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Marriage, Civil Unions, Domestic Partnerships And Health Insurance Benefits

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The landscape of rights afforded to same-sex couples has changed at a rapid pace over the last few years and seems certain to continue to evolve. As recently as May 2008, the California Supreme Court ruled that same-sex couples may no longer be excluded from civil marriage. The ever-changing amalgam of rights afforded to same-sex couples presents a host of issues for employers and a moving target for multistate employers to follow. These issues can be especially challenging to navigate in the area of employment benefits.

Federal Hurdles - ERISA Pre-emption

A growing number of states, including New Jersey (under its Civil Union Act, N.J. Stat. Ann. § 37:1-28), require that an employee's partner in a same-sex union be accorded the same access to health benefits under a health insurance policy regulated by a state as are provided to an employee's heterosexual spouse. In general, state laws governing welfare benefit plans sponsored by private employers are pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA); however, a state law that regulates the health insurance carriers or policies issued within that state (and not employer welfare benefit plans) are expressly "saved" from ERISA pre-emption under ERISA Code Section 514 (b)(2)(A). An employer should therefore bear in mind that health insurance policies or contracts that are part of an ERISA welfare benefit plan may still need to comply with state laws extending coverage to a same-sex partner, although ERISA pre-empts the application of the law to the benefit plan itself.

It follows that a state extension of benefits to same-sex partners should not apply where an employer provides health benefits under a "self-insured" arrangement rather than through insurance. Self-insured health coverage exists where an employer or welfare benefit plan retains the full economic risk for paying benefit claims (i.e., the risks are not shifted to an insurance carrier).

Determining whether a state law regulates insurance (thus, being "saved" from ERISA pre-emption) in the context of a benefit plan for employees is complex and has been the subject of numerous court cases. The U.S. Supreme Court held that a state law regulates insurance and is not subject to ERISA pre-emption where the state law: (1) specifically is directed towards entities engaged in insurance; and (2) substantially impacts the risk pooling arrangement between the insurer and the insured. See *Kentucky Assoc. of Health Plans v. Miller* , 538 U.S. 329, 341-342 (2003).

Under *Miller* , a state law that mandated insurance companies to allow any medical provider that met its requirements to participate in its network regulates insurance (i.e., is not pre-empted) because it applies to insurance companies (and not to employee welfare benefit plans) and directly impacted the number of providers available to insureds (thus, affecting the risk pooling arrangement between insurers and insureds). Courts at all levels have struggled to apply this test but to date have not fully considered ERISA pre-emption as it may apply to a state civil union or domestic partnership law.

Given the complexity of law on ERISA pre-emption, we recommend that employers consult with legal counsel regarding ERISA pre-emption of a specific state law, as the determination whether a law is written to apply to health insurance carriers, health insurance policies written within a state or an ERISA welfare benefit plan is often unclear.

State And Local Laws Affecting The Provision Of Benefits For Same-Sex Partners

After clearing the ERISA pre-emption hurdle, employers must next consult various state and local laws that may affect the provision of benefits to same-sex partners. Such laws include state and local laws recognizing any type of same-sex partnership, employment discrimination laws and insurance laws.

Laws Recognizing Same-Sex Partnerships

Currently 10 states recognize some form of same-sex union, ranging from domestic partnership to marriage: California, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Oregon, Vermont and Washington, as well as Washington, DC.

In these states, the laws governing same-sex partnerships may be interpreted to require that same-sex partners be accorded the same rights and privileges as married heterosexual couples. For example, New Jersey recognizes civil unions between same sex couples to "provide these couples with all the rights and benefits that married heterosexual couples enjoy." N.J. Stat. Ann. § 37:1-28(1)(d). In Massachusetts, same-sex couples can marry. *Goodridge v. Dep't of Pub. Health* , 798 N.E.2d 941 (Mass. 2003). In such states, the specific laws regulating same-sex partnerships should be consulted regarding provision of benefits.

Protection From Employment Discrimination

Even in a state that does not recognize same-sex partnerships, an employee could still fashion a discrimination claim against his or her employer for failure to provide benefits if sexual orientation is a protected status under state or local civil rights laws.[1]

As an example, New York State does not expressly recognize or authorize any kind of same-sex partnership. The New York Human Rights Law, however, makes it unlawful "For an employer or licensing agency, because of ... the ... sexual orientation ... of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment." N.Y. Exec. § 296. In *Martinez v. Monroe County* , N.Y. App. Div., No. 1562 CA 06-02591 (Feb. 1, 2008), a New York court found a community college violated New York's Human Rights Law by denying spousal health care benefits to a same-sex couple validly married in Canada.

