

# PERSPECTIVES

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A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

## Impact of Iowa Supreme Court's Decision on "Same Sex" Marriages On Employee Benefit Plans Provided by Iowa Employers

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The April 3, 2009, decision of the Iowa Supreme Court in *Varnum v. Brien* directed that "the language in Iowa Code section 595.2 limiting civil marriages to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage." In addition to "civil" (or statutory) marriages, Iowa law has historically recognized "common law" marriages. While the opinion makes no mention of "common law" marriages, given both the rationale of the court and the unanimity of the opinion in *Varnum*, the general consensus is that at some point in the future the Iowa Supreme Court will confirm that the state recognizes "common law" marriages between persons of the same sex.

The opinion leaves a number of questions unanswered for Iowa employers with regard to the various benefit packages that may be provided to employees. These questions arise from the potential interplay of several federal and state laws.

### *Federal Defense of Marriage Act ("DOMA")*

This federal statute, enacted on September 21, 1996, states that for purposes of federal law (including any regulation, ruling or interpretation of federal law by any administrative agency or bureau of the United States):

... the word "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 who is a husband or a wife.

### *Employee Retirement Income Security Act ("ERISA")*

Despite its full, proper name, ERISA covers two types of employee benefit plans – "employee pension benefit plans" and "employee welfare benefit plans." Over-simplistically stated, an "employee welfare benefit plan" is any plan, fund or program established or maintained to provide participants or beneficiaries "benefits" which are not retirement benefits. Essentially, any "benefit" that an Iowa employer may provide to its employees – other than a "retirement benefit" – would be encompassed under "employee welfare benefit" and thus potentially regulated by ERISA.

ERISA generally pre-empts state laws which deal with the subject covered by ERISA. ERISA does not, however, pre-empt state laws that regulate insurance. Thus, while an employer is free to choose what types of benefits it will offer to employees, a fully-insured group health plan offered by an Iowa employer will obtain an insurance contract, the provisions of which are subject to Iowa's insurance laws.

### *Iowa Civil Rights Act*

In 2007, the Iowa Civil Rights Act was amended to add "sexual orientation" and "gender identity" as classes or bases protected against discrimination in employment.

### **Iowa Employers – Employee "Welfare Benefits"**

Iowa employers should proceed with some caution when considering the effect of the *Varnum* decision on employee welfare benefit plans. It is important to consider carefully various policy choices that may have been made or may need to be considered or revisited. Once those decisions have been made, there should be a review of various plan documents (including the summary plan descriptions) to determine whether there needs to be some amendment(s) made.

## “Spouse”

At the outset, an employer should review all of its policies and welfare benefit plans (including any handbooks which describe the various welfare benefit plans and “booklets” – which may in fact be the “summary plan description” required by ERISA) to look for places where the word “spouse” might appear, or where it might be relevant. Examples would include not only health / medical insurance, or life insurance (e.g., “employee + spouse” coverage) but also such things as “sick leave” (e.g., “may be taken for sickness or illness of employee, or employee’s spouse, or employee’s child or dependent”) or funeral leave (death of “spouse”—or “mother / father-in-law”).

An Iowa employer should also check its various insurance contracts to ascertain whether and, if so, how the word “spouse” is defined. With the *Varnum* decision, “spouse” can now be a person of the same sex to whom one is civilly married (or with respect to whom one professes to have a common law marriage). If the Iowa employer has insurance for more than one type of welfare benefit (e.g., there is an insurance contract between the employer and an insurance company for life and a separate contract for disability insurance, and a separate one for health insurance, etc.), all of the underlying policies and plans should be checked for a definition of “spouse.”

Given that certain of an Iowa employer’s plans and policies may in fact be subject to federal requirements – flexible spending accounts for reimbursement of qualified medical expenses, for example – an Iowa employer should *not* change the definition of “spouse” for all plans or policies. However, if the policy / plan / contract uses the words “husband” or “wife,” that definition needs to be carefully examined with regard to the need for a change.

A related set of questions for an Iowa employer is whether there have been any standards imposed in the past for confirming the existence of a claimed “spousal” relationship, and whether there should be some change in the prior practice, one way or another. Regardless of the answers to those questions, an employer *must apply the same policy uniformly* for all employees. If the employer is going to insist on some kind of “proof” of a marriage when a current or newly hired employee says he or she is married, it must require the same type of proof for everyone, even if any of the co-workers witnessed the marriage personally.

