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New York Same-Sex Marriages: Reviewing the Potential Effects of State Same-Sex Marriage Laws on Employee Benefit Plans

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On July 24, New York's Marriage Equality Act will become effective, making New York the sixth and largest state to recognize same-sex marriage.[1] Specifically, New York's Marriage Equality Act "formally recognizes otherwise-valid marriages without regard to whether the parties are the same or different sex." In addition, the act provides that all marriages, including same-sex marriages, "be treated equally in all respects under the law."

This development raises a number of important employee benefits issues for plan sponsors based in, or with operations in, New York and provides an opportunity to review these issues for other states that recognize—or soon may recognize—same-sex marriage.

Potential Implications for Employee Benefit Plans

The federal Defense of Marriage Act (DOMA) provides that same-sex marriages are not recognized as valid under any federal statute, including the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (Code). So the impact of the New York Marriage Equality Act on the employee benefits offered by plan sponsors, as with other state laws that recognize same-sex marriages, will depend on the type of plan and the plan's specific provisions.

Health and Welfare Benefit Plans

Self-funded health and welfare plans are covered by ERISA, which generally preempts state laws. Accordingly, self-funded health and welfare plans are not required to provide benefits to same-sex spouses married under the New York Marriage Equality Act. However, plan sponsors may design plans to intentionally—or unintentionally—provide benefits to same-sex spouses. For example, a health and welfare plan that provides benefits for an employee's spouse without defining that term or that defines spouse as "legal spouse" or "the person to whom the employee is lawfully married" may be interpreted to provide benefits to same-sex spouses. Accordingly, plan sponsors should review each plan's definition of spouse to determine whether the plan provides benefits to same-sex spouses or may be

1. New York joins Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia.

interpreted to do so. To the extent that a plan's provisions do not reflect the plan sponsor's intention regarding benefits for same-sex spouses, the plan's definition should be clarified.

Moreover, ERISA preemption does not apply to insured health and welfare plans. Accordingly, insured health and welfare plans that are provided pursuant to insurance policies subject to New York insurance laws will have to treat same-sex spouses the same as opposite-sex spouses. For example, although a plan may not be required to cover spouses, if the plan does cover opposite-sex spouses, it must now cover same-sex spouses. Plan sponsors with plans funded through insurance policies issued in states other than New York may not be subject to New York law. Even if the policy is written in a state other than New York, plan sponsors should nonetheless read the underlying insurance policies to determine whether New York law may apply as a matter of contract law.

There may be tax implications for plans that provide health and welfare benefits to same-sex spouses. For federal income tax purposes, as required by DOMA, health and welfare benefits provided to a same-sex spouse are taxable to the employee unless the same-sex spouse qualifies as a federal tax dependent. Although tax treatment under state law often turns on whether the state recognizes a marriage as lawful, the result under the New York Marriage Equality Act is currently unclear because, prior to its enactment, the New York State Department of Taxation and Finance issued an advisory opinion suggesting that an individual's New York tax filing status is determined by his or her federal tax filing status. The New York State Department of Revenue is expected to clarify its position in light of the passage of the Marriage Equality Act.

Qualified Retirement Plans

Qualified retirement plans (e.g., defined benefit pension plans and 401(k) plans) are also governed by ERISA and the Code and therefore are not required to follow state laws that recognize same-sex marriage or provide benefits to same-sex spouses. Again, a plan sponsor may design a plan to intentionally—or unintentionally—provide benefits to same-sex spouses. Because a number of provisions of ERISA and the Code treat married and unmarried participants differently (e.g., provisions regarding qualified joint and survivor annuities, qualified preretirement survivor annuities, spousal consents, minimum required distributions, rollover distributions, hardship distributions, qualified domestic relations orders), a plan sponsor's intention regarding providing qualified retirement benefits to same-sex spouses should be made clear, rather than left open to interpretation. For example, even though same-sex spouses would be considered to be single under DOMA, if a defined benefit pension plan is interpreted to provide a same-sex spouse with the right to a qualified joint and survivor annuity rather than a single life annuity as required by ERISA and the Code, the plan's qualified status may be in jeopardy. Accordingly, plan sponsors should review each plan's definition of spouse to determine whether the plan provides benefits to same-sex spouses or may be interpreted to do so. To the extent that a plan's provisions do not reflect the plan sponsor's intention regarding benefits for same-sex spouses, the plan's definition of spouse should be clarified.

Non-ERISA Benefit Plans

New York employers providing benefits that are not covered by ERISA, such as leave or bereavement pay, will be required to provide such benefits to same-sex spouses in order to comply with state law prohibiting discrimination on the basis of sexual orientation.

Similarly, New York employers who have made health and welfare benefits available to same-sex—but not opposite-sex—domestic partners may wish to review those policies. To continue such programs now that marriage is available to same-sex couples may run afoul of New York's antidiscrimination laws.

What Should Plan Sponsors Do?

Plan sponsors that provide employee benefits should consider the potential impact the New York Marriage Equality Act or other applicable state law may have on their benefit plans by doing the following:

- Reviewing all benefit plans and other relevant documents (summary plan descriptions, insurance contracts, handbooks/policy manuals, and benefits forms) to determine what state law applies, how those documents define "spouse," and whether the documents should be clarified or modified.

- If spousal benefits are extended to same-sex spouses, consider (1) relevant tax-reporting and withholding issues, (2) potential effects on the plan's qualified plan status, and (3) where employees are covered by a collective bargaining agreement, whether there is a duty to bargain with the union regarding such extension of benefits.

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