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Same-Sex Couples May Now Marry In New York -- Impact On Employee Benefits And Other Employment Rights

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Last week, Governor Andrew Cuomo signed historic legislation (the *Marriage Equality Act*) making New York the largest (and only the sixth) state to permit the marriage of same-sex couples.[1] The Marriage Equality Act also provides same-sex married couples with the same legal rights as their opposite-sex counterparts in New York. The law becomes effective on July 24, 2011, which is 30 days after it was signed.

The Marriage Equality Act

The Act amends New York State's Domestic Relations Law to provide that same-sex couples may obtain a marriage license in New York, and that parties to a same-sex marriage shall be treated equally to opposite-sex married couples "in all respects under the law," without any distinction. Although New York has for the past few years recognized same-sex marriages validly performed in other jurisdictions, such marriages could not be performed legally in New York, and the State only recognized the rights of same-sex married couples for limited purposes.

Important Exemption to the Act's Requirements for Religious and Benevolent Organizations: In order "to ensure that [the Act] does not improperly intrude into matters of conscience or religious belief," the Act preserves the current rights of a member of the clergy to choose not to solemnize any marriage. It also protects the rights of a religious organization to choose who may use its facilities for a marriage ceremony and who may rent its housing accommodations. A benevolent organization is also exempt from the State's prohibitions against discrimination in public accommodation, so that it is not required to rent its halls for weddings of couples it chooses not to accommodate. The Act specifically provides that a religious or benevolent organization's refusal to provide accommodations, facilities or privileges in connection with a same-sex marriage does not create a civil claim or cause of action.

The Act is not intended to change, and expressly provides for, the existing exemptions in New York law that permit religious organizations (and charitable or educational organizations that are operated, supervised or controlled by religious organizations) to limit employment or admission to, or give preference to, persons of the same religion, or to "tak[e] such action as is calculated by such organization to promote the religious principles for which it is established or maintained."

Impact on Employee Benefits and Other Employment-Related Rights

The Act is quite broad. Based on the statutory language, *all* benefits and rights that are provided to employees' opposite-sex spouses as a result of a New York State statutory, decisional, administrative or other law must be provided to same-sex spouses married in New York or another jurisdiction where such marriages may legally be performed.[2] Not only will the Act have an impact on employee benefits and other employment-related rights that arise out of, or are governed by, New York law, but it will also cover various statutory and other legal rights provided to spouses in New York, such as those relating to inheritance and death benefits, property division, hospital visitation and parental rights.

Health and Other Welfare Benefits

With regard to *insured* health and other welfare benefits provided by an employer (under an insurance policy governed by New York State law), the Act does not represent much of a change. As a result of a directive issued by former Governor Paterson in 2008 (and in accordance with a Circular Letter issued by New York's Insurance Department as a result of that directive), New York State law already required that same-sex spouses (validly married in other jurisdictions) must be treated in the same manner as opposite-sex spouses. See our client alert dated December 2008: Fully-Insured Benefit Plans in New York Must Recognize Out-of-State Same-Sex Marriages**.** Now, same-sex couples who are married in New York will receive the same treatment.

With respect to *self-insured* health and other welfare benefits, the Employee Retirement Income Security Act of 1974 (ERISA) generally preempts state laws related to employee benefit plans (other than laws regulating insurance and certain other laws). The Act does notrequire employers to treat same-sex spouses as "spouses" for purposes of self-funded benefit plans. Under ERISA, the terms of the self-insured benefit plan (rather than the state law) would govern and, thus, employers that offer self-insured benefits and that do not wish to cover same-sex spouses should carefully craft the definition of "spouse" in the applicable plan documents to make the exclusion clear. However, employers may nonetheless wish to consider extending self-funded benefits to same-sex spouses, particularly if other benefits of the employer are provided to same-sex spouses in accordance with the Act or other state laws.

Pension and Other "Federal" Benefits

Employer-provided pension and other benefits that are governed by federal law (i.e., the Internal Revenue Code and ERISA) also are not impacted by the Act. The federal Defense of Marriage Act (DOMA) provides that, in determining the meaning of any federal statute, ruling or regulation, the term "spouse" can only refer to married persons *of the opposite sex.***[3]** Accordingly, the Marriage Equality Act does not change the fact that DOMA continues to prevent same-sex couples from accessing many federal protections and benefits, which include federally-mandated surviving spouse protections under pension plans. DOMA also precludes same-sex spouses from receiving federal tax and other benefits that are only available to married couples of the opposite sex (including the ability to file federal tax returns as a married couple), such as Social Security survivor benefits, favorable federal income tax treatment with regard to employer-provided health benefits, the right to reimbursement for a spouse's medical expenses under a flexible spending account and federal COBRA continuation coverage rights.

