

From the Editor

(Same) Sex Education

Determining the marital state of an employee never was much of a challenge for human resource departments. If you produced a marriage certificate from any state or country, you were considered legally wed; if you presented a divorce decree or death certificate, you were officially no longer married. An employee who tied the knot in Texas, Hawaii, or even Brazil and subsequently moved to Rhode Island was no more or less married than before.

In the past year, however, determining whether an employee's significant other is actually his or her "spouse" has become far more complicated. The Massachusetts Supreme Judicial Court has ruled that starting May 17, 2004, same-sex couples can be legally married in that state—even though the federal Defense of Marriage Act (Public Law 104-199) (DOMA) stipulates that such nuptials are not recognized under federal law. Additionally, some city halls on both coasts have been inspired to start granting same-sex marriage licenses—even though they may be illegal under state law. To top it off, 38 states (at the last count) have laws specifically providing that they will not recognize any same-sex marriage performed in another state.

The constitutionality of both DOMA and those state prohibitions is being challenged in litigation that is certain to reach the Supreme Court but is unlikely to be decided for several years. Putting aside issues of morality—I am speaking strictly as an employee benefits attorney—how can a company decide the rights of an employee's same-sex spouse under a benefit plan until the courts definitively rule whether, in a legal sense, they are really married or not? As things stand, HR administrators need a marriage certificate *and* a legal opinion to determine if an employee is indeed married.

This issue is of key concern to benefits administrators because, under federal law, marriage conveys certain benefit rights to an employee's spouse. Of most immediate interest to many couples is health plan coverage. Virtually all plans extend this coverage to spouses without any waiting period, as long as the newlyweds enroll within a specified period after marriage. In many plans, spousal coverage is paid in part by the employer as a tax-free benefit. Marriage and divorce also are considered life events under a cafeteria plan and spouses are entitled to Consolidated Omnibus Budget Reconciliation Act (COBRA) rights upon a loss of coverage under a health plan. Employees also are allowed Family and Medical Leave Act (FMLA) rights to care for a sick spouse. Spouses of retirement plan participants have protected death and survivor annuity rights. In the case of divorce, the Qualified Domestic Relations Order rules come into play. Some employers also permit employees to purchase life, long-term care, and other insurance

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policies for their spouses, and they mandate that employee death benefits under the company's life insurance program be paid to the spouse if the employee fails to designate a beneficiary. The list of benefits extended to spouses goes on and on.

Many employers, starting with the Village Voice in 1982, have for some time voluntarily extended certain benefits to employees' "significant others" of the same or opposite sex. Today, almost half the Fortune 500 and approximately 10,000 employers nationwide offer some form of "domestic partner" benefits. Such programs usually are limited to health plan coverage, but they sometimes include family leave policies and pension plan survivor rights. Initially, offering benefits to a nonmarried partner was a bold move that risked significantly increased costs and a backlash from disapproving customers and employees. As it turns out, domestic partner health benefits increased most employers' total health bill by less than 1 percent (skyrocketing health care costs eventually may make even that price tag too expensive for some employers) and the public relations fallout has ranged from nonexistent to positive. The bottom line has been that employers were able to choose whatever benefit structure they considered most appropriate.

It was not necessarily a fair system, but it was workable. We entered uncharted waters when the Massachusetts Supreme Court ruled that denying same-sex partners the right to wed was unconstitutional and gave legislators until May 17, 2004, to work out the details of legalizing same-sex marriages. Since then, thousands of same-sex weddings have been performed by local officials in Portland, Oregon; New Paltz, New York; and San Francisco, California—all of which were subsequently declared illegal by those states' attorneys general. Meanwhile, Vermont permits same-sex couples to be joined in a civil union that is not considered a marriage. In a strange twist, an Oregon court ruled that same-sex marriages are illegal—but said couples married before the decision are legally married.

The issue involves more than just figuring out which same-sex marriages are valid under state law. In 1996, President Clinton signed the Defense of Marriage Act. (A better means of promoting matrimony would have been eliminating the marriage penalty from the Tax Code and giving married couples the higher Social Security benefits they would receive as singles.) DOMA states that for all purposes of federal law, including the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC), "the word 'marriage' means only a legal union between one man and one woman . . . and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife." DOMA also provides that a state is not required to recognize a same-sex marriage that is legally performed in another state.

