



Same-Sex Marriages: What Do They Mean For Your Benefit Plans?

By Josh Norris (Atlanta)

On May 15 of this year, the California Supreme Court held that same-sex couples must be permitted legally to marry in California. According to the decision, the failure to designate the relationship of a same-sex couple as a marriage violates the equal protection clause of the California Constitution. When the decision takes effect on June 14, 2008, California will join Massachusetts as the only states that recognize same-sex marriages.

Employers and plan sponsors based in California or with California employees should carefully review their employee benefit plans to determine whether and how to accommodate participants' same-sex spouses. Since there is no residency requirement to marry in California, employers and plan sponsors without a connection to California also need to be prepared.

While the issue of same-sex marriage remains highly controversial in other areas, California has a reputation as a trend-setter in many respects, and this may prove to be one of them. What are the implications of this ruling on employee benefit plans? In this article, we'll take a look.

Existing Federal and State Laws Conflict

While California state law now permits same-sex marriages, employee benefit plans which are subject to the Employee Retirement Income Security Act of 1974 (ERISA) are not required to recognize same-sex marriages. The federal Defense of Marriage Act (DOMA) provides, for purposes of federal law, that "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. According to DOMA, no state is required to recognize a same-sex marriage licensed under the laws of another state. In fact, many states have adopted either constitutional amendments or DOMA-like laws defining marriage as a relationship between a man and a woman.

Although ERISA preemption is broad, ERISA does not preempt state laws regulating insurance. California's domestic-partner laws already require both public and private employers to extend the same health and welfare benefits to state-registered domestic partners that are provided to spouses. But because of ERISA preemption, self-insured plans are not subject to this requirement. Employers and plan sponsors of self-insured

plans will need to decide whether they want to cover same-sex spouses for benefit purposes.

Federal Tax Issues

One of the reasons that this is a hot-button issue is because of the favorable income tax treatment for employee benefits. Specifically, group health plan benefits provided by an employer, including the cost of employer provided group health plan coverage for employees and their family members, are generally exempt from federal income taxation. Although the California decision will exempt health benefits provided to same-sex spouses from California state income tax, DOMA clearly provides that these individuals will not avoid federal income tax implications unless they meet the tax definition of a "dependent."

For those same-sex spouses that fail to qualify as a "dependent," employers and plan sponsors will be required to impute income to employees whose same-sex spouses are enrolled in the health plan.

There are additional issues for cafeteria plans. For example, newly married employees may need to wait until open enrollment to add their same-sex spouse to the plan, because a same-sex marriage is unlikely to be considered a marriage under the change in status rules.

Also, same-sex spouses can not be included in health flexible spending accounts (FSAs), health reimbursement arrangements (HRAs) or health savings accounts (HSAs), unless the same-sex spouse meets the tax definition of a "dependent."

What Should an Employer Do?

The first step that employers and plan sponsors should take is to decide whether they want to provide benefits to same-sex spouses. Regardless of their decision, employers and plan sponsors should carefully review plan documents to make sure that they accurately reflect the employer's intent. If they don't, change them accordingly.

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You've Gotta Have Heart

By Josh Norris (Atlanta)

Last month President Bush signed into law the Heroes Earnings and Assistance and Relief Act of 2008 (HEART or the Heroes Act). The Act's provisions impact benefits under 401(k) plans. In addition, Health FSAs, group health plans, and cafeteria plans may also be impacted by some Heroes Act changes.

Death or Disability During Military Service

The Heroes Act requires 401(k) and other qualified retirement plans to provide the survivors of a plan participant who dies while performing qualified military service with additional benefits that would have been provided if the participant had resumed employment and then died. Qualified military service is the type of service that would entitle the participant to reemployment rights under the Uniformed Services Employment and Re-employment Act (USERRA). Examples of additional benefits include accelerated vesting and ancillary life insurance benefits.

Although not required, the Act permits 401(k) and other qualified retirement plans to treat individuals who die or become disabled while performing qualified military service as if they had resumed employment in accordance with their USERRA reemployment rights on the day before death or disability, and then terminated employment on the date of death or disability. The result is that these individuals (or their survivors) are allowed to receive all or part of the retroactive benefit accruals that the plan must provide to reemployed service members under USERRA. The additional benefit accruals must be credited on a reasonably equivalent basis.

These provisions apply to deaths or disabilities occurring on or after January 1, 2007.

Aiding Employees Called Up For Military Service

HEART also allows elective deferrals to be distributed to participants on active duty for more than 30 days. But individuals who elect to take a distribution will be prohibited from making elective deferrals and employee contributions for 6 months after the distribution date. This provision is effective for years beginning after December 31, 2008.

The Act permanently waives the 10 percent additional income tax on early distributions from 401(k) and other qualified retirement plans made to qualified reservists who are called to duty. Although the Pension Protection Act of 2006 initially waived the tax, it was limited to qualified reservists who were called to active duty after September 11, 2001 and before 2008.

In addition, the Act allows health FSAs to provide distributions of all or a portion of the health FSA account balances of participants who are reservists called to active duty for 180 days or more. The Act provides that distributions may be made at anytime from the date of the call to duty through the last date on which reimbursements may be made for the plan year in which the call to duty occurred. This provision is intended to provide a way for plans to help reservists avoid unwanted forfeitures under the "use-or-lose" rule.

Differential Pay

Some employers voluntarily agree to continue paying the compensation that service members would otherwise have received from the employer during their active duty. Under pre-Heroes Act law, such "differential pay" was not considered wages for federal tax withholding purposes. Under the Heroes Act, differential pay is subject to withholding, and employers are required to include the amount of differential pay as plan compensation and wages for 401(k) and other qualified plans. The result, for example, is that an employee receiving differential pay can elect to contribute a portion of that pay into a 401(k), with the employer



matching that contribution on the same basis as other employees' contributions.

Previously, employees who returned to their same employers after military service were allowed to make retroactive contribution to their retirement savings plan, and employers were required to match those retroactive contributions to the same extent that they matched other workers' contributions during the period of military service. This provision applies to differential pay paid after December 31, 2008.

It is important to point out that retroactive 401(k) plan amendments intended to comply with the Act's provisions must be adopted no later than the last day of the first plan year beginning on or after January 1, 2010.

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