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Management Alert

California Supreme Court Approves Same-Sex Marriage & Bush Signs Genetic Information Act

A recent California Supreme Court decision to recognize same-sex marriages and recent federal legislation banning discrimination based on genetic testing warrants a "checkup" for employee benefit plans, including group health, life, and other welfare benefits.

California Supreme Court Lifts Ban on Same-Sex Marriage

On May 15, 2008, the Supreme Court of California, in *In re Marriage Cases*, found that the failure to designate the relationship of a same-sex couple as "marriage" violated the California Constitution. In doing so, the Court makes clear that under California's constitution, same-sex couples can be married. Voters in California will most likely be given the opportunity to weigh in on this issue. A proposed amendment to California's constitution prohibiting same-sex marriage will be placed on the November ballot if a sufficient number of signatures are timely collected. The ruling is scheduled to go into effect in mid-June, unless the Court agrees to an appeal asking to delay the decision until after the November vote.

Notably, the day before the California Supreme Court rendered its decision, the Governor of the State of New York issued a directive to all state agencies to revise their policies and procedures to ensure that the term "spouse" included same-sex spouses. Opponents of same-sex marriage claim that the Governor overstepped this authority. This Alert identifies some of the employee benefits issues facing employers with employees in California in light of the Supreme Court decision, and outlines how these issues may be addressed.

Requirements Under ERISA and ERISA Preemption

Although California state law may permit same-sex marriages, employee pension and welfare benefit plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), are not required to recognize same-sex marriages. The federal Defense of Marriage Act (DOMA) provides that for purposes of interpreting ERISA, the Internal Revenue Code and any other federal law, "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. Thus, any state law providing otherwise, or prohibiting discrimination based upon marital status or sexual orientation, would generally be preempted by ERISA to the extent it affects covered employee benefits.

Limits on Preemption and Insured Arrangements: There are limits to ERISA's preemption of state law, however. In particular, employee benefit plans maintained by a governmental or church employer normally fall outside the scope of ERISA entirely. Moreover, ERISA does not preempt state laws governing insurance. Thus, California's domestic partner laws that currently require health and welfare insurance policies to provide certain coverage to domestic partners are not preempted. Similarly, the recent California ruling will most likely require health and welfare insurance to provide coverage to same-sex spouses. These same-sex spouse coverage requirements will also extend to group life insurance.

Self-Funded Arrangements: Because of ERISA preemption, California cannot require self-funded plans to offer coverage to same sex couples. Thus, employers offering self-funded benefits will need to decide whether or not they want to cover same-sex spouses for benefit purposes.

Federal and California COBRA: Under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), same-sex spouses and domestic partners are not considered qualified beneficiaries and are not entitled to continued coverage under a group health plan unless the plan provides for it.

California state law, however, has its own continuation coverage requirements known as "Cal-COBRA." Under current California law, smaller employers (two to 19 employees) with insured plans must provide registered domestic partners with Cal-COBRA benefits. In light of the recent California Supreme Court decision, same-sex spouses should now be entitled to the same benefits under Cal-COBRA as registered domestic partners. Thus, smaller employers should provide Cal-COBRA continuation benefits to same-sex spouses. Larger employers with more employees will not need to provide federal or Cal-COBRA continuation coverage to same-sex spouses.

Tax Consequences

Income Taxes: Amounts received under an employer-provided group health plan and the cost of employer-provided coverage for employees (and family members) are generally exempt from federal income taxation. DOMA makes clear that this exemption will not apply to a same-sex spouse, unless the spouse is also a "tax dependent" under Section 152 of the Internal Revenue Code (*i.e.*, an individual who receives over half of his or her financial support for the taxable year from the taxpayer and who resides with the taxpayer as a member of his or her household for the entire taxable year).

Under this recent decision, health benefits provided to same-sex spouses will be exempt from California state income tax. Thus, an employee who elects health coverage for a same-sex spouse will have taxable income equal to the value of the coverage for federal income tax purposes, but not for California income tax purposes. The employer will face the task of capturing that income for reporting and withholding purposes at the federal level, but omitting it from reporting and withholding at the state level in California.

Flexible Spending Arrangements: A same-sex spouse who does not qualify as a tax dependent cannot be included in a health flexible spending account (FSA), health reimbursement arrangement (HRA) or health savings account (HSA) because these types of tax

advantaged arrangements can only reimburse for medical expenses incurred by the employee, the employee's spouse (as defined under DOMA), or a tax dependent.

The different treatment under California law and federal law of same-sex spouses and domestic partners may lead to some interesting results. For example, with respect to dependent care FSAs, payments to certain caregivers who are related individuals (including a spouse) do not qualify for reimbursement. Because DOMA would exclude same-sex spouses and domestic partners from the definition of a spouse under the Code, it may be possible for a same-sex spouse or domestic partner who does not qualify as a tax dependent to be compensated from a dependent care FSA for taking care of the employee's child(ren).

The Impact of a Plan's Definition of "Spouse"

A plan document's definition will be critical to determining who is eligible for spousal or dependent benefits under a plan. Some plans define "spouse" by reference to state law (*e.g.*, "in a marriage recognized under state law" or any "spouse who is legally married"). Other plans define "spouse" by reference to DOMA. The plan's definition of "spouse" should be reviewed to ensure that the plan does not inadvertently provide coverage or benefits to individuals to whom the employer did not intend to provide such coverage.

The Impact on Domestic Partner Laws

The recent decision does not affect current domestic partner laws in California. Such domestic partner laws continue to remain in existence, unless some action is taken by the California legislature in this regard.

