

# ERISA INDUSTRY COMMITTEE

FocusOn Call: DOMA Impact on Employee Benefit Plans

Implications for Health and Welfare Benefits

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# Overview

- How ruling may affect:
  - Employers that currently offer health coverage to same-sex spouses/domestic partners and those that don't
  - Health FSAs, HRAs and HSAs
  - Dependent care assistance programs and other benefit programs
  - Administration of Family and Medical Leave
- Action items

## Employers that currently offer health coverage to same-sex spouses

- Change in federal tax treatment of coverage provided to same-sex spouses residing in states that recognize same sex marriage
  - Tax exclusions for spousal benefits apply--no imputed income. Change likely effective for 2013 and prior years but need guidance
    - Need to be able to differentiate between same-sex spouses and same-sex domestic partners
    - Consider filing for refund of FICA taxes paid in open years (2010 – 2012)
    - Employees may ask assistance with refund claims
- Multi-state employers may have issue when some employees reside in states that do not recognize same sex marriage
  - Will IRS provide relief by extending exclusion to all legally married same sex spouses?

## Employers that currently offer health coverage to same-sex spouses (cont'd)

- Change in treatment under COBRA if recognized as spouse
  - Same-sex spouses will be qualified beneficiaries with independent COBRA rights
    - Must be permitted to elect COBRA even if employee does not
    - Must be permitted to add dependents at annual enrollment
  - Need to identify same-sex spouses currently enrolled in COBRA coverage to ensure all rights are extended
  - Need approach for same-sex spouses not offered COBRA or whose COBRA coverage ended at employee's death or upon divorce
- Appears that employer not required to offer COBRA to same-sex spouses living in states that do not recognize same-sex marriage but employer may make COBRA-like coverage available

## Employers that currently provide benefits to same-sex spouses (cont'd)

- Change in Medicare rules if recognized as spouse
  - Employer plan must pay primary to Medicare for same sex-spouses over age 65
  - Partners recognized as spouses may be less likely to drop coverage at age 65 because will no longer be subject to late-enrollment penalty if don't enroll when first eligible
    - Penalty waived if have employer-sponsored coverage due to spouse's active employment

## Employers that currently do not provide benefits to same-sex spouses/domestic partners

- *Windsor* ruling does not require employers to provide coverage to same-sex spouses even in states that recognize same-sex marriage
- Employers should review definition of “spouse” in plan documents
  - “Opposite-sex” – would not be required to offer coverage to same-sex spouse unless amended
  - “As defined in the Internal Revenue Code” – same-sex spouse may be eligible now unless amended

## Mid-year offers of health coverage to same-sex spouses

- If spouse not previously eligible under plan terms, mid-year offer of coverage will be HIPAA special enrollment event
  - Must be given at least 30 days from date first eligible to enroll
  - Employee must be permitted to enroll self and spouse if previously declined or to add spouse and change options if enrolled
- If coverage had been offered but declined, recognition as spouse under federal law arguably is “change in legal marital status” under Section 125
  - If so, plan could permit enrolled employee to add previously eligible individual
- No requirement that coverage be made retroactive

## Treatment of spouses' children

- To qualify for federal tax exclusion, spouse's child must be employee's dependent
  - To be "qualifying child" dependent, child generally must be employee's adopted, foster child or stepchild
  - "To be "qualifying relative" dependent, can't be "qualifying child" of any other taxpayer
- 2011 IRS FAQ says that individual recognized as stepparent of partner's child under laws of state of residence is stepparent for federal tax purposes
  - So status of child as stepchild could vary by state
- Ruling does not appear to change this but could be subject to expansion



## Impact on Health FSAs, HRAs and HSAs

- Expenses of same-sex spouse recognized as spouse under federal law eligible for reimbursement
  - Qualify as change-in-status event under Section 125 that could permit increase in salary reductions to health FSA
- Additional implications for HSAs
  - Limit on HSA contributions for married couples who each have family HDHP coverage now applies
    - Each spouse may only contribute  $\frac{1}{2}$  of statutory family limit to his or her HSA
  - Same sex spouses previously ineligible for HSA because could be claimed as tax dependent by partner now eligible

# ACA considerations

- Possible Section 4980H penalty implications
  - Employees' eligibility for premium tax credits may be affected by inclusion of same sex spouse and children in determining family size and household income
  - Must make coverage available to employees' stepchildren to avoid potential Section 4980H(a) penalty

## Impact on dependent care assistance programs

- If same-sex spouse's child becomes "stepchild", may be "qualifying individual"
  - Allow election change to increase salary reduction contributions because new eligible dependent?
- Recognition as spouse for tax purposes means:
  - Employee can no longer be reimbursed by DCAP for payments to partner caring for employee's child
  - If employee and spouse file jointly, no eligible expenses unless spouse is working, looking for work, a full-time student or incapable of self care

## Impact on other benefit programs

- Ruling may affect tax treatment of other benefits provided to same-sex spouses and children
  - Exclusion for *de minimis* amounts of dependent life for spouse and children may now apply
  - Exclusion for tuition reimbursement benefits provided to spouse and children
- Adoption assistance programs
  - Can reimburse expenses to adopt the child of domestic partner, but not to adopt the child of a spouse

## Family and Medical Leave

- Only available with respect to spouses, children and parents and, for military caregiver leave, “next-of-kin”
  - Final FMLA regulations define spouse as “husband or wife as defined for purposes of marriage in the State where the employee resides ..” but per DOMA, would not include same-sex spouse
- 2010 DOL guidance: May be “parent” of partner’s child under FMLA even if no biological or legal relationship if standing “in loco parentis”
  - Entitled to leave for birth, bonding, care of child
- With ruling, same-sex spouses living in states that recognize same sex marriage must be granted FMLA leave on same basis as other spouses
- Not required to provide FMLA leave to same-sex spouses living in states that do not recognize same-sex marriage, but may do so.

## Action items

- Identify any benefits/policies that could be affected by ruling and review plan definitions of “spouse”
- If currently provide benefits to same-sex partners
  - Determine how to differentiate between same-sex spouses and same-sex partners for proper tax administration
  - Determine how to comply with COBRA obligations
- If you are a multi-state employer, determine what your policies will be when you have employees residing in states that recognize same-sex marriage and in states that don't
- Monitor developments as guidance is issued
- Develop employee communications

# Questions

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