

"Employers in all states should review their benefit plans and policies to ensure they are in compliance with applicable law...in light of Obergefell."



Lori A. Basilio
Partner
Providence
401-276-6475
lori.basilico@lockelord.com

Lori Basilio has focused her practice in the field of employee benefits and executive compensation since 1988. She represents and advises private and publicly held clients with respect to the design and legal compliance of executive compensation programs, equity-based incentive compensation plans, severance and retention plans, tax-qualified plans, welfare plans, fringe benefit plans and ERISA fiduciary and prohibited transaction issues. She also counsels clients regarding compliance with ERISA, the Internal Revenue Code, COBRA, HIPAA, FMLA and other federal and state laws impacting employee benefit plans.



Edward A. Razim III
Partner
Houston
713-226-1544
erazim@lockelord.com

Ed Razim has extensive experience in employee benefits and executive compensation, including drafting and implementing employee benefit and executive compensation programs for large and small employers; addressing compliance issues regarding Section 409A of the Internal Revenue Code and various equity compensation plan design matters; addressing employee benefits matters in corporate mergers and acquisitions; resolving unique plan design issues faced by controlled groups of corporations or businesses; consulting employers and plan administrators on plan design and compliance matters; and negotiating with the Internal Revenue Service, U.S. Department of Labor and Pension Benefit Guaranty Corporation on a variety of audit and compliance matters. Ed also has worked extensively with non-profit and tax-exempt organizations on a variety of tax issues.

Same-Sex Marriage is Legal – Are Your Employee Benefit Plans Up to Date?

Editor's Note: This is one in a continuing series of Q&As with Locke Lord lawyers on key legal issues confronting companies engaged in industries that have national and global impact.

What is the Supreme Court's holding in *Obergefell v. Hodges*?

LB: The U.S. Supreme Court ruled that all states must license a marriage between two people of the same sex and all states must recognize a lawful same-sex marriage performed in another state.

What are some of the potential pitfalls for employers with self-insured health and welfare plans if they fail to provide coverage to same-sex spouses?

LB: Unlike fully insured plans, self-insured health and welfare plans are not subject to state insurance laws that would mandate equal coverage for same-sex spouses if the employer offers spousal benefits. Neither ERISA, the Affordable Care Act nor any other federal law require an employer to provide spousal benefits coverage. Thus, employers with self-insured health and welfare plans who currently limit spousal coverage to opposite-sex spouses are not technically required to offer such coverage same-sex spouses.

However, employers who decline to offer health and welfare benefits to same-sex spouses, while offering such benefits to opposite-sex spouses, may face the risk of federal and state discrimination lawsuits, most notably under Title VII of the Civil Rights Act of 1964. Title VII prohibits employers from discriminating against employees based on race, religion, national origin, age, disability or sex. The Equal Employment Opportunity Commission (EEOC) recently concluded that Title VII prohibits employers from treating an employee differently than other employees based on sexual orientation. Employers may have legal exposure under state and local anti-discrimination laws if those laws prohibit discrimination based on sexual orientation. Further, an executive order signed by President Obama in 2014 bans federal contractors from discriminating based on sexual orientation or gender identity.

What should employers consider about continuing benefits to domestic partnerships and civil unions?

ER: Employers that provide domestic partner benefits will need to decide whether to continue providing these benefits to same-sex partners in a civil union or domestic partnership. This decision may depend on whether the employer provides coverage to both same-sex and opposite-sex domestic partners or merely to same-sex domestic partners. Now that same-sex marriage is legal in all 50 states, employers may require employees to marry in order to retain their partner benefits.

Employers should be aware of city, municipal and state law requirements that require employers to offer domestic partner benefits. For example, the California Insurance Equality Act of 2004 requires employers that offer spousal health benefits to provide the same coverage to domestic partners.

There may be a risk of "reverse" discrimination claims by unmarried opposite-sex partners if the employer provides domestic partner coverage for same-sex domestic partners only.

What actions should employers take now?

ER: Employers in all states should review their benefit plans and policies to ensure they are in compliance with applicable law, and determine whether any amendments are required or necessary in light of *Obergefell*. Any reference in a plan document to a spouse being of the opposite sex will need to be deleted. Employers should review their administrative procedures to verify equal treatment of opposite- and same-sex marital status. Employers should work with third-parties, including insurers or vendors, to determine whether any changes are required for compliance, and must communicate any changes, and the timing thereof, to plan participants. Employer should also review payroll procedures to ensure the proper federal and state tax treatment of same-sex spousal benefits.

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