

## Management Alert

# D.C. Recognizes Same-Sex Marriages From Other Jurisdictions

On July 7, 2009, the District of Columbia began recognizing same-sex marriages performed in other jurisdictions. The Council of the District of Columbia approved the bill on May 5, 2009. The bill then went before the Congress of the United States, which had the power to block the bill during a period of review under the D.C. Home Rule Act. Although Congress did not block the bill, opponents of the bill attempted to overturn it by referendum, which was rejected by the District of Columbia Elections Board and the D.C. Superior Court, clearing the way for the bill to become effective last week. This Management Alert identifies some of the employee benefits issues facing employers with employees in the District of Columbia in light of the new law, and outlines how these issues may be addressed.

### *Requirements Under ERISA and ERISA Preemption*

Although the District of Columbia law will now recognize same-sex marriages from other jurisdictions, employee pension and welfare benefit plans subject to the Employee Retirement Income Security Act (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" is limited to 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. Accordingly, it is possible that the District of Columbia law will require health insurance policies issued within the District of Columbia, including those for use in employer health plans, to offer health benefits to the same-sex spouse of an employee whose same-sex marriage was performed in another jurisdiction. These same-sex spouse coverage requirements could also extend to group life insurance.

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

**COBRA Continuation Coverage.** Under the federal Consolidated Omnibus Budget Reconciliation Act (COBRA), same-sex spouses and domestic partners are not considered qualified beneficiaries and are therefore not entitled to continued coverage under a group health plan *unless* the plan provides for it. District of Columbia law, however, has its own continuation coverage requirements that apply to insured health plans, such as plans maintained by smaller employers

(fewer than 20 employees), that are not otherwise covered by federal COBRA. In light of the new District of Columbia law, such employers with insured plans will be required to provide District of Columbia continuation coverage benefits 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 the new District of Columbia law, health benefits provided to same-sex spouses will likely be exempt from District of Columbia 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 District of Columbia 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 District of Columbia level.

**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 federal income 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 District of Columbia law and federal law of same-sex spouses may lead to some unintended 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 from the definition of a spouse under the Code, it may be possible for a same-sex spouse 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 accurately reflects the employer’s intent.

### *The Decision’s Impact Outside of the District of Columbia*

Under the District of Columbia law, it appears that insurance policies issued within the District may be required to recognize same-sex marriages from other jurisdictions and provide insurance coverage for same-sex spouses. Thus, an employer maintaining an insured arrangement may need to provide coverage to a couple who is married outside, but lives in, the District of Columbia. However, there are situations that will present challenges to benefit administrators. For example, if a couple whose same-sex marriage is recognized in the District of Columbia moves from the District to a state that does not recognize same-sex marriages, will the marriage continue to be recognized? Such questions are particularly problematic

because DOMA provides that states do not have to recognize same-sex marriages under another state's laws, and many states (including Virginia and Maryland) 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 are consistent with that policy.

**Check Insurance Policies and Positions.** Employers providing insured health and welfare benefits in the District of Columbia 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 an increasing number 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.

*For more information about this law, please contact the Seyfarth attorney with whom you work, or any Employee Benefits attorney on our website ([www.seyfarth.com/EmployeeBenefits](http://www.seyfarth.com/EmployeeBenefits)).*



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