Advocates of same-sex marriages, including some academic heavy-

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weights, argue that DOMA violates the full faith and credit clause of the US Constitution. The Supreme Court is unlikely to rule on any such case until 2006 at the earliest and as of now, the debate is too tight to determine the outcome. Meanwhile, Massachusetts same-sex spouses remain legally married under that state's law, and other states are expected to legalize same-sex marriages before a Supreme Court decision is issued. That leaves companies with the challenge of administering benefit plans in an uncertain legal environment where gay and lesbian employees' marital status will be based in large part on where they were married, where they reside, and whether and to what extent the US Constitution protects their right to marry.

For example, say an employee designates his parents as beneficiaries under his retirement plan, then enters into a same-sex marriage in Massachusetts and subsequently dies. IRC Section 401(a)(11) provides that the plan benefit must be paid to the spouse but DOMA provides that they were not married under federal law, so IRC Section 401(a)(11) does not apply and the parents remain plan beneficiaries. If the Supreme Court later rules DOMA unconstitutional, does that mean the same-sex marriage was really valid and the surviving spouse is really the beneficiary? Can the spouse then sue the plan or parents to recover the benefit?

Clearly, benefits law is not for the faint of heart—but employers do not have the luxury of waiting for the Supreme Court's decision before determining what to do and how to protect themselves and their employees. Every employee benefit plan that provides any sort of benefit, protection, or right to a spouse must be examined promptly to ensure the employer is providing the benefits intended and to avoid, or at least reduce, the potential for disputes.

Despite the obvious risks, I think we must treat DOMA as the law of the land until the Supreme Court rules otherwise—although the risks will multiply exponentially if a District Court or Court of Appeals rules in the interim that DOMA is unconstitutional. While DOMA is in effect, health benefits provided to same-sex spouses are taxable (unless the spouse also happens to be a dependent for tax purposes), and same-sex partners lack benefit rights under COBRA or rights to receive survivor benefits from a retirement plan under IRC Section 401(a)(11). Although, to complicate matters further, some states—including Massachusetts—have “mini COBRA laws” that would apply to a same-sex spouse. Presumably, ERISA would not preempt these mini COBRAs, at least for insured health plans.

Employers that do not want to offer benefits to same-sex spouses may need to amend their documents to define “spouse” according to the DOMA standard. With insured health plans, this may require a change in the insurance policy. Presumably, any state law that prohibits discrimination on the basis of sexual orientation would be preempted by ERISA, although this is by no means a slam dunk. Whatever definition the

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employer decides to follow should be clearly disclosed in its summary plan descriptions and other employee communications. Employees also should be encouraged to keep their beneficiary designations up to date.

Employers that want to cover same-sex spouses, presumably including employers that already offer domestic partner benefits, must perform the same exercise and amend their plans as needed. Indeed, even if it does not do so already, any employer that wishes to provide benefits to a same-sex spouse should also offer benefits to domestic partners, for at least two reasons. First, it would be unfair to offer benefits to employees in states that allow same-sex marriages but not to others. Second, on a practical note, it avoids a situation in which an employee who is in a legal same-sex marriage moves to a state where same-sex marriages are illegal and becomes “unmarried,” in which case the spouse would lose coverage.

The safest course to minimize litigation probably is to treat same-sex spouses the same as opposite-sex spouses as much as legally possible. For now, however, same-sex spouses will not be considered the equals—benefit-wise—of their heterosexual counterparts because same-sex spouses are not considered married under ERISA or IRC. Like domestic partners, they will not be eligible to receive federal COBRA, survivor benefit, and other rights afforded to spouses. In some cases, it may be possible for employers to voluntarily extend spousal protection to same-sex couples by amending their plan documents to give same-sex spouses COBRA rights—but only if their insurance company (including any stop-loss carrier for a self-insured plan) and the state law permit this decision. Same-sex partners also could be provided survivor benefits, but anti-alienation rules probably would prohibit giving same-sex partners veto power over an employee’s beneficiary designations or distribution elections.

While we wait for the Supreme Court to rule whether DOMA is constitutional (and assuming President Bush does not get his way with a Constitutional amendment making same-sex marriages illegal), it is imperative that the employee benefits community actively lobby now against unworkable retroactive changes to federal marriage laws as they apply to benefit plans. Employers will be devastated if DOMA is declared unconstitutional as of the date that same-sex marriages were first performed and employers are required to find a way to provide same-sex spouses with retroactive health coverage, COBRA, and death benefits. Ultimately, Congress and the Supreme Court must recognize that such a scenario would clearly be absurd and act to protect employers from liability for complying with current federal law. Or at least, we will hope so.

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