



## PLANNING FOR SAME-SEX MARRIAGES IN MASSACHUSETTS

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### 1. INTRODUCTION.

Most employers provide benefit plans which are regulated by ERISA, a federal law. To promote consistency in a nation of 50 separate jurisdictions, ERISA preempts all state laws related to employee benefit plans, except for state laws which regulate insurance. If an ERISA employee benefit plan is funded with insurance products, federal and state law requirements can both apply.

This is not a new conundrum. Large employers, especially those with multi-state operations, often self insure their major medical plans so that they may avoid conflicting insurance mandates, which vary from state to state, and which make plan administration expensive and unwieldy. They administer their self-insured plans solely under Federal law, with mandates which have been approved by the entire Congress and the President.

The Goodridge decision (Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003)) may be viewed as a State law mandate that will affect the administration of benefits plans. In simple terms, the Massachusetts Supreme Court declared that State action may not discriminate, when issuing marriage licenses, against "same-sex" couples. It interpreted the State Constitution to say that these "same-sex" spouses are entitled to the same Massachusetts rights as any other married couple. Because of the massive impact, the Court said its decision would not be effective until May 17, 2004.

The Commonwealth's agencies and divisions are already falling into line with this new law of the land. The Department of Revenue, for example, has announced that it will permit same-sex spouses to file joint tax returns for periods ending after May 16. With a specific reference in Goodridge to State insurance law, it is reasonable to assume that the Division of Insurance will interpret this as a mandate to require a State law definition of "spouse" in policies.

This sets up an inevitable challenge with the 1996 federal statute known as the Defense of Marriage Act ("DOMA"). DOMA prominently added a definition of "spouse" to Title 1, Chapter 1 of the U.S. Code. When interpreting federal statutes (such as the Internal Revenue Code and ERISA), DOMA says that "marriage" can only mean a union of two persons of the opposite sex. This means, for example, that spouses of a Massachusetts same-sex marriage will not be entitled to file joint federal tax returns, but may file joint State tax returns.

In the case of ERISA, which is riddled with protective provisions for "spouses", much will depend on the language of the Plan, and whether it uses insurance products to deliver benefits. Action is required, regardless of whether the employer is enthusiastic (or less so) about this new Massachusetts development. Similar considerations will apply in the case of other federal workplace mandates, such as COBRA and FMLA.

## **2. PLAN SPONSOR OBLIGATIONS FOR BENEFIT PLANS.**

The employer is the Sponsor of an ERISA-regulated employee benefit plan ("Plan"), and typically has the right to amend or terminate the Plan. The Plan Administrator, sometimes the Sponsor and sometimes a Sponsor-appointed individual or committee, must interpret the Plan. For Taft-Hartley Plans, the joint board of trustees is the Sponsor.

A Sponsor should make these determinations for each of its Plans:

- ▶ Does ERISA cover the Plan?
- ▶ Does the Plan use products regulated by State insurance laws (such as life insurance, Blue Cross and HMO coverage, or group annuities)?
- ▶ What is the definition of "spouse" in each Plan and summary plan description ("SPD") and how will the Plan Administrator interpret that definition after May 16, 2004?
- ▶ Are there other benefits and payroll practices, such as COBRA and FMLA leave, which are observed solely due to federal law?
- ▶ Should the definition of "spouse" be amended in the ERISA Plan and SPD documents? Should other employer documents, such as Policy Manuals and COBRA disclosures, be revised?

### **A. Does ERISA cover the Plan?**

ERISA covers most employee benefit plans, meaning Plans which provide retirement type benefits and welfare type benefits. ERISA does not cover (1) governmental and workmen's compensation plans, or (2) Plans of churches and church-controlled entities, except for retirement plans which opt to be covered, or (3) offshore plans for non-resident aliens, or (4) "excess benefit plans", which gross up employee pensions that are otherwise limited by Internal Revenue Code ("Code") limits. Generally, participant and spouse rights under these non-ERISA plans will be determined by the contractual and (when applicable) insurance rules of the State or foreign jurisdiction.

ERISA covered Plans are of two types:

"welfare benefit" (i.e. major medical, dental, Section 125 medical reimbursement accounts, group life, severance and disability), and

"pension benefit" (i.e. 401(k), profit sharing, SEP-IRA, defined benefit, or money purchase).

Executive "top-hat" plans, which usually make a one-time filing with the Department of Labor for exemption from most ERISA requirements, are still considered to be covered by ERISA for this analysis.

**B. Does the Plan use products regulated by State insurance laws (such as life insurance, Blue Cross and HMO coverage, or group annuities)?**

After cataloguing the Plans, a Sponsor should then determine whether insurance products are used. ERISA does not preempt State laws regulating insurance products. Note that the use of stop-loss insurance, which protects Sponsors from large claims, does not generally convert a Plan from self-insured to insured status.