Recall that there is no “certificate of marriage” or “marriage license” in the situation of a common law marriage. There can, however, be a judicial determination that a particular couple is or is not married at common law. It may be appropriate for an Iowa employer to develop a form which reminds persons that while there is no official state action required for a couple to become married at common law, state action – a court order in a dissolution of marriage proceeding – is required to “split.”

### Taxation – federal income

Federal individual income tax law provides the gross income of an employee does not include a contribution which [the employee’s] employer makes to an accident or health plan . . . for personal injuries incurred by [employee], [employee’s] spouse, or [employee’s] dependents.” If an employer pays the premium for a benefit that does not qualify to be excluded from “income,” the employer is required by federal law to attribute income to the employee for the fringe benefit that was provided. That attributed income must be included on the employee’s Form W-2 at the end of the year. Because DOMA limits “spouse” for purpose of the Internal Revenue Code to a person of the opposite sex who is a husband or a wife in a legal union between one man and one woman, to the extent that an employer pays all or a portion of the insurance premium for a “same-sex” spouse, the employer *must* attribute income to the employee. That result is required under federal law.

### Taxation – state income

With regard to Iowa’s individual income tax, the law appears to require the calculation of “adjusted gross income” using the same standards “as for federal income tax purposes” under the Internal Revenue Code.

Given that, it would appear that an Iowa employer is to compute “Iowa taxable income” and “federal taxable income” on the same general basis. This is an area where both Iowa employers and Iowa employees might at least hope for some additional guidance from the Iowa Department of Revenue. The state’s statutory standard on computation of income – “properly computed for federal income tax purposes under the Internal Revenue Code” – appears to require the application of DOMA, as that federal standard is a part of every federal law. Different attorneys may, however, come to different conclusions as to how to interpret and construe a statute. Neither the Iowa Attorney General nor the Iowa Department of Revenue has, as of the date this was prepared, issued any guidance on this particular question. In the future, there may be some requirement imposed upon Iowa employers to treat premiums paid by an employer for “spousal” coverage differently under Iowa than under federal income tax laws, and thus “Iowa taxable income” may be different than “federal taxable income.”

## Domestic Partners

Over the last several years, some Iowa employers have adopted policies or provisions which extended coverage under employee welfare benefit programs to domestic partners. In many instances this was done as a way to ensure that benefits were provided to all employees who may be in committed relationships regardless of their sexual orientation. Because the partner was not claimed to be a “spouse,” benefits provided to domestic partners resulted in taxable income to the employee in most instances. (If the domestic

partner qualified as a “dependent” under regulations adopted under the Internal Revenue Code, an exception to that general rule may have been found.)

Following *Varnum* and the resulting availability of marriage for all Iowa employees regardless of their sexual orientation, those Iowa employers which have domestic partner benefits may wish to re-examine those policies and plans. An initial question is why such benefits were put in place in the first instance, and does that reason still exist? What standards – what kind of proof – has an employee who is seeking domestic partner benefits been required to establish? Do those standards differ in purpose from the standards of Iowa’s historical standard for a “common law marriage?” In considering the question of whether or not to continue to provide a domestic partner benefit, an Iowa employer should keep in mind the “nondiscrimination in benefits” requirement of the Iowa Civil Rights Act. That is, a domestic partner benefit must be available to persons regardless of sexual orientation or gender identity – to persons of the opposite sex who, for whatever reason, are not willing to (or perhaps unable to) become married.

### Special Problems

Under the provisions of the federal Defense of Marriage Act, employers are prohibited from extending certain “federal benefits” to same-sex spouses.

#### Flexible Spending Arrangements / Health Savings Accounts

A Health Savings Account is generally established by an employee in connection with a high deductible health plan. Because it is a creation of federal laws, it is subject to DOMA. Thus, claims paid from the account to cover health expenses of a same-sex spouse would result in taxable income to the employee (unless the same-sex spouse also qualified as a “dependent” under applicable federal law).

Most cafeteria plans offer a Flexible Spending Arrangement (more frequently called “flexible spending accounts” or “FSAs”) to reimburse the employee for qualified medical expenses. Where a “qualified medical expense FSA” talks about medical expenses for a “spouse” or a “dependent,” one needs to make sure that an employee with a same-sex spouse understands that the FSA must apply the “DOMA-defined” standard, and *not* the standard of Iowa law. Thus the expenses for a same-sex spouse would *not* be eligible for reimbursement. (This is an excellent example of a problem that an Iowa employer can create for itself if it changes all definitions of the word “spouse” to include persons of the same sex. The definition in the plan would be flatly contrary to current federal law.)

