Update – Administering Benefits in a Post-DOMA World

Here is a brief update to our **September 24, 2013 alert**, which addressed the administration of employee benefits as well as federal income taxes and FMLA leave following this summer's ruling by the U.S. Supreme Court in United States v. Windsor. In Windsor, the Court struck down Section III of the federal Defense of Marriage Act (DOMA), holding that it was unconstitutional for the federal government to define marriage for purposes of administering federal laws such as the Internal Revenue Code, the Family and Medical Leave Act (FMLA), and the Employee Retirement Income Security Act of 1974 (ERISA).

The Department of Labor's Employee Benefits Security Administration (EBSA) has now released guidance stating that for purposes of administering employee benefits governed by ERISA, same-sex couples shall be treated as spouses if they were lawfully married in a U.S. or foreign jurisdiction that recognizes same-sex marriage. This is known as the "celebration" rule (i.e., spouses are deemed to be married for purposes of ERISA based on where they "celebrated" or entered their marriage, rather than based on where they currently live).

Practically speaking, the first thing to note is that neither the Affordable Care Act health care reform law, the Windsor decision, nor any other federal law currently requires an employer to offer health care or other benefits to same-sex spouses, regardless of where they are married. In fact, there is no federal requirement that employers offer health care or other benefits to any spouse, whether same- or opposite-sex. If an employer's health care plan is insured through a third party, however, then the health insurance would be subject to *state* insurance laws, and some states require coverage of same-sex spouses.

Depending on a how an employee benefit plan is worded, federal law now would make same-sex spouses (who are lawfully married in a jurisdiction which recognizes same-sex marriage) eligible for coverage, if a benefit plan provides coverage for "spouses" but does not define "spouse" to mean "a spouse of the opposite gender." (Note that under federal l aw, the term "spouse" only includes couples that are married. It does not include domestic partnerships or civil unions, although, again here, some state laws may require coverage for such groups.)

So, if an employer does not wish to provide coverage to same-sex spouses, the employer can either amend its benefit plans to exclude coverage for all spouses or to include only spouses of the opposite sex. Employers who choose the latter approach should be mindful that they would be at risk for discrimination claims by employees who are part of a lawful same-sex marriage, if they have operations in cities or states in which sexual orientation is recognized as a protected class (or if the proposed federal laws protecting sexual orientation eventually become law). Also, again, to the extent the plans are insured and state insurance laws require coverage for same-sex spouses (and/or domestic partners or civil unions), the employer may be obligated to provide coverage for such individuals in these states.

With respect to qualified retirement plans, employers now have no choice but to include validly-married same-sex spouses in their definition of "spouse" (for beneficiary and distribution purposes, for instance).

Other benefits-related areas in which employers must treat legally-married same-sex spouses the same as opposite-sex ones include federal tax laws (regarding the tax treatment of HSA and other benefit contributions), the Department of Labor

summary plan description (SPD) regulations, COBRA notice regulations, requirements relating to genetic information, and regulations addressing evidence of creditable coverage under HIPAA.

For questions regarding which employer-provided benefits are governed by ERISA or otherwise relating to this new guidance, please contact Chris Crevasse, Stacie Caraway, or any other member of our Labor & Employment Law Practice Group.

The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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