A typical Sponsor offers insured and non-insured Plans, such as insured long term disability, insured group life and ad&d, and insured group medical (through an HMO and/or PPO network). Typically, a 401(k) plan is non-insured, although any insured products the Plan offers (such as a fixed group annuity) will have to comply with State law. Section 125 medical expense reimbursement accounts, funded with voluntary salary deferrals, are non-insured.

**C. What is the definition of "spouse" in each Plan and summary plan description ("SPD") and how will the Plan Administrator interpret that definition after May 16, 2004?**

Some sponsors of self-insured ERISA plans are simply assuming that Goodridge is irrelevant for Plan administration. They could not be more wrong. Nothing in ERISA prevents a Court from determining that Plan language is more expansive than required by ERISA. ERISA simply provides that plan documents govern, and that they must include, at a minimum, the protections which it mandates.

***401(k) Query:** Widget Co. sponsors a typical 401(k) plan which defines spouse as a "lawful spouse." The Plan says that a spouse must consent to the naming of a non-spouse beneficiary for death benefits. An employee marries a same-sex person and does not change his beneficiary form, which names brothers and sisters. The spouse never consents to the naming of others, and the employee dies. The same-sex-spouse says he or she is entitled to the benefits as a "lawful spouse." The brothers and sisters respond that they are the named beneficiaries. Who gets the money?*

***Answer:** If the Plan defined "spouse" as a spouse under DOMA, the same-sex spouse would lose any challenge. It is now up to the Plan Administrator to determine what the term "lawful spouse" in the Plan document means. An appeal to Court may result, regardless of the decision, due to this ambiguous Plan term.*

***Health Plan Query:** An employee wants to cover his same-sex spouse under the self-insured medical plan of his employer. The Plan Administrator refuses the enrollment and says ERISA (and DOMA) do not require enrollment. The Plan SPD defines "spouse" as determined by the law of the employee's residence.*

***Answer:** The spouse will be covered. The SPD language, overlooked by the Plan Administrator, is enforceable under ERISA. The fact that the SPD could have been amended to use a federal (DOMA) definition is irrelevant. But assume that the Massachusetts same-sex couple then moved to NH and the employee commutes to Massachusetts. NH does not recognize Massachusetts marriages and DOMA expressly permits this. The same-sex spouse is probably no longer eligible for coverage, due to the SPD language which refers to the employee's state of residence.*

The bottom line is that this complexity is unnecessary for non-insured plans if the language is reviewed and, when appropriate, clarified.

A typical Massachusetts Sponsor may decide that all of this complexity is not worthwhile. Most of its Plans are insured, so why not just amend the non-insured Plans to give same-sex spouses equal treatment? Here are some of the considerations that may make this "simple" solution not so simple:

1. IRS-qualified plans, these days, are usually "prototype" documents sponsored by a national vendor. Unless it wants a lot of IRS red tape, the employer is only permitted to amend the adoption agreement, not the underlying definitions in a thick "basic" document approved by the IRS National Office. The best solution for a Massachusetts employer might be for the Plan Administrator to announce to employees (in the SPD or a separate posting) that it will interpret the definition of "spouse" to be consistent with the Massachusetts definition. But the Plan Administrator must be careful. Code qualification rules provide special long term distribution rights to DOMA spouses, so the calculation of minimum distribution payouts under Code Section 401(a)(9) cannot take into account the marital status of a same-sex spouse. And, of course, same-sex spouses cannot set up rollover IRA's to receive tax-deferred distributions of death benefits. Marital IRA's are only available for DOMA spouses.
  2. The typical medical reimbursement account in a Section 125 Plan permits tax free reimbursement only for eligible expenses as defined in the Code. That means that a Section 125 Plan may not make reimbursements to a spouse who is "same-sex" on a tax-free basis. In fact, distributions for persons outside of an employee's federally-recognized family unit would probably be a violation of the "use it or lose it" principle which governs Section 125 Plans. The best practice, even for Sponsors who support same-sex marriages, is to make clear that the 125 Plans will not reimburse due to restrictions of federal tax law. However, if the "same-sex spouse" is also a "dependent" for federal tax purposes, reimbursement will be permissible. For those Plans which offer dependent care benefits (technically not covered by ERISA) an employee may obtain reimbursement for a "same-sex" spouse only if he or she is a federal tax dependent and incapable of caring for himself or herself. Because Plan language and SPD's were certainly not drafted with this issue in mind, they should be reviewed.
- D. **Are there other benefits and payroll practices, such as COBRA and FMLA leave, which are observed solely due to federal law?**

#### COBRA

COBRA is a federal statute and its protections do not extend to non-DOMA (same-sex) spouses. A State law, called "mini-COBRA", applies only to employers with less than 20 employees in the previous year. Massachusetts approved mini-COBRA because COBRA only applied to employers with 20 or more employees. For Employer groups with 20 and up, same-sex spouses accordingly have no protection under mini-COBRA or under federal COBRA.