#### Group Health Insurance Continuation – federal COBRA

Both ERISA and the Internal Revenue Code define the term “qualified beneficiary” as used in the “COBRA continuation” provisions as any individual other than the covered employee who is, on the day before the qualifying event for that covered employee, covered under the program either “as the spouse of the covered employee, or . . . as the dependent child of the employee.”

COBRA itself requires that a plan provide the option to elect to continue coverage to each “qualified beneficiary who would lose coverage under the plan as the result of a qualifying event.” Given the provisions of DOMA, the same-sex “spouse” under Iowa law of a covered employee is *not entitled* (as a “spouse” under applicable federal laws) to either the “general notice” that is required to be provided to “spouses” at the time of initial coverage, or the notices that are required to be provided at the time of a qualifying event.

That having been said, an Iowa employer may wish to work with its group health insurance provider to determine if the company is willing to provide “COBRA-like” continuation benefits to individuals who are same-sex spouses under Iowa law on the same terms and conditions as are available under COBRA. Iowa employers are cautioned that if such a system is devised, it would most likely be determined to be an “employee welfare benefit plan” under ERISA. It would thus be subject to the various requirements of that federal law that are imposed upon such plans generally. The advice of a competent professional should be obtained.

#### Group Health Insurance Continuation – Iowa’s state law

Iowa employers are reminded that Iowa Code Chapter 509B provides for “state law” continuation benefits. While the provisions are different than federal COBRA (e.g., the maximum period of coverage is nine months; the maximum premium that may be charged is 100%; the notice provisions are markedly different; continuation is available only if the employee was covered for the three months prior to the qualifying event, etc.), the Iowa statute provides for the “employees or members whose coverage under the group policy would otherwise terminate because of termination of employment or membership may continue their accident or health insurance under that group policy, for themselves and their eligible dependents . . .” The Iowa Insurance Commissioner has, by rule, defined the “continuation right” to extend to “an employee or member or the employee’s or member’s spouse and dependent children whose coverage under a group accident or health insurance policy would terminate because of termination of employment or membership or dissolution or annulment of marriage or death of the employee or member.” 191 IAC Rule 29.1(509B). While the advice of a competent professional should be obtained with regard to each specific situation, Iowa employers may wish to consider the practice of providing the notices (and the options for continuation) required by Iowa Code Chapter 509B in *all* instances, regardless of the availability of federal COBRA continuation.

Family and Medical Leave Act (“FMLA”)

The federal Family and Medical Leave Act requires that a job-protected period of leave (for up to 12 workweeks in a 12-month period) be provided to an eligible employee by a covered employer because of the birth of a son or daughter and in order to care for such son or daughter, or the placement of a son or daughter for adoption or foster care, to care for the spouse, or a son, daughter or parent of the employee, “if such spouse, son, daughter, or parent has a serious health condition” or because of any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

Notwithstanding the FMLA has its own definition of “spouse,” because it is a federal law which uses the term, it is subject to DOMA. Thus a person of the same sex as the Iowa employee who qualifies as a “spouse” under Iowa law is not a “spouse” under the FMLA. Leave for that person would not count towards the 12-week maximum. The term “son or daughter” is also defined in the FMLA. It can include biological, adopted, or foster children, stepchildren, legal wards or the “child of a person standing in loco parentis.” Thus the status of “son or daughter” is not a function of whether one is married, or even whether there is a biological or a legal relationship between the employee seeking the leave and the “son” or “daughter.”

29 CFR Section 825.122(j) provides that an employer may require an eligible employee seeking an FMLA-protected leave “to provide reasonable documentation or statement of family relationship.” As was noted earlier with regard to what an employer is going to require by way of proof to establish that a person is a “recognized-under-Iowa-law spouse,” an employer needs to consider whether anything is going to be required other than the employee’s oral statement that a particular person qualifies as a “spouse” or a “son or daughter” for purposes of FMLA. If an employer is going to require something more, employers need to ensure *uniformity of treatment* among *all* employees.

An Iowa employer may choose to develop a “welfare benefit plan” type of benefit which mirrors that of the FMLA, providing some benefits (e.g., a leave of absence, a job-protected leave of absence, continuation of health insurance benefits as though actively employed) to the Iowa employee which has a state-recognized “spouse” who is not a “spouse” under the FMLA. As noted above, an Iowa employer that is considering such a program needs to be mindful that any period of absence provided for the serious health condition of a “spouse” who doesn’t qualify as such under the FMLA will *not* be counted toward the 12 workweek maximum period for FMLA leave. For example, if an FMLA-eligible Iowa employee were permitted to be absent for 12 workweeks to care for a same-sex spouse with a serious health condition, that Iowa employee would have used “zero” FMLA leave during the absence, and thus would still be entitled to a full 12 workweeks of “FMLA leave” during that year. A co-worker who had a different gender spouse with an identical condition, who was gone for an identical period of time, would have “zero” FMLA left for the year. Does that rise to the level of unlawful discrimination under the Iowa Civil Rights Act – different benefits based on the “sexual orientation” of the employee? (Two similarly situated employees with identical reasons for absences – a sick spouse followed by a sick child – may get 12 or 24 weeks of leave in a 12-month period depending on sexual orientation.)