The Decision's Impact Outside of California

Under current California law, it appears that insurance carriers must recognize same-sex marriages and provide insurance coverage for same-sex spouses. Thus, an employer maintaining an insured arrangement will most likely need to provide coverage to a couple who is married in California and lives in California. However, there are at least two situations that are likely to present challenges to benefit administrators. First, if a couple living in California gets married in California, but then moves to a state that does not recognize same-sex marriages, will the marriage continue to be recognized? Second, if a couple does not reside in California but gets married in California, will the marriage be recognized in their state of residency if their state of residency prohibits same-sex marriages? Unlike the same-sex marriage laws in Massachusetts, California does not have a residency requirement, which means that same-sex couples who are not California residents can come to California and get married.

These questions are particularly problematic because DOMA provides that states do not have to recognize same-sex marriages under another state's laws. Many states have adopted either Constitutional amendments or DOMA-like laws defining marriage as a relationship between a man and a woman.

What Should Employers Be Doing Now?

Decide What Benefits the Employer Wants to Provide to Whom. ERISA plan coverage is generally a design decision for the employer. An employer may offer coverage for same-sex partners in order to be competitive in attracting employees and generating new business

opportunities. However, if only opposite-sex spouses are intended to be covered, that should be clearly reflected in the plans.

Review/Revise Plan Documents. The employer should review its plan documents (including summary plan descriptions) to make sure they accurately reflect the employer's intent as to same-sex marriages, paying particular attention to the definitions of "spouse" and "domestic partner." In addition, if a plan sponsor generally recognizes common law marriages, it should determine whether it will apply the same factors to same-sex marriages. If the sponsor maintains a corporate policy that prohibits discrimination based on sex or marital status, it should ensure that the benefit plans consistent with that policy.

Check Insurance Policies and Positions. Employers providing insured health and welfare benefits in California and other jurisdictions that recognize same-sex marriages or civil unions should contact their insurance carriers to determine whether (and when) coverage will be provided to same-sex partners under applicable state laws. It is possible that insurance carriers will take the position that no change is required, while other insurers may view the definition of "spouse" in existing insurance policies as automatically affected by the authorization of same-sex marriages.

Monitor What Benefits the Employer Must Provide. Many state laws related to same-sex benefits are in flux and more and more may require an employer to provide benefits to same-sex spouses. If a plan or program is insured, employers should monitor state and local law regarding the treatment of marriage, domestic partnerships and civil unions where they have employees.

Consider Applicable State Tax Laws. Employers with plans defining "spouse" as an individual legally married under applicable local law must determine whether a same-sex marriage will be recognized in the states in which affected employees reside. Although providing coverage to a same-sex spouse may cause an employee to have imputed income for federal income tax purposes, employers should determine which states treat coverage as tax free and contact their payroll vendors to adjust state tax withholding in those states.

Genetic Information Nondiscrimination Act of 2008

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008, or "GINA" which, among other things, prohibits group health plans and insurers from discriminating against individuals based on the individual's or the individual's family member's genetic makeup. Critics of the legislation have called GINA "legislation in search of litigation," however, privacy advocates hail GINA as promoting genetic counseling by providing individuals with the peace of mind that their genetic information will not be used against them by their employers.

GINA and Health Plans

While health plan genetic-based discrimination was initially outlawed in 1996 with the passage of HIPAA, GINA further refines how health plans and insurers handle genetic information.

GINA's health plan-related provisions will apply to nearly all forms of health insurance, self-funded ERISA plans (including wellness plans), Medigap and individual

insurance policies. There is no exception under GINA for small employers, limited scope dental and vision benefits, or government and church plans. Under GINA, group health plans and health insurers may not:

- adjust premiums or contributions based upon genetic information,
- collect genetic testing information (request, require or purchase genetic information),
- require that an individual or family member undergo a genetic test (subject to an exception for voluntary genetic testing that is used solely for research purposes).

GINA defines "genetic information" rather broadly. Genetic information includes any analysis of an individual's (or the individual's family member, embryo or fetus) DNA, RNA, chromosomes, proteins, or metabolites that detect mutations or chromosomal changes. Accordingly, under this definition of "genetic information", if an employee's family member has a genetically-based disease, such information is considered protected under GINA.

GINA does not apply to life insurance, disability, long-term care insurance, or stop-loss insurance.

HIPAA Privacy Provisions

GINA amends HIPAA to provide that genetic information shall be treated as protected health information and limits the permitted uses and disclosures of genetic information for underwriting purposes. Such special treatment of genetic information may lead to additional administrative procedures in order to further segregate genetic information from other protected health information. Furthermore, GINA requires Health and Human Services to issue additional HIPAA privacy regulations by May 2009. Most employers will need to review their privacy and security procedures to verify compliance with GINA and the subsequent regulations.

Enforcement

Failure to comply with GINA can bring penalties from the DOL of $100 per day per participant. If the DOL discovers such non-compliance before the failure is corrected by the plan, the minimum penalty to be assessed is $2,500. If such failure is determined by the DOL not to be de minimus, the minimum penalty is $15,000 to a maximum of $500,000 (or, if less, 10% of the aggregate paid by the plan sponsor for group health plans in the preceding year). If it can be shown that the failure is due to reasonable cause and not willful neglect, the DOL may waive all or part of the penalty.

Effective Date

With the exception of the application of HIPAA to genetic information, the provisions of GINA will be effective for group health plans on the first day of the plan year beginning on or after May 21, 2009 – or for calendar year plans – January 1, 2010. The changes to HIPAA take effect May 21, 2009.

For further details, or if you have any questions regarding the California Supreme Court decision or its affect on your benefit programs, or the Genetic Information Nondiscrimination Act of 2008, contact your Seyfarth Shaw LLP attorney or any Employee Benefit attorney listed on the website at www.seyfarth.com.

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