EXPERT UPDATE

Implications of IRS Ruling on Benefits for Same-sex Spouses

The SCOTUS ruling on DOMA along with the new IRS FAQs do not automatically impact the definition of spouse for certain ERISA plans. Plan sponsors of fully-insured plans, specifically medical, dental and vision programs, will find that generally the insurer will follow state marriage license laws in the state the contract is executed. Self-insured plan sponsors, regardless of where they are located, will continue to have the freedom to define spouse as they deem appropriate according to Littler Mendelson, *at least for now*.

We have all been waiting for the agencies to take a position once the Supreme Court released its official opinion on the constitutionality of DOMA. We have heard from the DOL with respect to Family and Medical Leave and we have heard from the IRS regarding the federal tax implications when same-sex spouses are enrolled in group benefit coverage. We have yet to receive guidance with regards to HIPAA and COBRA but counsel is suggesting we apply the prudent approach. This means that for now, employers should consider extending COBRA and HIPAA special enrollment rights to same-sex spouses when coverage to same-sex spouses is available. This position seems consistent with the IRS FAQs (Revenue Ruling).

Same-sex marriages that will be recognized -

Under the new ruling, the IRS will recognize for federal tax purposes ALL legal same-sex marriages, both foreign and domestic, even if the couple resides in a state that does not recognize same-sex marriage. The IRS FAQ is in stark contrast with the recently published FML guidance that recognizes only those marriages valid in the state of residence.

Ruling applies for all tax purposes, including employee benefits-

The ruling applies for all tax purposes, including filing status, claiming personal and dependency exemptions, taking standard deductions, contributions to IRAs, etc. where marriage is relevant.

Fully-insured plan sponsors that extend coverage to same-sex spouses today -

For the most part, fully-insured plan sponsors have been provided latitude by insurers the past several years to cover "domestic partners". Fully-insured employers that cover same-sex domestic partners and same-sex spouses currently under a rider that was added to the plan, will not need to open enrollment because coverage has been extended to same-sex spouses all along. However, these employers will need to understand the impact of the IRS ruling on the taxation of benefits for SAME-SEX SPOUSES that are currently enrolled in the plan. Adjustments will need to be made to contributions withheld so premium can be pre-taxed via the IRC 125 plan and the reporting of additional imputed income will need to cease. These adjustments to the taxation of benefits does not apply to domestic partners or partners in a civil union, ONLY same-sex spouses if coverage is offered to these employees. Note: Employees in domestic partnerships that can claim their partner as a tax dependent for federal tax purposes can continue to contribute premiums with pre-tax dollars and imputed income will not apply. We are suggesting that employers compare the definition of spouse in their plan documents to the definition in their insurance contracts to make certain the language is properly aligned.

Fully-insured plan sponsors that do not extend coverage to same-sex spouses today in states that do not recognize same-sex spouse marriages –

These plan sponsors won't need to amend their plans to include coverage for same-sex spouses. Eligibility with regards to spouse coverage is generally driven by state marriage license laws. However, employers that want to extend eligibility to same-sex spouses will likely be permitted to do so, but should inquire with the insurer as to whether the definition of spouse can be altered.

Self-insured Plans -

We know that self-insured plan sponsors have flexibility to define eligibility and can amend their plans to cover same-sex spouses if they chose to do so. All documents including ERISA require disclosures should be properly aligned with the same definition and the taxation of same-sex benefits will change for same-sex spouses that are permitted to enroll in the group benefit plans.

Domestic Partners and Partners in Civil Unions -

The new rulings do not have implications on same-sex and opposite sex domestic partners and civil union partners regarding benefit eligibility and taxation. Both will continue to see benefits taxed if they are entitled to coverage unless a domestic partner is considered a tax dependent as previously mentioned.

Summarizing implications of the new changes with respect to federal tax -

- An employer will no longer need to impute additional income to an employee who covers his or her same-sex spouse as a dependent under the employer's health plan;
- An eligible employee may pay for a same-sex spouse's health coverage on a pre-tax basis through a cafeteria (or section 125) plan in the same way as an employee with an opposite-sex spouse;
- An eligible employee may receive tax-free reimbursements for expenses of his or her same-spouse through a health flexible spending account (FSA), health reimbursement account (HRA) or health savings account (HSA);
- A same-sex spouse is considered a spouse or family member for purposes of taking leave under the federal Family and Medical Leave Act (FMLA);
- Special enrollment rights under HIPAA are triggered when an employee acquires a same-sex spouse; and
- Same-sex spouses may qualify as a "spouse" for COBRA purposes and can have their own COBRA election rights.

Employees may claim a refund of income taxes paid on the value of the coverage for same-sex spouse by filing an amended Form 1040 for any years in which the period of limitations has not expired. Additionally, employees may seek a tax refund with regards to health premiums for a same-sex spouse that was paid with after-tax dollars outside the employer's cafeteria (IRC 125) plan. Employers may also claim a refund of social security and Medicare tax paid on the value of the same-sex spouse's health coverage by filing Form 941-X within the limitation period. There is a special administrative procedure for employers to file claims that will be defined shortly by the IRS. Employers may also make adjustments for excess income tax withholding for the current year ONLY, assuming the employer repays or reimburses the employee before the end of the calendar year and they may not make adjustments for any prior calendar year. This guidance appears to confirm that employers are not required to provide amended Form W-2 as a result of the new rules.

Effective dates -

In general, although certain retroactive tax filing and refund applications are identified in the new guidance, the Revenue Ruling will be applied prospectively as of September 16, 2013. The IRS has also indicated its intent to issue further guidance on other

retroactivity issues and to provide "sufficient time" for any plan-related actions that may be required as a result.

Further Guidance Intended on Cafeteria Plans and Other Employee Benefits –

According to the Revenue Ruling, the IRS intends to issue further guidance with respect to cafeteria plans and the retroactive application of Windsor to other employee benefits. Comment: The expected cafeteria plan guidance will presumably address the application of Windsor to the cafeteria plan election change rules. Many other benefit rules, including HIPAA special enrollments, DCAP rules, and various fringe benefits, may also be addressed.

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