

## CLIENT ACTION BULLETIN

July 15, 2008

CAB 08-16

## State Laws on Marriage: Implications for Employee Benefit Plans

**SUMMARY** The recent ruling by the California Supreme Court allowing same-sex couples to marry has reignited employer interest in the effects such laws might have on employee benefits. Many retirement, health, and welfare benefits are governed by the federal Employee Retirement Income Security Act (ERISA), which in combination with the Defense of Marriage Act (DOMA), insulates these plans from state laws and regulations on same-sex marriages. However, notable exceptions to federal preemption apply, such as for employee benefit plans maintained by a governmental or church employer. In addition, ERISA does not preempt state laws governing insurance. Employers that provide benefits for same-sex couples either under state law or voluntarily should be aware of potential federal and state tax consequences. The evolving changes occurring in the states (and localities) and moving through the federal judicial system will complicate plan administration for some time to come.

This *Client Action Bulletin* focuses only on a handful of the most significant concerns facing benefit plan sponsors. Milliman's [Benefits Information Bulletin 04-02](#) provides a more comprehensive discussion of those issues and the legal developments up to the October 2004 publication date. Employers should seek appropriate legal advice on specific issues.

#### Definition of "Marriage" and "Spouse"

Benefit plan sponsors arguably face the most uncertainty about spousal benefits under same-sex marriage laws. To the extent a plan is governed by ERISA or the Internal Revenue Code (IRC), DOMA's stipulation that a marriage is a "legal union between one man and one woman" applies. As a result, DOMA permits a state to refuse to recognize the validity of a same-sex marriage performed in another state. Plans that are not subject to ERISA or the IRC might be indirectly affected by DOMA if other federal statutes apply. If DOMA does not apply, plan sponsors must look to the state laws to determine whether the recognition of same-sex marriages is precluded or required. Employers with operations in multiple states may have to consider the rules in each state.

For purposes of spousal rights to benefits, factors that must be taken into account include:

- In what state (or, indeed, country) did the marriage occur, and when?
- Where does the couple reside?
- In which states does the employer operate?
- What is the plan's definition or interpretation of "spouse"?
- Is the employee benefit plan covered by ERISA or the IRC?

In addition, plan sponsors should consider administrative issues such as parity in any proof requirements for covered relationships so that same-sex couples are treated similarly as opposite-sex couples. Thus, if an employer requires certification to prove that a marriage exists to extend benefits coverage, it should apply the requirement to all couples. Plan sponsors also must address how the plan handles divorces or other dissolutions of unions.

#### Retirement Plan Issues

Tax-qualified plans that are subject to ERISA must follow federal standards. For example, ERISA plan sponsors are not required to extend to same-sex couples the mandated qualified preretirement survivor annuity (QPSA) and the qualified joint and survivor annuity (QJSA) at the employee's retirement. However, a plan is permitted to offer both types of survivor benefits for same-sex spouses. But doing so carries federal tax implications that will differ from an opposite-

sex married couple's (e.g., the minimum required distribution rules under the tax code might restrict the amounts that may be given under the survivor annuity, particularly if one partner of a same-sex marriage is significantly younger than the other). Also, depending on the prevalency of same-sex marriages and the subsidy built into the joint-and-survivor factors, there could be an overall cost impact to those plans recognizing same-sex marriages.

ERISA also establishes retirement plan notification and other requirements pertaining to spousal consents, nonspouse beneficiary designations, and qualified domestic relations orders (QDROs). To the extent that government or church plans mimic these ERISA provisions, the sponsor may need to be mindful of the requirements for same-sex marriages.

### Health and Welfare Benefit Plan Issues

The application of federal laws to employees in same-sex marriages when they are participants in health and welfare plans in large measure will turn on whether the plans are self-insured. If they are, ERISA applies and thus they are subject to DOMA. If they are not, state laws apply, in general. However, insured arrangements and certain governmental and church plans that are not subject to ERISA could be subject to other federal laws, such as the Public Health Service Act (for healthcare continuation coverage requirements along the lines of COBRA, or the health insurance portability requirements along the lines of HIPAA, for example) that are covered by DOMA. In many cases, state laws have been structured very similarly to federal requirements.

Where there are federal tax implications, the IRC (and thus, DOMA) will govern.

Reimbursements to same-sex spouses from health flexible spending arrangements (FSAs) will be restricted, unless the same-sex spouse qualifies as a "dependent" under the tax code. Unless they qualify, same-sex spouses will similarly be prohibited from participating in health reimbursement accounts (HRAs), health savings accounts (HSAs), and medical savings accounts (MSAs). For general health plan coverage purposes, where the same-sex spouse is not a dependent, the employer's cost for the covered employee's same-sex spouse is imputed income for federal tax purposes, while state law may exclude reporting of income and withholding of taxes. Thus, for employers operating in states that recognize same-sex marriages or similar unions, payroll processing and similar administrative issues must be addressed to accommodate the different tax effects.

### Other Benefits Concerns

Employers also will have to grapple with the effects of same-sex marriages on other benefit programs and employer policies and practices, including:

- family and medical leave;
- adoption assistance;
- child support orders, wage garnishments, and similar obligations;
- relocation and housing benefits; and
- employee discounts.

**ACTION** The employee benefits issues raised by same-sex marriage laws in states (or local jurisdictions) are complex for many employers and will remain in flux for the foreseeable future. State constitutional amendments, voter referendums, and legal challenges will not be settled any time soon. Still, employers and plan sponsors can review their programs in light of both the federal requirements and any state-based regulations. Plan documents, summary plan descriptions, employee communications materials, administrative procedures and systems, and employer policies should be reviewed to ensure that the employer's intention with respect to benefits complies with the legal requirements under which the programs must operate.

Appropriate legal advice and guidance should be sought for specific effects of state and federal laws on any employer-sponsored benefit plan.