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Alert

Employment Law

The New York State “Marriage Equality Act” and its Effects on Employee Benefits

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On July 24, 2011, the Marriage Equality Act (the “Act”) became effective, making New York State the sixth state to legalize same-sex marriage. Although New York has, for several years, recognized same-sex marriages performed outside the State, the Act now permits same-sex couples to legally marry in-state. The Act, signed into law on June 24, 2011, also provides that, in New York, no distinction may be made between the treatment of same and opposite sex marriages. However, the Act includes an explicit exemption for benevolent organizations and religious institutions and makes clear that no member of the clergy acting in such capacity will be required to perform any marriage.

The broad sweeping language of the Act will have a significant effect on employee benefits arising out of or governed by New York State law. However, pursuant to the Federal 1996 Defense of Marriage Act (“DOMA”), which defines “marriage” as “only a legal union between one man and one woman as husband and wife” and “spouse” as only “a person of the opposite sex who is a husband or a wife,” many rights afforded under New York State law will not be mandated for certain employee benefits subject to DOMA. This could create new pitfalls for certain employees and employers attempting to navigate the Act as well as DOMA.

Health and Welfare Benefits

The Act’s effect on a health or other welfare benefit plan provided by an employer depends on whether the plan is provided through an insurance policy purchased by the employer (an “insured” plan) or funded through the general assets of the employer (a “self-insured” plan).

Insured Plans

Insured plans funded through insurance policies governed by New York State insurance law will be required to comply with the Act, meaning that such plans cannot distinguish between the treatment of same-sex spouses and opposite sex spouses. In practice, this is not a significant change from current law, since Governor Patterson issued a directive in 2008 that all New York State agencies recognize same-sex marriages performed in other jurisdictions. However, there continue to be adverse Federal tax implications for coverage of same-sex spouses – the fair market value of any benefit for a same-sex spouse would be treated as imputed income to the employee for Federal income tax purposes.

Self-Insured Plans

Self-insured plans are typically not subject to state insurance laws. The Employee Retirement Income Security Act of 1974 ("ERISA") generally preempts state laws with respect to self-insured plans, so that such plans are not subject to the Act. Because of DOMA's definition of "marriage" and "spouse," self-insured plans are not required to recognize otherwise valid same-sex marriages. Therefore, despite the provisions of the Act, employers are not required to treat same-sex spouses in the same manner as opposite sex spouses under self-insured benefit plans. However, an employer can still elect to provide equal benefits to same-sex spouses if the employer so chooses, subject to the imputation of tax discussed above. Employers should give serious thought to whether or not they wish to extend self-insured benefits to same-sex spouses and should carefully review the definition of "spouse" in all plan documents to properly capture the employers' intended universe of beneficiaries. For example, employers should consider whether or not, in addition to same-sex spouses, they wish to extend benefit coverage to include opposite sex non-married domestic partners or, alternatively, discontinue offering coverage to all unmarried domestic partners.

Post-Employment Benefit Continuation Coverage

COBRA Continuation Coverage

The Consolidated Omnibus Budget Reconciliation Act of

1985 ("COBRA") is a federal program requiring employers to provide continuation coverage under certain health and welfare benefits to "qualified beneficiaries" (such as employees and their spouses) following a "qualifying event" (such as a termination of employment). Because COBRA is a Federal program, as with self-insured benefit plans, DOMA provides that an employer is not required to provide COBRA continuation coverage to same-sex spouses. However, as with self-insured benefit plans, an employer may still elect to extend such coverage to same-sex spouses. It should also be noted that a bill was introduced in the House of Representatives on June 23, 2011 which seeks to extend COBRA continuation coverage eligibility to domestic partners (as defined in the applicable group health plan) and their children.¹

New York State "Mini-COBRA" Coverage

In addition to COBRA, New York State law requires certain employers to provide COBRA-like post-employment benefit continuation coverage ("mini-COBRA") with respect to insured plans funded through insurance policies governed by New York State law.² While the Act does not affect COBRA entitlements, it does affect continuation coverage under New York State's mini-COBRA laws and, therefore, to the extent opposite sex spouses would be entitled to continuation coverage under New York State mini-COBRA, such benefits will now need to be extended to same-sex spouses.

