How to Administer Benefits, Leave, and Taxes in a "Post-DOMA" World

Well, our title is a bit provocative in that not all of your "post-DOMA" questions have yet been answered by the IRS (who defines "spouse" for purposes of employee benefits under ERISA as well as taxation under the Internal Revenue Code) or the Department of Labor (DOL) for purposes of administering leave under the federal Family and Medical Leave Act (FMLA).

So, here's what we do know so far. . .

Regarding the administration of employee benefits governed by ERISA --

The IRS has not yet defined "spouse." This means that, for now, employers are free to define this term under their employee benefit plans however they choose just as they always have been. One trend we are beginning to see "post-DOMA" is that many municipal governments are choosing to extend employee benefits to same-sex couples (even in states where same-sex marriage is not recognized). Many private employers who have employees in a mix of states which both do and do not recognize same-sex marriage already had chosen to provide such benefits for ease of administration even before Section 3 of the DOMA was struck by the Supreme Court in June of this year.

Regarding the administration of leave under the FMLA –

The DOL has not yet revised the FMLA regulations "post-DOMA." Currently, the Department's internal guidance materials state that "spouse" for FMLA administration purposes shall be defined "as defined by the state in which the employee resides." This means if an employee who has been lawfully married in a state which recognizes same-sex marriage now lives in a state which does not, you do not have to provide FMLA leave for that employee to care for his/her same-sex spouse. It also means that if your business chooses to provide "FMLA leave" to employees to care for their same-sex spouses who live in states where same-sex marriage is not recognized, such leave will not qualify as "true FMLA leave," such that same-sex spouses actually will be eligible to use more than 12 weeks of leave per each 12-month period – as they will be able to use "true FMLA leave" (for true FMLA-covered purposes) in addition to whatever time you allow them to use to care for their same-sex spouse.

Regarding tax withholding/allowed dependents and the taxation of employee benefits --

Of the three areas addressed in this alert, this is the only one for which we have an official "post-DOMA" published rule. IRS ruling 2013-17 provides that same-sex couples who have been lawfully married in a state which recognizes same-sex marriage may claim each other as dependents on their federal income taxes and are "spouses" for purposes of federal estate and gift taxes. The ruling applies to all federal tax provisions where marriage is a factor, including filing status, claiming personal and dependency exemptions, taking the standard deduction, taxation of employee benefits, contributing to an IRA, and claiming the earned income tax credit or child tax credit.

Any same-sex marriage legally entered into in one of the 50 states, the District of Colubia, a U.S. territory, or a foreign country will be covered by the ruling. However, the ruling does not apply to registered domestic partnerships, civil unions, or similar formal relationships recognized under state law.

Legally-married same-sex couples generally must file their 2013 federal income tax return using either the married filing jointly or married filing separately filing status.

Individuals who were in same-sex marriages may, but are not required to, file original or amended returns choosing to be treated as married for federal tax purposes for one or more prior tax years still open under the statute of limitations.

Generally, the statute of limitations for filing a refund claim is three (3) years from the date the return was filed or two (2) years from the date the tax was paid, whichever is later. As a result, refund claims can still be filed for tax years 2010, 2011, and 2012. Some taxpayers may have special circumstances, such as signing an agreement with the IRS to keep the statute of limitations open, that permit them to file refund claims for tax years 2009 and earlier.

Additionally, employees who purchased same-sex spouse health insurance coverage from their employers on an after-tax basis may treat the amounts paid for that coverage as pre-tax and excludable from income and file for refunds for tax years 2010, 2011, and 2012, as applicable, as well.

Hopefully, this helps clear up what you don't know, what you should know, and what no one knows in each of these areas for now. We will, of course, continue to keep you updated as the IRS and DOL provide additional guidance and official regulations, etc. to help you administer benefits, leave, and taxes in this "post-DOMA" world. Stay tuned. . .

For questions regarding any of these post-DOMA areas or any other labor and employment law issue, please contact Stacie Caraway or any other member of our Labor & Employment Law Practice Group.

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