Employers with insured health plans may take either of two tacks. Most (we believe) will want their Plans to provide COBRA-type coverage, even though they are not required to do that. Most Massachusetts health insurers are indicating, to our knowledge, that they will respect and cover same-sex spouses who have been offered such COBRA-like coverage, but this must be checked with the insurer to avoid the risk of unintended self insurance.

We recommend amending a health insurance plan, one way or the other, to indicate the Sponsor's intent in this regard. A Sponsor of an insured plan who does not wish to extend COBRA-like coverage will still be required to extend State law non-COBRA continuation mandates, such as continuation for 39 weeks for involuntary terminations, and continuation throughout employment for divorce orders.

### HIPAA

HIPAA is a federal statute which provides for special enrollment rights after marriage and relief for new enrollees from preexisting condition limits on coverage. Like COBRA, it is a federal statute. The extension of HIPAA-type rights to same-sex spouses presents issues which are generally the same as for extending COBRA-type rights.

### FMLA

FMLA covers larger groups (50 or more employees) and mandates 12 weeks unpaid leave for personal illness or to care for children, spouses, and parents. Unfortunately, a Massachusetts employer who just wants to treat everyone the same cannot do so without violating current FMLA regulations.

*Example: Sponsor X tells employees that it's OK to take FMLA leave to care for same-sex spouses under the same conditions as other spouses. Sponsor X does not know that FMLA regs. say that this Leave, which is not for a DOMA spouse, child, or parent, will not be credited against the 12 weeks required for FMLA purposes. After taking 12 weeks to care for the same-sex spouse, the employee of Sponsor X may then obtain an additional 12 weeks for personal illness. By trying to be fair, Sponsor X now favors employees of same-sex marriages over those in traditional marriages. The FMLA description in any Policy manual should be clarified. There is no requirement to extend the protections of FMLA to employees in same-sex marriages. Query if it would be possible to require an employee to reimburse an employer for non-FMLA Leave if the total of non-FMLA and FMLA leave exceed 12 weeks. If applied consistently to all leaves, so that there is no discrimination against same-sex marriages, it might solve the problem.*

### Taxes

Payroll systems will be challenged. However, the experience of many Sponsors with "domestic partner" programs is good precedent. Health insurance poses the primary difficulty. The cost to cover a non-DOMA spouse cannot be tax free for federal purposes. The value of the coverage must be imputed to the employee as a taxable benefit.

**[SPECIAL NOTE]: since the date of this article:**

*Federal law has changed so that it is possible, in certain situations, for a same-sex spouse to be a tax-free dependent under group medical plans and 125 medical/dental flex accounts. In a nutshell, if the same sex-spouse (i) lives in the employee's household for the entire 12 months of a calendar year with the employee, and (ii) receives more than 1/2 of his or her support from the employee in the calendar year, he or she will be a "qualifying relative," (and a dependent for tax-free health insurance coverage) even if he or she has income and could not be claimed as a dependent on a federal tax form. See Sections IRC 105(b) and 106, which modify the definition of tax dependent in IRC 152 solely for purposes of medical and dental coverage.*

If coverage must be imputed for federal taxes, what is the cost of coverage? IRS guidance indicates that there is no bright line test. However, IRS has approved a method under which the employee is taxed based on the cost of "single coverage" for the same-sex spouse (i.e. a COBRA premium less any 2% surcharge). Remember that no tax imputation is required for MA purposes, of course, due to the principles in Goodridge.

E. **Should the definition of "spouse" be amended in the ERISA Plan and SPD documents? Should other employer documents, such as Policy Manuals and COBRA disclosures, be revised?**

Anyone who has read this far knows the answer. A logical approach, for the Sponsor which does not have such marriages in the workplace, might be to wait a bit. The danger, of course, is that action after the fact, unless totally in favor of such marriages and in excess of federal requirements, could cause unnecessary hard feelings on the part of a good employee. Larger employers who have not already done so should focus on the matter now.

### 3. CONCLUSION.

Above all, this issue must be addressed with seriousness and in a respectful manner. There is a strong civil rights statute in Massachusetts. Although it cannot prohibit the amendment of Plans in accordance with federal law, it does prohibit employers from taking actions against persons based on their sexual preferences.

In many groups, there will be one or more with a "sense of humor", who may delight in "clever" remarks and e-mails. There is no privilege protecting the confidentiality of such tidbits, of course, in the event of a civil rights lawsuit. A decision-making process which is flawed with such repartee could be actionable under State law and, at the very least, cause significant embarrassment. Make this clear to all who are involved.

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