Pension and other Benefits Governed by Federal Law

401(k) & Defined Benefit Pension Plans

Employer-provided 401(k) and pension plans are governed by ERISA and are therefore outside the ambit of the Act. Because DOMA provides that the term "spouse" can only refer to people of opposite sexes that are married, same-sex spouses are not legally entitled to many of the protections and rights provided under such plans to married persons of opposite sexes.

Examples:

- **Beneficiary Designation** – A participant may name anyone as beneficiary under a 401(k) plan. However, if no one is named, the default beneficiary under Federal law is the participant's spouse. Since under DOMA a "spouse" does not include persons of the same sex, the same sex spouse would not be the default beneficiary.
- **Hardship Withdrawals** – Federal law allows for early withdrawal from a 401(k) plan due to financial hardship, including that of a spouse as part of a safe harbor. This benefit is not automatically available to married persons of the same sex, although employees may make withdrawals on account of hardship suffered by the primary beneficiary under the plan.
- **Nonspousal Rollovers** – Employers must offer a nonspousal rollover option to

beneficiaries of an employee's 401(k) Plan; however, several inequalities remain between spousal and nonspousal rollovers, most notably that spousal beneficiaries may delay withdrawal from their rollover account until reaching age 70½ while nonspousal beneficiaries must either (i) withdraw all funds within 5 years of the employee's death or (ii) immediately begin annual withdrawals for the duration of either the decedent or the nonspousal beneficiary's life expectancy (depending on the terms of the plan).³

- **Pension Distributions** – Pension plans must generally offer married participants payment in the form of a qualified joint and survivor annuity, along with pre-retirement spousal death benefit coverage. These benefits are not required for same-sex spouses and would be unavailable unless an employer specifically alters its plan and employees are made aware of their ability to elect such option.

While employers are not required to provide equal protections and rights under 401(k) plans and defined benefit pension plans to married persons of the same sex, to a large extent, employers are free to do so if they so choose.

Family and Medical Leave Act ("FMLA")

The FMLA is a Federal law requiring certain employers to provide employees with job-protected unpaid leave due to a serious health condition or to care for a sick family member or new child. While the FMLA definition of "spouse" defers to the definition recognized under State law for

purposes of marriage in the State in which the employee resides, it is likely that DOMA, which was enacted after the FMLA, restricts this definition solely to spouses of the opposite sex. This interpretation is supported by a 1998 Department of Labor opinion letter as well as at least one recent Federal District Court case in the First Circuit.⁴ However, in 2010 the Department of Labor expanded same-sex domestic partners' rights to some extent, having issued interpretive guidance clarifying that non-biological parents are permitted unpaid FMLA leave for the birth of a child or to care for such child with a serious health condition.⁵ In addition, several bills have been proposed in the House of Representatives which, if passed, would extend FMLA coverage to domestic partners.⁶

While not required under the FMLA, an employer could voluntarily provide leave benefits to same-sex spouses similar to those provided to spouses of the opposite sex. However, it should be noted that since such leave could not be designated as FMLA leave, the employee taking the leave could potentially "double up" where covered FMLA leave is later taken in the same 12-month period (e.g., caring for a parent or child).

Social Security

Under the Social Security Act, the Federal government provides numerous benefits, such as the spousal survivor benefit, for which same-sex married couples remain ineligible as a result of DOMA. Despite this, some expansions in entitlements have been effected, such as the extension of non-

biological children's entitlements to disability benefits under the Social Security Act.⁷

State and Federal Income Tax Issues

New York. Since the Act requires there be no differentiation under New York State law between opposite and same-sex married couples, it is expected that same-sex spouses should be able to file a joint New York State tax return. In addition, we anticipate that there should not be imputed New York State income tax as a result of an employer's provision of health and welfare benefits to an employee's same-sex spouse. The New York State Department of Taxation and Finance is expected to issue further guidance on these issues in the near future.

