



# eBenefits Alert - Post DOMA ERISA Guidance for Treatment of Same Sex Marriage

September 20, 2013

Last week, the Department of Labor issued Technical Release 2013-04 stating its position on recognition of same-sex marriage for ERISA purposes. The IRS issued a Revenue Ruling a few weeks ago stating that for federal tax purposes, a marriage will be recognized as long as it is valid in the state that celebrates the marriage. This new DOL guidance clarifies that the DOL is taking the same position with regard to determinations for ERISA purposes.

## ***What Does the Technical Release Do?***

- The guidance clarifies for individuals and employers how to determine ERISA treatment of benefits for employees in a legal same sex marriage.
  - Employers should treat same sex marriages entered into in a state recognizing the marriage as creating a spouse relationship for ERISA purposes, regardless of whether the marriage is recognized in the state the employee resides.
  - Employers can rely on the legal status of a marriage even when an employee relocates to a state that does not recognize the marriage.
  - This means that spousal consents, joint and survivor benefit requirements, QDROs and eligibility for coverage under benefit plans will be administered the same for all married employees and their spouses, regardless of their gender.
- All employers must recognize same-sex marriages contracted in any state for purposes of beneficiary designations and retirement plan distributions.
- Minnesota employers offering spousal benefits under their health plans will need to offer them on the same basis to all legally married couples - whether they are a same sex or opposite sex couple - because Minnesota law recognizes same-sex marriage. Employers based in states that do not recognize same-sex marriage may be able to continue offering health benefits only to opposite-sex spouses.

## ***What Doesn't the Technical Release Do?***

- The Technical Release does not change the status of a civil union or domestic partnership. Neither is considered a legal marriage for ERISA purposes.

- The DOL guidance does not require states to recognize same sex marriages for state law purposes.

#### ***What Are Some Issues After the Technical Release?***

- The Technical Release clarifies that spousal benefits can be offered under ERISA health plans, regardless of whether the employee's state of residence recognizes the marriage. This may create tax and other considerations in non-recognizing states.
- For example, employers offering pre-tax benefits for spouses may need to impute income for state tax purposes in states that don't recognize same sex marriage; it make take legislative action for some states to implement a difference between the federal and state calculations of income to be used for taxation.
- Employers may not need to impute income for state tax purposes in states that don't recognize same sex marriage if the state has a civil union or domestic partnership law that extends state law recognition to those relationships.
- Employers will have to impute income for federal tax purposes for benefits extended to an employee's civil union or domestic partnership partner, as the guidance makes clear that those relationships are not marriages for federal tax purposes.

#### ***What Should Employers Expect?***

- Having to address state tax issues that will arise when employees in a same-sex marriage move from a state that recognizes same-sex marriage to one that doesn't, or get married in a state that recognizes same-sex marriage and reside in one that doesn't
- Having to clarify the federal tax treatment of the benefits for same sex married couples, as it may differ from state treatment
- Possible further state activity either adopting or preventing same-sex marriage recognition
- Additional litigation or legislative activity

#### ***What Should Employers Do Now?***

- Continue to monitor developing information regarding the treatment of same sex marriages at the federal and state level
- Review current benefit language, insurance policies, and administrative services agreements for:
  - definitions of Spouse and dependents
  - eligibility criteria
- Determine whether changes are needed, considering:
  - Compliance with state law recognition of same-sex marriage and federal law recognition of the state law determinations
  - Multi-state employers' issues with determining the appropriate federal and state consequences of same-sex marriage recognition



- Determine whether changes are needed in employee communications
- For employers currently providing civil union or domestic partner coverage, determine whether such coverage should continue, terminate, or be modified.

### **Conclusion**

Now the IRS and DOL have issued guidance for employers requiring recognition of same sex marriage as long as a marriage is legal in the state celebrating the marriage. This provides greater certainty for employers in administering their benefit plans. However, in doing so, it is forcing some employers into dealing with state tax and other issues for employees in same sex marriages who reside in states that do not recognize the marriage.

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