BUTZEL LONG

Client Alert:
Employee Benefits

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September 20, 2013

U.S. Department of Labor Issues Guidance Regarding Same-Sex Marriage for Employee Benefit Plans

Background

In our June 26, 2013, Client Alert, we informed you that the United States Supreme Court ruled that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional.

Section 3 of DOMA had defined "marriage" for purposes of all federal laws as a legal union between one man and one woman as husband and wife, and it defined "spouse" as a person of the opposite sex who is a husband or wife. By ruling Section 3 of DOMA as unconstitutional, the definitions of "spouse" and "marriage" under state law became applicable. In essence, the court decision meant that federal benefits and protections provided to opposite-sex spouses apply to same-sex spouses *if* same sex marriage is recognized under applicable state law. If applicable state law defines spouse as including a member of the same sex, then provisions in employee benefit plans pertaining to a spouse includes an employee's same-sex spouse.

One major question following the U.S. Supreme Court's decision became which state's law applies in defining "spouse": the law of the state where the couple resides - or the law of the state where the couple married?

In our August 30, 2013, Client Alert, we informed you that the Internal Revenue Service ("IRS") issued guidance indicating that for federal tax purposes the IRS will recognize a marriage of same-sex individuals validly entered into in a state whose laws authorize the marriage of two individuals of the same sex – even if the state in which they are domiciled does not recognize the validity of same-sex marriages. The IRS specifically noted that this rule applies for purposes of employee benefit plans employers offer to employees.

Recent U.S. Department of Labor Guidance

Consistent with the IRS guidance, on September 18, 2013, the U.S. Department of Labor ("DOL") adopted the "state of celebration" rule for employee benefit plan purposes. More specifically, in Technical Release 2013-04 the DOL indicates that for purposes of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") and certain provisions of the Internal Revenue Code of 1986, as amended, over which the DOL has interpretive authority (such as the prohibited transaction rules), the term "spouse" includes individuals married to a person of the same sex who were legally married in a state[1] that recognizes such marriages, even if they are domiciled in a state that does not recognize such marriages.

So, for example, a same-sex couple who resides in Michigan (which does not recognize the validity of same-sex marriage) who marry in New York (which does recognize the validity of same-sex marriage) is considered married (and husband and wife) for purposes of ERISA.

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[1] The term "state" means any state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Northern Mariana Islands, any other territory or possession of the United States, and any foreign jurisdiction having the legal authority to sanction marriages.

The DOL notes that its rule that recognizes same-sex marriages that are valid in the state in which they were celebrated, regardless of the married couple's state of domicile, provides a uniform rule of recognition.

Consistent with the IRS, the DOL states, however, that the terms "spouse" and "marriage" do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether it is a opposite-sex or same-sex relationship.

DOL states that it has coordinated its same-sex spouse position with other federal government agencies- such as the IRS and the U.S. Department of Health and Human Services. The DOL specifically states that the agencies' position regarding same-sex spouse is coordinated for purposes of the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA").

Although the DOL does not so explicitly state, presumably the guidance means that the special enrollment rights available to a spouse under HIPAA for group health plan purposes apply to a same-sex spouse (if the couple was legally married in a jurisdiction which recognizes same-sex marriage). Likewise, presumably the guidance means that spousal rights under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA") apply to a same-sex spouse (if the couple was legally married in a jurisdiction which recognizes same-sex marriage).

Like the earlier IRS guidance, the DOL guidance also does not expressly address whether a welfare plan which makes benefits available to an employee's opposite-sex spouse *must* also make the benefit available to an employee's same-sex spouse (if the same-sex couple married in a jurisdiction where authorizes same-sex marriage). Arguably, this remains an open issue. Any local or state laws (or employer policies) prohibiting discrimination based on sexual orientation may also play a role in determining whether an employer can provide welfare plan coverage to only opposite-sex spouses.

DOL notes that it intends to issue future guidance addressing specific provisions of ERISA and its regulations. Hopefully future DOL guidance will expressly address the applicability of HIPAA and COBRA to a same-sex spouse and will address the issue regarding any mandatory coverage of same-sex spouses (if opposite-sex spouses are covered) for welfare benefits.

The present DOL guidance does not provide an effective date, so presumably the DOL guidance is immediately effective.[2] All employee benefit plans subject to ERISA should immediately modify their operations consistent with DOL's uniform definition of same-sex spouse. Plan documents should be reviewed to determine if any modifications are necessary to the definition of spouse.

If you have any questions regarding the DOL guidance, please contact the author of this Client Alert or a member of the Butzel Long Employee Benefits Practice Group.

Thomas L. Shaevsky, Esq.
248 258 7858
shaevsky@butzel.com

[2] The DOL also does not address whether its guidance has retroactive effect, and so this remains an open issue.

Butzel Long Employee Benefits Practice Group

Alexander B. Bragdon
248 258 7856
bragdon@butzel.com

Lynn McGuire
734 213 3261
mcguire@butzel.com

Thomas L. Shaevsky
248 258 7858
shaevsky@butzel.com

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