However, DOMA and ERISA-preemption notwithstanding, employers and other plan sponsors can and have voluntarily chosen to re-create certain "federal" benefits as plan or policy features, such as providing COBRA-like benefits, in order to make them available to same-sex spouses. Accordingly, employers may want to take this opportunity to revisit benefit plan documents and other employment policies to clarify that federally-required spousal benefits are not available to same-sex spouses, and to make plan design changes to provide same-sex couples with similar alternatives.

Other Employment-Related Rights and Benefits

Other benefits and policies of an employer that arise out of (or are governed by) New York State law must be provided in accordance with the Act. Employer policies and practices that are not "legal" rights, such as inviting spouses to work events and providing tuition assistance for family members, may not be technically governed by the Act, but it appears that such benefits should be provided to employees' same-sex spouses based on New York's nondiscrimination law, which prohibits discrimination in employment on the basis of sexual orientation. It also should be noted that New York State law already specifically requires that employers offering bereavement or funeral leave to their married employees (e.g., in the event of death of a spouse, or the spouse's parent or other close relative) must provide the same leave to same-sex couples in committed relationships, in accordance with an amendment to the New York Civil Rights Law that became effective last year.

Tax Implications

Importantly, the Act changes how same-sex marriages will be recognized for New York State income tax purposes. Since same-sex marriages have not been recognized as marriages for New York State personal income tax purposes,[4] employers have been required to include in an employee's income the value of employer-provided health coverage for the same-sex spouse for New York income tax purposes (unless the spouse qualified as a federal tax dependent of the employee). In light of the Act, there should no longer be any imputed New York State income with regard to such benefits,[5] and same-sex spouses should be able to file state tax returns as a married couple. A representative of the New York State Department of Taxation and Finance has stated that the Department will issue guidance on the Act soon.

However, as a result of DOMA, the Act does not change the analysis under federal tax law. An employee with health coverage for a same-sex spouse will be subject to bifurcated tax treatment — i.e., the benefit for the non-employee spouse will not be imputed into the employee's income for state tax purposes, but will be imputed into the employee's income for federal tax purposes (unless the spouse qualifies as a dependent of the employee for federal tax purposes). Employees will also generally be required to pay for their same-sex spouse's health benefits with after-tax dollars (since pre-tax benefits under cafeteria plans are governed by federal law) and will not be permitted to obtain reimbursement for the spouse's medical expenses from a health flexible spending account (unless the spouse qualifies as a federal tax dependent of the employee).

Action Items

It is important for employers and other benefit plan sponsors to review existing benefit programs and policies to determine the scope of any necessary changes or clarifications that may be required as a result of the Act. Even if an employer or plan sponsor is not resident in New York, the heightened interest and publicity of domestic partner/same-sex marriage issues and benefits created by the Act suggest that this is a good opportunity to review and reconsider benefit programs and policies. Among other things, the following actions should be taken:

- Review and analyze existing HR policies and procedures, including employee handbooks, to assess the current rights of same-sex spouses and domestic partners, and consider any required (or desired) changes;
- Review benefit plan documents, summary plan descriptions, enrollment forms and administrative procedures to assess the current rights of same-sex spouses and domestic partners, and consider any required (or desired) changes;
- Confer with insurance providers and TPAs, and work with payroll department to address taxation issues;
- Review and update domestic partner benefit policies;
- If certain benefits are provided only to same-sex domestic partners, review with legal counsel whether the right of same-sex couples to marry in New York enhances potential discrimination claims by opposite sex domestic partners;
- Consider with legal counsel the potentially discriminatory consequences of imposing any eligibility requirements on same-sex partners that are not imposed on opposite-sex partners; and

- Carefully communicate the applicable rules and changes to employees and their family members.

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The purpose of this Alert is to provide a general overview of the impact of the Marriage Equality Act on employee benefits and other employment-related rights. Please contact your employee benefits attorney at Proskauer if you would like more detailed guidance on this subject.

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[1] New York joins the states of Connecticut, Iowa, Massachusetts, New Hampshire and Vermont, as well as the District of Columbia.

[2] The Act provides that "no government treatment or legal status, effect, right, benefit, privilege, protection or responsibility related to a marriage, *whether deriving from statute, administrative or court rule, public policy, common law or any other source of law*, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex."

[3] Importantly, earlier this year, the Department of Justice announced that it will no longer defend the constitutionality of DOMA. The potential impact of that announcement is reviewed in our client alert of March 8, 2011: Departing from Prior Practice, DOJ Declines to Defend Section 3 of the Defense of Marriage Act.

[4] See Advisory Opinion No. TSB-A-10(2)I of the State of New York Commissioner of Taxation and Finance.

[5] This would apply equally to insured and self-insured benefits.

Related Professionals

- **Roberta K. Chevlowe**
  Senior Counsel