "cosmetic" exclusions) in order for the employer to receive a 100% rating.
- It can be difficult to work with insurers/providers to add this benefit.
- Some complicated considerations (e.g., whether to cover "medically necessary" cosmetic procedures).

Transgender Benefits (cont.)

- Taxation of Transgender Benefits

- Medical care related to diagnosis, treatment or prevention of diseases or for treatment related to any part or function of the body is generally exempt from employer payroll and individual income tax purposes.
- Expenses related to cosmetic surgery are generally extended favorable tax treatment only if the procedures are medically necessary to treat a physical deformity existing at birth or arising by accident or disease.
- Taxation of medical care related to treatment of gender identity disorder (GID) is confusing since many of the treatments are cosmetic in nature.
- 2010 U.S. Tax Court held hormone therapy and gender reassignment surgery were deductible medical expenses because they are "well-recognized and accepted treatments for severe GID." Breast augmentation surgery was not deductible because there was insufficient evidence that surgery was medically necessary for individual involved in case. Ruling was based on specific facts and circumstances involved and leaves open the possibility that breast augmentation could be medically necessary for another individual with GID.

Unmarried Partner Benefits

- Eliminating Partner Benefits

- Will employers continue to provide benefits to same-sex unmarried partners? What about opposite-sex unmarried partners? What about “reverse” discrimination?
- Will employers require employees to marry in order for the employee’s partner to be eligible for benefits coverage? Will there be a grace period or other grandfathering?

- Proof of Partnerships

- Employers are changing policies to require equal proof of all employee marriages (e.g., sex of spouse/state of marriage/licenses).
- Trend is to require less proof of domestic partnerships by eliminating requirements such as cohabitation, minimum duration and financial interdependence.

Other Benefits

- Adoption assistance
- Fertility benefits
- Surrogacy benefits
- Maternity and paternity leave/“parental” leave



YOUR QUESTIONS