Federal. As a result of DOMA, the Act does not affect how same-sex marriages in New York will be recognized for Federal income tax purposes. That is, same-sex spouses cannot file joint Federal tax returns and cannot receive any Federal tax advantages associated with employee benefit plans by virtue of their marital status.⁸ For example, the fair market value of any benefit coverage given to an employee's same sex spouse, as discussed above, would be imputed into the employee's taxable income for Federal income tax purposes. In addition, employees could not pay for their same-sex spouse's health benefits with pre-tax dollars (since "cafeteria plans" are governed by Federal law) and would not be eligible for reimbursement of their same-sex spouse's medical expenses under the employee's flexible spending account.

The disparity in treatment of same-sex married couples for Federal and New York State income tax purposes could likely result in complex tax filings in which same-sex spouses must file differently for purposes of Federal and New York State income tax returns and treat certain benefits as taxable income for Federal income tax purposes and non-taxable for purposes of New York State income tax. This will be administratively burdensome for both the employer and the employee.

Same-Sex Divorce

Entitlement to same-sex marriage in New York brings with it the inevitable complications of same-sex divorce. One significant issue that arises in connection with divorce proceedings in the benefits context is the division of a couple's retirement assets. Tax qualified pension plans are generally prohibited under ERISA from permitting the assignment or alienation of plan benefits.⁹ ERISA provides an express carve-out for alienation resulting from a qualified domestic relations order (a "QDRO") entitling a person to all or a portion of his or her ex-spouse's plan benefits.¹⁰ As a result of DOMA, however, an order relating to same-sex spouses would not constitute a "domestic relations order" under ERISA.¹¹ As a result, such an order could not qualify as a QDRO and would therefore be unenforceable against a same-sex ex-spouse's qualified plan assets. Therefore, same-sex couples negotiating a divorce settlement should take care not to rely on QDROs as part of the settlement.¹²

Employer Action Items

As a result of the impact that the Act will have on employee benefits, employers should review their current benefit plans and policies to determine any necessary changes or clarifications as a result of the Act and to ensure that the structure of the plans and policies accurately reflects the benefit coverage the employer desires to provide. It is recommended that, among other things, employers take the following actions:

- Consider, to the extent not required by the Act, the degree to which the employer desires to extend employee health and welfare benefits to same-sex spouses, including, for example:
 - Provision of self-insured health and welfare benefits to same-sex spouses (including whether or not to provide a tax gross-up to the extent such benefits are deemed taxable to the employee);
 - Extension of COBRA continuation coverage to same-sex spouses and/or expansion of the definition of qualifying event (e.g., to cover dissolution of a domestic partnership or same-sex marriage);
 - Treatment of same-sex marriages as spousal relationships for purposes of 401(k) and defined benefit pension plans (e.g., entitlement to survivor annuity coverage, establishment of automatic beneficiary entitlement, and expansion of hardship withdrawal rights);
- Consider the degree to which the employer desires to extend benefit coverage to include opposite-sex and same-sex non-married domestic partners or, alternatively, discontinue benefit coverage to all unmarried domestic partners.
- Review and analyze existing benefit plans, policies and procedures (including enrollment forms, administrative procedures, employee handbooks and current domestic partner policies) to (i) determine the rights to which same-sex spouses and domestic partners are currently entitled (including the definition of "spouse" in each plan), (ii) ensure current rights reflect the benefits the employer desires to provide, and (iii) revise such plans, policies and procedures to the extent necessary or desired.
- Coordinate with the employer's payroll department to ensure payroll is prepared to address the taxation issues that may arise as a result of providing benefits with disparate Federal and State income tax treatment.
- To the extent any benefits are provided solely to same-sex domestic partners (e.g., tax gross-ups on taxable health benefits), review with legal counsel whether such benefits remain necessary in light of the Act and whether the legalization of same-sex marriage in New York enhances potential discrimination claims against the employer by non-married opposite sex or same-sex domestic partners;

- Review any current eligibility requirements imposed on same-sex partners but not opposite sex partners (e.g., proof of domestic partnership, cohabitation requirements) and consider with legal counsel any potential employer liability arising out of such potential discrimination;
- Confer with legal counsel to prepare employer communications to employees and their families.