Fair Labor Standards Act (“FLSA”)

The federal Fair Labor Standards Act requires covered employers to pay employees a premium of not less than one and one-half times the individual’s “regular rate” for those hours worked in excess of 40 in a workweek. Section 7(e)(4) of the FLSA permits the exclusion from the computation of the “regular rate” certain payments irrevocably made to certain ERISA-regulated welfare benefit plans. Under the statute, and 29 CFR Sections 778.214 and 778.215, the tests would appear to be met for exclusion from the calculation of FLSA “regular rate” of the premium payments made for benefit coverage for a same-sex spouse. We are informed that the United States Department of Labor is presently taking the position that so long as the payments made by the employer are clearly understood to be for “benefits” under Section 7(e)(4), the fact that the Internal Revenue Service would treat the payments as “income” to the employee reportable on a Form W-2 would *not* change the exclusion under the FLSA. That is, the payments which are to provide fringe benefits to a same-sex spouse would not be required to be included in the calculation of the “regular rate” for the employee.

**Iowa Employers – Employee “Pension Benefits”**

ERISA very heavily regulates “retirement” or “pension” benefit plans. That regulation includes such things as “anti-alienation” provisions. ERISA also requires that “spouses” – again, a term used in the federal statute, so it is presently subject to the restrictions of DOMA – have certain rights. While it clearly is outside the scope for an employer to provide advice to employees who may be married, the plan administrator or plan sponsor may wish to review the “Summary Plan Description” for a particular plan – especially the definition of “spouse” – and consider the wisdom of adding some clarifying comment regarding the federal Defense of Marriage Act’s definition, and the fact that the plan lacks the ability to vary from the provisions of federal law.

Administrators of retirement plans covering Iowa employees have no doubt become familiar in the past with what ERISA calls a “qualified domestic relations order” or “QDRO.” It would appear clear that because Iowa recognizes marriages between persons of the same sex, Iowa courts in the future will be issuing decrees and orders in conjunction with the dissolution of such marriages. No doubt such decrees will at least attempt to address the division of benefits under retirement plans – something that QDRO’s have done for

years in conjunction with marriages between people of the opposite sex – between “spouses” as that term is defined in DOMA, and as that term is used in ERISA. Hopefully, attorneys and judges who are engaged in “family” law will become familiar with the area. But if a Plan Administrator gets a copy of a judicial order or decree in conjunction with the marriage (or the dissolution of the marriage) of two persons of the same sex, the advice of competent professional counsel should be *promptly* sought. At this time, it is clear that by virtue of DOMA, a former same-sex “Iowa spouse” cannot be a “spouse” as that term is used in ERISA. It follows that a dissolution decree cannot be a QDRO as defined by ERISA because that definition requires the QDRO to relate to payment to a “spouse, former spouse, child or other dependent.” In turn, because the dissolution decree for a same-sex marriage cannot be a QDRO, it cannot qualify for the narrow exception given to QDROs with regard to the prohibition in ERISA regarding assignability of benefits.

## CONCLUSION

As noted at the outset, the *Varnum* decision – especially when viewed in the light of some federal laws – raises some significant questions for not only Iowa employers but also Iowa employees. The foregoing is not intended to provide a complete explanation of the various implications and impact of the decision on employee benefits. It also is not intended as, nor should it be relied upon as, advice or guidance for specific situations. The only “hard” piece of advice which the reader is encouraged to take away from this article is that an Iowa employer should review the definition of “spouse” in its various employee benefit plans and insurance contracts to ensure that the definition conforms to Iowa’s law where Iowa’s law applies. However, where the definition is a function of federal law (e.g., “spouse” for purposes of FMLA leave has a unique, federally-mandated definition; discussions of FSAs must use a DOMA-dictated definition), do not make changes or risk creating some real problems.

If you have questions regarding the impact of the Iowa Supreme Court’s decision on same-sex marriages, please contact a member of the Firm’s [Employment and Labor Law Group](#) or the Dickinson attorney with whom you normally work.

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## HIRE PERSPECTIVES

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