Highlights of the Impact of the Marriage Equality Act on Employee Health and Qualified Retirement Benefits

Carrie L. Mitnick
October 4, 2011

A. The Impact of Federal Law on the Benefits Arena

1. Defense of Marriage Act ("DOMA"). DOMA prohibits the recognition of a same-sex marriage for purposes of certain Federal benefits law.

2. ERISA Preemption and ERISA-Governed Benefits. ERISA generally preempts state law. However, insured plans are an exception to ERISA preemption and must comply with state insurance law relating to the plan.

B. Self-Insured v. Insured Health Plans: Obligation to Offer Health Benefits

1. Self-insured plans are not required to offer health benefits to employees' same-sex spouses. Plan sponsors may choose to make these benefits available under a self-insured plan.

2. Insured plans subject to New York law are required to offer health benefits to same-sex spouses, if benefits are offered to different gender spouses of employees.
   a. The plan sponsor of an insured plan not subject to New York law (or the law of another state requiring recognition of same-sex marriage) may amend the plan to provide benefits to a same-sex spouse. However, it must secure the consent of the insurer to provide these benefits. (Also note that some states have mini-DOMA rules barring the recognition of a same-sex marriage, which may impact the ability of the insured plan to provide these benefits.)

C. Availability of COBRA v. New York State Continuation Coverage

1. A same-sex spouse is not eligible to elect COBRA coverage, regardless of whether a health plan is insured or self-insured.

2. A same-sex spouse covered under an employee's insured medical plan subject to New York law is eligible to elect New York continuation coverage under an employer's medical plan.

3. A self-insured health plan or an insured health plan subject to another state's insurance rules may choose to offer continuation coverage to an employee's same-sex spouse. If a plan sponsor wants to offer continuation coverage through an insured arrangement which is not subject to New York law (or another law requiring the recognition of a same-sex marriage), the plan sponsor must first secure the consent of the insurer to offer this benefit. (Also note that some states...
have mini-DOMA rules barring the recognition of a same-sex marriage, which may impact the ability of the insured plan to provide these benefits.)

D. Highlight of Tax Ramifications of Health Benefits Provided to Same-Sex Spouses

1. Federal tax-free health coverage can only be provided to an employee, his/her Federally recognized spouse or tax dependent.
   a. Health coverage provided to a same-sex spouse will be subject to Federal income tax unless the spouse qualifies as the employee's tax dependent.
   b. Effective July 24, 2011, health coverage provided to a same-sex spouse will not be subject to New York income tax, regardless of the spouse's tax dependent status.
   c. An employee married to a same-sex spouse, prior to July 24, 2011, in a state legalizing same-sex marriage is subject to New York income tax for the period prior to July 24, 2011, unless the spouse qualified as the employee's tax dependent.

2. An employee may not pay for a same-sex spouse's health coverage on a pre-tax basis, for Federal income tax purposes, unless the spouse is the employee's tax dependent.
   a. It appears an employee may for a same-sex spouse's health coverage on a pre-tax basis for New York income tax purposes, regardless of the spouse's tax dependent status.

3. A health flexible spending arrangement may not reimburse a non-tax dependent same-sex spouse's medical expenses.

E. Qualified Retirement Plans

1. Certain retirement benefits may not be extended to same-sex spouses:
   a. An employee married to a same-sex spouse must be treated as an unmarried participant for purposes of determining the default form of benefit (i.e., qualified joint and survivor annuity v. single life annuity).
   b. A same-sex spouse must be treated as a non-spousal beneficiary for purpose of:
      i. the rules governing minimum required distributions and the timing of these distributions;
      ii. hardship distributions; and
      iii. rollover distributions.

2. A qualified domestic relations order (also known as a "QDRO") may only be issued with respect to same-sex spouses and former same-sex spouses in very limited circumstances.
   a. The same-sex spouse or former same-sex spouse must be a tax dependent of the participant.
   b. The order must issued with respect to child support.
3. Certain retirement benefits may (but are not required to) be extended to same-sex spouses:
   a. A 50% joint and survivor annuity, with the same-sex spouse as the surviving annuitant (subject to the non-spousal beneficiary rules on minimum required distributions and incidental death benefits), may be offered.
   b. Arguably, a same-sex spouse can be the default beneficiary to a participant's pre-retirement death benefit (subject to the non-spousal beneficiary rules on minimum required distributions).
   c. Arguably, a plan can require a participant to secure a same-sex spouse's permission to name a beneficiary other than the same-sex spouse.

If you would like more information, please contact Carrie L. Mitnick at cmnitnick@pbwt.com or 212-336-2415.

This information is for general informational purposes only and should not be construed as specific legal advice or relied upon.

IRS Circular 230 disclosure: Any tax advice contained in this communication (including any attachments or enclosures) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)