Interpretation No. 2010-3 (June 22, 2010) ("Employees who have no biological or legal relationship with a child [such as a same-sex spouse] may nonetheless stand in loco parentis to the child and be entitled to FMLA leave... to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement.")

6 See Family Leave Insurance Act of 2009 (H.R. 1723); Family and Medical Leave Inclusion Act (H.R. 2132); Balancing Act of 2009 (H.R. 3047).

7 See Department of Justice, Office of Legal Counsel, Memorandum Opinion for the Acting General Counsel Social Security Administration (Oct. 16, 2007) ("Although DOMA limits the definition of 'marriage' and 'spouse' for purposes of federal law, the Social Security Act does not condition eligibility for [child's insurance benefits] ('CIB') on the existence of a marriage or on the federal rights of a spouse in the circumstances of this case... Accordingly, we conclude that nothing in DOMA would prevent the non-biological child of a partner in a Vermont civil union from receiving CIB under the Social Security Act.")

8 Note, however, that a same-sex spouse can still receive certain Federal tax advantages to the extent the spouse qualifies as a "dependent" under the Federal tax code. See, e.g., PLR 200108010, 2/23/2001 (A "dependent" includes an individual who "(1) receives more than half of his or her support from the taxpayer for the year, and (2) who has the home of the taxpayer as his or her principal abode and is a member of the taxpayer's household during the entire taxable year of the taxpayer" provided that the individual

and taxpayer's relationship is not in violation of local law.)

9 See 29 U.S.C. §1056(d).

10 A "qualified domestic relations order" is defined under ERISA as a domestic relations order (i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and (ii) includes certain enumerated information (such as the name and last known mailing address of the participant and each payee covered by the order and the portion of benefits to be paid) and does not require the plan to provide certain other specifically enumerated information. See 29 U.S.C. §1056(d)(3).

11 See 29 U.S.C. §1056(d)(3)(B)(ii) ("the term 'domestic relations order' means any judgment, decree, or order (including approval of a property settlement agreement) which— (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law).")

12 Note that a domestic relations order granted to an ex-spouse in a same-sex divorce proceeding could qualify as a QDRO to the extent the ex-spouse qualifies as a dependent of the plan participant. See 29 U.S.C. §1056(d)(3)(B)(ii)(I) (providing domestic relations orders apply with respect to spouses, former spouses, children or other dependents of a participant).

1 Equal Access to COBRA Act of 2011 (H.R. 2310).

2 See McKinney's Insurance Law §3221(m)(6); see also NYS Insurance Department State Continuation Coverage Extension to 36 Months Frequently Asked Questions at http://www.ins.state.ny.us/cobra/cobra_ext_36.htm#faq, last updated Apr. 27, 2010 ("State continuation coverage does not apply to self-funded plans, dental-only plans, vision-only plans or prescription-only plans...").

3 The Pension Protection Act of 2006 created an entitlement for nonspousal rollovers, now codified under Section 401(a)(9)(B) of the Internal Revenue Code of 1986, as amended, and Treas. Reg. §§ 1.401(a)(9)-3 and 1.401(a)(9)-5. See also Notice 2007-7, 2007-5 IRB 395, 1/10/2007 as modified by Notice 2009-82, 2009-41 IRB 491, 9/24/2009.

4 See Department of Labor Wage and Hour Division Opinion Letter dated November 18, 1998 (FMLA-98); *Gill v. Office of Personnel Mgmt.*, 699 F.Supp. 2d 374 (D. Mass. 2010).

5 See Department of Labor Wage and Hour Division Administrator's

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If you would like more information about the NYS "Marriage Equality Act" or Weil's employment law practice, please speak to your regular contact at Weil, or contact:

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