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Developments Impacting Benefits for Same-Sex Spouses

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As federal and state agencies and courts further examine the implications of the Supreme Court of the United States' ruling on same-sex marriage in ***U.S. v. Windsor***, the laws and regulations governing employee benefits for employees' same-sex spouses continue to be clarified. As a result, employers should monitor **additional guidance** as it is issued and continue to reevaluate the same-sex spousal benefits offered under their employee benefit plans.

Qualified Plan Amendments

Employers should review the definition of "spouse" under their qualified retirement plans to determine whether a clarifying amendment may be required. All *Windsor*-related plan amendments generally must be adopted by December 31, 2014.

The Internal Revenue Service (IRS) published Notice 2014-19 in April 2014. Notice 2014-19 clarifies that, effective June 26, 2013, retirement plans must be administered in a manner that reflects the *Windsor* ruling. Plans are not required to retroactively recognize same-sex spouses prior to that date. In addition, plans that initially applied a "state of residence" approach, as opposed to the IRS' state of celebration approach, are not required to retroactively adopt the state of celebration approach prior to September 16, 2013. (A state of residence approach means that the plan extended spousal rights and benefits only to same-sex spouses legally married and residing in a jurisdiction where same-sex marriage is legal or recognized.)

Amendments are not required for plans that define marriage or spouse by general reference to federal law or in a manner that is otherwise not inconsistent with *Windsor*. However, plans that define "marriage" by reference to the Defense of Marriage Act (DOMA) or that limit "spouse" to an individual of the opposite-sex must be amended to reflect the *Windsor* ruling and related IRS guidance. Plans also need to be amended if spousal rights and benefits were administered in a manner that reflects the outcome of *Windsor* prior to June 26, 2013.

The IRS clarified in Notice 2014-37, published May 2014, that employers may adopt mid-year amendments to safe harbor 401(k) plans and safe harbor 401(m) plans to comply with the *Windsor* ruling. Safe harbor plans generally cannot be amended mid-year, except in certain

limited circumstances.

Retroactive Spousal Survivor Benefits

Employers with qualified retirement plans may see claims for retroactive spousal survivor benefits from employees' surviving same-sex spouses who may have previously been denied such benefits because of DOMA.

On May 14, 2014, *Passaro v. Bayer Corporation Pension Plan* was filed in the U.S. District Court for the District of Connecticut. Passaro is the surviving spouse of a same-sex couple who were married in Connecticut in 2008. Although the plan did not define "spouse" for purposes of survivor benefits, the plan denied such benefits to Passaro after his spouse died in 2009. The plan interpreted "spouse" to mean a DOMA definition of spouse that was limited to a person of the opposite sex as the employee. Because the U.S. Supreme Court found Section 3 of DOMA to be unconstitutional in *Windsor*, the case challenges the plan's denial of a surviving spouse benefit. As this case illustrates, employers with plans that do not define the term "spouse" are particularly vulnerable to a challenge for retroactive benefits.

FMLA Coverage

On June 20, 2014, the U.S. Department of Labor (DOL) Wage and Hour Division announced a Notice of Proposed Rulemaking to revise the definition of spouse under the Family and Medical Leave Act of 1993 (FMLA). The revised definition would allow eligible employees in legal same-sex marriages to take FMLA-protected leave to care for a same-sex spouse with a serious medical condition, regardless of whether the couple resides in a state where same-sex marriage is recognized.

The DOL previously adopted a state of residence rule for purposes of FMLA leave—meaning an employee who is legally married to a same-sex spouse would be entitled to FMLA leave to care for the serious illness of his or her spouse only if the couple resides in a state where same-sex marriage is recognized. The revised definition would adopt a state of celebration rule for FMLA leave, which is consistent with the approaches adopted by the DOL and the IRS for purposes of other laws governing employee benefits.

Federal Ruling on Denial of Self-insured Health Coverage

On May 1, 2014, the U.S. District Court for the Southern District of New York ruled in *Roe v. Empire Blue Cross Blue Shield* that the exclusion of same-sex spouses from coverage under a self-insured health plan did not violate Section 510 of the Employee Retirement Income Security Act of 1974 (ERISA). Section 510 is a fairly narrow provision of ERISA that prohibits discrimination "against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan."

Employers with insured medical, dental or vision benefit plans insured in states where same-sex marriage is legal are required under state insurance laws to extend spousal coverage to same-sex spouses. Such state insurance law mandates do not apply to self-insured plans.

The District Court held in *Roe* that ERISA is "a regulator of plans, not a dictator of plan terms." ERISA Section 510 prohibits employer interference with the employment relationship to prevent employees from obtaining benefits. The District Court ruled that a "fundamental prerequisite" to an

ERISA Section 510 action is that the employer-employee relationship, not just the benefits plan, be discriminatorily or wrongfully changed. The District Court noted that while employers may need to adjust their plans to comply with IRS guidance regarding *Windsor*, Section 510 did not apply to the exclusion of same-sex couples because no adverse employment action existed.

The *Roe* decision provides some guidance regarding the obligations of employers with self-insured plans with respect to *Windsor*. However, the decision is somewhat limited because the claim was filed as an ERISA Section 510 claim rather than a claim for benefits eligibility under ERISA Section 502. Employers with vague plan terms may still be at risk of challenges if they deny coverage or benefits to same-sex spouses. Employers should seek to clarify plan terms before the *Windsor*-related plan amendment deadline (generally December 31, 2014). In addition, employers may face a risk of federal and state lawsuits if they continue to provide coverage under self-insured plans only to opposite-sex spouses.

Same-sex Spousal Coverage in Washington

On June 5, 2014, officials in the State of Washington issued a joint letter to employers, insurance companies and benefit plan administrators to clarify that existing state laws require spousal coverage offered under benefit plans to be extended to same-sex spouses. The letter proposed no new laws or regulations, but stated that, as a result of the legalization of same-sex marriage in Washington, employers that deny spousal coverage to same-sex spouses violate the Washington Law Against Discrimination and potentially the Washington Consumer Protection Act. In addition, the Washington Insurance Code prohibits insured benefit plans from discrimination based on sexual orientation. The guidance is important because it clarifies that spousal benefits under all plans, including self-insured plans, must be extended to same-sex spouses. One can argue that Washington law should be preempted by ERISA, but this position has yet to be asserted and tested.

Next Steps for Employers

Employers should continue to review their benefit plans and policies with respect to benefits extended to employees' same-sex spouses. Year-end amendments may be required for qualified retirement plans to comply with the IRS guidance on *Windsor*. The recent DOL guidance may require employers to change their policies with respect to FMLA-protected leave to care for a same-sex spouse with a serious medical condition. In addition, employers with self-insured plans may want to consider whether to extend spousal coverage to same-sex spouses in light of the *Roe* case and other challenges that will likely follow.

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