

## 2013 EMPLOYER CHECKLIST FOR BENEFITS PLANNING: Post *Windsor* and Latest Health Reforms

EVELYN A.  
HARALAMPU

Partner in the Firm's Labor, Employment  
& Employee Benefits Group



The following is a short checklist of issues that Massachusetts and other employers need to address as the laws relating to retirement, medical and other employee benefits have changed. The details regarding the application of the U.S. Supreme Court decision invalidating the Defense of Marriage Act (DOMA) in states that recognize same-sex marriage will not be entirely clear until IRS issues regulations. However, employers with employees in states that recognize same-sex marriage (such as Massachusetts) should now be taking the steps, discussed in *A*, below. Employers dealing with federal and Massachusetts health reforms should be alert to the issues listed in *B*, below.

### A. Planning for DOMA Repeal in Benefit Plans

- **Retirement Plans:** The U.S. Supreme Court held in *U.S. v. Windsor* that the definition of marriage under DOMA is unconstitutional for federal tax purposes in states which recognize same-sex marriage. This holding affects many retirement plans, and, for Massachusetts employers and other states recognizing same-sex marriage, plan amendments are necessary. For example, after *Windsor*, spousal benefits will be guaranteed to surviving spouses in recognized same-sex marriages; minimum distributions may have to be recalculated in some cases; qualified domestic relations orders from divorce courts (QDROs) have a new application to same-sex spouses in some circumstances; and certain distributions require spousal consent for recognized marriages of same-sex couples.

- **Medical Plans:** Massachusetts employers sponsoring either insured or self-insured medical plans must already cover same-sex spouses. Same-sex spouses of Massachusetts employees will now be covered for COBRA. Employers with employees in states that do not recognize same-sex marriage have different issues that forthcoming IRS regulations will address.
- **Massachusetts Employers:** For federal tax purposes, Massachusetts employers have treated as compensation to an employee the value of group medical coverage provided to the employee's same-sex spouse. After *Windsor*, Massachusetts employers should no longer impute income on the employee or withhold federal income tax on the value of medical coverage for a same-sex spouse, and may want to file for federal tax refunds for all open years. In addition, Massachusetts employers must take same-sex marriages into account when applying FMLA leave policies, cafeteria plan election changes, medical coverage for step-children of same-sex spouses, and Health Savings Account contribution levels.
- **Caveat:** There are many questions left unanswered for employers regarding the application of *Windsor*, including the problems of retroactive application and the definition of marriage for employees in states that do not recognize same-sex marriage. IRS will issue rules regarding the details of application, including how "married" status is determined.

### B. Planning for Health Reform

- **Delayed ACA Effective Date Only for Employer Mandate:** Employers with 50 or more employees are not subject to the federal healthcare mandate and certain reporting requirements until 2015. However, the individual mandate applies in 2014 and the state exchanges are still scheduled to open on October 1, 2013. Fines for violating nondiscrimination rules will not be imposed on employers in 2014, as previously scheduled, and it is still unclear what the nondiscrimination rules will be. Employers are left with many unanswered questions, including how to count full-time, seasonal, variable hour and part-time employees.
- **Federal Notice to Employees:** Employers with at least one employee must distribute the model notice issued by the government announcing the state exchanges and options for an individual's healthcare coverage by October 1, 2013.
- **Massachusetts Health Reform:** Massachusetts employers with 11 or more employees have been subject to the special rules in Massachusetts requiring health care coverage or the payment of a small fine per employee. However, effective as of July 1, 2013, the rule changed for what employers must make a "fair share" contribution. Under the new rule, employers of 21 or more full-time equivalent employees in Massachusetts are subject to the "fair share" fine if health coverage is not

provided. (Section 141 of S. 224). Watch for more changing rules in this area and beware that Massachusetts employers must also meet the federal health reform requirements.

- **Federal Health Reform:** Some other issues under the federal health reform laws to consider for planning purposes are as follows:

- Employers may want to assess the cost of fines for noncompliance versus the cost of providing healthcare when the employer mandate takes effect in 2015. The moratorium on the employer mandate has added a year for planning.

- Employers cannot require employees to co-pay more than 9.5% of "family income" for health insurance and must consider this in restructuring healthcare programs.

- Employers may want to explore different coverage options for healthcare given escalating costs (*e.g.* health savings accounts and high deductible plans, health reimbursement plans funded by employees).

- Employers must withhold greater Medicare payroll taxes on higher income employees. Beginning this year ACA imposes an additional 0.9% Medicare Hospital Insurance tax for single taxpayers earning over \$200,000 (or \$250,000 for married taxpayers filing jointly) for a total Medicare tax of 2.35% on wages over these thresholds.

For questions regarding this Client Update, please contact the following attorney:

**Evelyn A. Haralampu**

617.345.3351 / [eharalampu@burnslev.com](mailto:eharalampu@burnslev.com)