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UBA ComplianceAdvisor

Same-Sex Marriages and Group Health Benefits

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From 2013 to 2015, a series of Supreme Court cases and government updates have changed the landscape of the way employers must consider same-sex spouses in relation to employee benefits.

Most recently, in June 2015, the Supreme Court ruled in *Obergefell v. Hodges ("Obergefell")*, that the 14th Amendment requires a state to license a marriage between two people of the same sex, and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state. Prior to the Supreme Court's decision in *Obergefell*, approximately two-thirds of states recognized same-sex marriage (whether performed within the state or another state or country that recognizes same-sex marriage).

In February 2015, the Department of Labor (DOL) issued an updated definition of "spouse" under the Family and Medical Leave Act (FMLA) to make compliance easier, and defined "spouse" as a husband or wife, which refers to a person "with whom an individual entered into marriage as defined or recognized by state law." The governing state law is that of the celebration state, or where the marriage took place. This definition was set to go into effect across the United States on March 27, 2015, but litigation in Texas, Arkansas, Louisiana, and Nebraska prevented the new rule from going into effect in those states immediately. After the ruling in *Obergefell*, which severely undermined the arguments of the objecting states, the injunction was dissolved.

In June 2013, the Supreme Court ruled that the Defense of Marriage Act (DOMA), which provided that, for federal law purposes, marriage could only be between a man and a woman, was unconstitutional.

Implication for Employers

For individuals with a same-sex spouse (validly married in a state allowing same-sex marriage) who reside in a state that did not previously recognize same-sex marriage, the ruling in *Obergefell* likely triggered a change in status event for Section 125 plans. That is because, as of June 26, 2015, the individual was considered married under state law, whereas they were not the day before.

As a result of these changes, employers need to review the eligibility requirements in their group life and health plans, Section 125 plans, and health reimbursement arrangements. The Employee Retirement

Income and Security Act (ERISA) requires employers to administer their plans according to the terms of the plan, which means that the plan's definition of a covered spouse is key. A plan that covers "spouses" or "lawful spouses" must offer coverage to same-sex spouses.

Opinions differ as to whether an employer may continue to write its self-funded plans to exclude same-sex spouses. To date there is only one court case that addresses this issue – in that case, the court held that a self-funded plan that specifically limited eligibility to opposite-sex spouses was not required to provide coverage to a same-sex spouse because ERISA does not prohibit discrimination based on sexual orientation. *Roe v. Empire Blue Cross Blue Shield***,** No. 12–cv–04788 (NSR), 58 EBC 1077, 2014 WL 1760343 (S.D. N.Y. May 1, 2014). An employer that wishes to limit coverage under its Section 125, health reimbursement arrangement (HRA), or group health plan to opposite-sex spouses should:

- Verify that the plan and summary plan description are written to clearly limit eligibility to opposite sex spouses.
- Check their state and local laws to be sure that there is not a state or local law that prohibits discrimination based on sexual orientation.
- Recognize that there is a risk that this decision will be challenged by the Equal Employment Opportunity Commission or an employee.

However, self-funded plans that cover opposite-ex spouses and do not cover same-sex spouses have high exposure to individual lawsuits. Section 510 of ERISA prohibits discrimination against participants and beneficiaries for exercising rights under an ERISA plan, or for interfering with such rights. Lawsuits on the basis of violating an individual's civil rights are also a possibility.

Most practitioners agree that fully insured plans are required to cover same-sex spouses. Employers should contact their carrier to verify this approach.

The IRS has issued Frequently Asked Questions that employers and employees may find helpful. The questions and answers that relate to benefits begin with Question 10.

Tax Treatment

The DOL, the Department of Health and Human Services (HHS), and the Internal Revenue Service (IRS) have issued several notices that explain how same-sex spouses must be treated for purposes of Section 125 plans, including flexible spending accounts (FSAs) and health savings accounts (HSAs). Specifically,

- A new same-sex marriage is a change in status event that allows a mid-year change to pre-tax and health and dependent care FSA elections consistent with the marriage.
- Expenses of the new spouse or dependent child may be reimbursed from the FSA or HSA from the date of the marriage.
- As of the date of the marriage, imputed income for covering the new same-sex spouse (who may have been covered previously as a domestic partner) ends.

The regulatory agencies only recognize actual marriages of same-sex spouses. This means, for example, that if an employer chooses to offer coverage to those in a civil union or domestic partnership, it still must impute income on the value of the partner's benefit.

FMLA Administration

In February 2015, DOL updated its definition of “spouse” for the Family and Medical Leave Act (FMLA) to assist employers and employees with compliance. Prior to the change, the law of the state in which the employee lives when FMLA is requested would apply. This means that an employee who was legally married to a same-sex spouse but who moved to a state that does not recognize same-sex marriages was not entitled to FMLA to care for the same-sex spouse. (FMLA generally would be available in connection with caring for the same-sex spouse’s children – in all states – because FMLA is available to anyone helping to raise a child.)

The change in definition defines "spouse" as a husband or wife, which refers to a person "with whom an individual entered into marriage as defined or recognized under state law." The governing state law is that of the "celebration state" or where the marriage took place. Residency of the employee or the state of the employer will no longer have any bearing on the definition of "spouse" for purposes of FMLA. This change means that the same criteria for determining whether an employee is legally married will apply to both benefits and FMLA eligibility determinations.

The updated regulations will allow an employee in a same-sex or common-law marriage to take FMLA leave to care for a child of his or her spouse, or take care of a parent's same-sex or common-law spouse. For individuals married outside of the United States, the regulations will also apply to any marriages that were legal in the country in which they were performed, as long as the marriage could be legally entered into in at least one state.

Employers may request "reasonable" documentation of a family relationship, but the request cannot interfere with an employee's rights, and the employer cannot dictate what documentation must be presented. A simple statement by the employee may be sufficient, although the employer may request that a statement be put in writing.

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About Cowden Associates, Inc.

Cowden Associates, Inc. (“Cowden”) is a Pittsburgh-based consulting and actuarial firm. We have a dedicated team of professionals with extensive experience in benefits, retirement programs, compensation, employee communications, benefits enrollment, actuarial and technology services. Using a total compensation based approach, Cowden provides a full range of consulting services helping clients establish and maintain high quality compensation and benefit programs aligning organizations’ business strategies and objectives. Cowden is a charter partner of United Benefit Advisors (UBA), the nation’s leading independent employee benefits advisory organization.

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