In addition to illustrating how the state anti-discrimination law can work to protect same-sex couples in the benefits arena even where same-sex unions are not affirmatively recognized, *Martinez* also demonstrates the possibility that New York may recognize same-sex marriages or other forms of union legally entered into outside of its borders. As a result of the *Martinez* decision, New York Governor David A. Paterson, through legal counsel David Nocenti, issued a directive to the counsel of all state agencies requiring recognition of valid same-sex marriages performed outside of New York.

Not all states that protect sexual orientation in their fair employment laws require the equal provision of benefits (though such laws still remain open to legal challenge). Rhode Island's Fair Employment Practices Act prohibits employers from discriminating with respect to hire, tenure, compensation, terms, conditions or privileges of employment or any other matter directly or indirectly related to employment, based on protected categories including "sex, sexual orientation, gender identity or expression." R. I. Gen. Laws § 28-5-7(1)(ii). Nonetheless, the Fair Employment Practices Act contains a specific provision addressing insurance benefits, which states: "[I]f an insurer or employer extends insurance related benefits to persons other than or in addition to the named employee, nothing in this subdivision shall require those benefits to be offered to unmarried partners of named employees." *Id.* Based on the statutory language, employers are not obligated to provide insurance benefits to same-sex partners. This does not mean, however, that discrimination claims will not arise.

Note that some localities may also have their own laws protecting sexual orientation and/or familial status. For example, the New York City Human Rights Law prohibits discrimination in employment, housing and public accommodations based on protected status including gender (including gender identity and sexual harassment), sexual orientation and partnership status. New York City also recognizes registered domestic partnerships in its Administrative Code. See N.Y.C. Admin. Code § 3-240 - § 3-245. Philadelphia's Fair Practices Ordinance protects sexual orientation and gender identity. In such localities, the risk of a discrimination claim exists not only for sexual orientation but also partnership status, where equal benefits are not provided.

Administrative And Implementation Considerations

Once an employer decides to provide benefits to same-sex partners (or determines that such coverage is legally mandated), are there any special administrative issues for the employer to consider? The answer is yes. These include requirements to document a same-sex partner's eligibility for benefits and tax reporting and withholding for such benefits under the federal Internal Revenue Code (the Code).

An employer's enrollment of an employee's same-sex partner in health benefits should be approached in

the same manner as the employer's enrollment of an employee's heterosexual spouse to avoid any discrimination issues. This means that an employer should require proof or the employee's signed attestation of a civil union or domestic partnership (whichever is applicable) to enroll a partner in benefits under the same circumstances and in the same manner in which it requires a heterosexual employee to provide a signed attestation of marriage or a marriage certificate. An employer's failure to adhere to neutral documentation requirements is potentially discriminatory under employment discrimination laws and guidance issued by state insurance agencies.

Consider, for example, New Hampshire. New Hampshire's Law Against Discrimination protects individuals from employment-related discrimination on account of sexual orientation. N.H. Rev. Stat. Ann. § 354A:7. Thus, requiring a same-sex couple to provide additional information to receive health insurance could give rise to a discrimination claim. Further, New Hampshire also recognizes civil unions and provides that the parties to a civil union are entitled to the same rights as the parties to a marriage. N.H. Rev. Stat. Ann. § 457. New Hampshire's Insurance Department has specifically advised that "Insurers cannot impose more stringent requirements to prove a civil union than are required to establish a marriage. An insurer cannot, for example, require certification or evidence that the couple joined by civil union has a joint account, owns real estate jointly, or shares a residence, unless the insurer also requires the same certification or evidence of couples joined in marriage to prove the marriage." See Bulletin, Docket No. INS 07-088-AB, Implementation of New Hampshire's Civil Union Law, RSA 457-A:6, available at http://www.nh.gov/insurance/ media/bulletins/2007/documents/ins07-088ab.pdf). Requiring parties to a civil union to provide different documentation to obtain health care violates this clear mandate.

In addition, employers should realize that a state law requirement to provide any benefits to a same-sex partner does not govern taxability under the Code (or, perhaps, even state law). Accordingly, an employer should verify with its payroll provider that the value of the partner's benefits is handled correctly for tax reporting and withholding purposes. Unlike benefits provided to an employee's heterosexual spouse, the Code does not exempt the value of benefits provided to a same-sex partner from an employee's taxable wages. Employers should consult with tax counsel regarding proper taxation of benefits; however, in general, the fair market value of the benefit provided to the same-sex partner is "imputed income" to the employee and any employee contributions to the cost of the benefit are deducted from the employee's wages on an after-tax basis (unless the partner also happens to qualify as the employee's legal dependent under the Code).

Conclusion

Employers, especially those that maintain multistate operations, are challenged now more than ever by the changing landscape of health benefits offered to same-sex couples. In light of these changes, employers are well-advised to consult with legal counsel regarding potential ERISA pre-emption of state laws, laws regarding employment discrimination and the administrative and implementation of benefits to same-sex partners.

[1] *Note that sexual orientation is not currently protected under federal law.*

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