Employee Benefits Compliance Alert – July 7, 2015

Supreme Court ruling on same-sex marriage and impact on health benefits

On June 26, 2015, the United States Supreme Court issued its opinion in Obergefell v. Hodges and held, in a 5-4 decision, that the 14th Amendment to the Constitution requires all states to license same-sex marriages, which brings the final 13 states with same-sex marriage bans still in place (Arkansas, Georgia, Louisiana, Kentucky, Michigan, Missouri, Mississippi, Nebraska, North Dakota, South Dakota, Ohio, Tennessee and Texas) in line with the rest of the country. Further, the Court held that all states must recognize same-sex marriages that are licensed and performed in any other state. This decision brings a great deal of clarity and simplicity to employers that have struggled with various health plan-related issues for same-sex couples since the Supreme Court’s U.S. v. Windsor decision in 2013. This article highlights some key aspects of how the Obergefell decision will impact employers sponsoring health plans for their employees.

**Summary**

- Ruling in Obergefell v. Hodges holds that the 14th Amendment requires states to license marriage between same-sex couples
- Case also requires states to recognize same-sex marriages licensed and performed in other States
- Impact on insured and self-insured benefits expected to be similar to impact from 2013 Windsor decision, except expanded across the entire country
- Decision should simplify tax impact of same-sex spouse benefits for employers
- IRS guidance is expected on cafeteria plans
- Obergefell decision has no direct impact on benefits for same-sex domestic partnerships or civil unions

**Insured health plans**

As reported in our April 2014 Legislative Update, effective for all policy renewals occurring on or after January 1, 2015, the Centers for Medicare & Medicaid Services (CMS) branch of the Department of Health and Human Services (HHS) already requires carriers in all states to allow (but not necessarily require) plan sponsors to cover same-sex spouses to the same extent as opposite-sex spouses. Separately, some states have already modified their insurance laws requiring same-sex spouse coverage, and employers there are likely unable to purchase policies that exclude same-sex spouses. It would appear more states are likely to modify their insurance laws pursuant to Obergefell.

Employers with insured plans that do not currently provide coverage for same-sex spouses should check with their carriers for their positions on whether such coverage is or soon will be mandatory and, if so, the date by which the employers should provide such coverage to their employees.

**Self-insured plans**

As we reported in our July 2014 Legislative Update, the State of Washington, which legalized same-sex marriage by voter approval effective in 2012, takes the position...
that all self-insured plans providing coverage to opposite-sex spouses must provide coverage to same-sex spouses. There do not appear to be any cases where this position has been challenged in the courts, and the Obergefell decision could result in additional states taking such position. However, the U.S. Court of Appeals for the 2nd Circuit recently let stand a lower court decision in New York, which has recognized same-sex marriage since 2011, in which a private plan, apparently subject to ERISA, does not violate ERISA by excluding same-sex couples from beneficiary status. Interestingly, that case did not address whether ERISA preemption would allow a sponsor of self-insured, ERISA-covered plans to take the position that it can disregard state laws such as marriage and nondiscrimination laws to the extent they impact employee benefit plans. As a result of the Obergefell decision, it appears likely that employers with ERISA-covered plans that continue to exclude coverage for same-sex spouses will see additional court challenges.

An employer with a self-insured plan that provides spousal benefits, but does not currently provide coverage for same-sex spouses should evaluate whether to change its position. Employers that continue to exclude same-sex spouses may have legal arguments for continuing to do so, but will want to evaluate the risk and potential cost of litigation should employees seek to challenge the exclusion. These employers should also remain aware of possible guidance from federal regulators interpreting ERISA, or other federal laws, whereby offering of same-sex spousal coverage may be viewed as mandatory.

### Tax treatment of benefits for employers likely to be simplified

The Windsor decision resulted in recognition of same-sex marriages with respect to tax treatment of benefits for federal income tax purposes. In short, employer-paid benefits for same-sex spouses are federal income tax free for employees and the portion of benefit costs paid by employees for same-sex spouses through a cafeteria plan are federal income tax free for employees. However, states that did not recognize same-sex marriage generally continued to require state income taxation on the value of benefits for same-sex spouses. It appears that the Obergefell decision will require recognition of same-sex marriage for state income tax purposes such that “imputed income” to employees for the value of same-sex spouse benefits should no longer be required. Presumably, state tax authorities will provide future guidance for employees (and possibly employers) to recoup prior income and other taxes paid on imputed income for same-sex spouse benefits.

### Cafeteria plans and mid-year election changes pursuant to Obergefell

Many employers may look to add eligibility of same-sex spouses immediately, but have some concern whether cafeteria plan rules allow for mid-year election changes by employees to add their spouses. As reported in our [January 2014 Legislative Update](#), following the Windsor decision the Internal Revenue Service (IRS) issued Notice 2014-1, which included guidance on mid-year election changes under cafeteria plan rules in light of that decision. This guidance clarified that new legal same-sex marriages are treated like any other marriage and would constitute a change in marital status generally allowing for a mid-year election change. That would continue to be true pursuant to the Obergefell decision.

However, cafeteria plan rules are unclear with respect to situations where an employee was already married as of the date of the Obergefell decision. For employers that are adding new eligibility of same-sex spouses, there should be reasonable arguments that this constitutes an “Addition or improvement of a benefit package option” and should allow for a mid-year election change. For employers that had already allowed eligibility of same-sex spouses, allowance of a mid-year election change is questionable. Under IRS Notice 2014-1, such a change was allowed but had to be done in a narrow window of time at the end of 2013. Additional wording in the Notice tied the change in federal income tax status to be a significant change in the cost of health coverage, another event that allows for mid-year election changes under cafeteria plan rules. The Obergefell decision

### Governmental and church employers (not subject to ERISA)

It appears plans of all governmental employers, whether insured or self-insured, will be required to treat same-sex spouses the same as opposite-sex spouses for health benefits purposes. Because governmental and church plans generally are not subject to ERISA, these employers would not be able to make ERISA-based arguments, including preemption of state laws. With respect to churches, church-related entities and perhaps other organizations with strong religious beliefs, many expect to see court challenges as to whether their benefit plans are required to offer coverage for same-sex spouses.
perhaps changes the state income tax status in some situations, but that will be far less significant than the change in federal income tax treatment resulting from the Windsor decision. Thus, until further notice, employers that had already allowed eligibility of same-sex spouses as of the time of the Obergefell decision may want to delay allowing mid-year election changes pursuant to that decision pending further guidance.

**Same-sex domestic partnerships**

The Obergefell decision pertains solely to same-sex marriage and has no direct impact on the status of domestic partnership, civil unions, or any other type of non-marriage relationships. Thus, federal income taxes generally continue to apply to benefits for domestic partners of employees (unless the domestic partners otherwise qualify as tax dependents for benefits purposes). Further, there are no federal mandates pertaining to domestic partner coverages, while state mandates requiring domestic partner coverage under insured plans continue to be quite limited.

The Obergefell decision may have an impact on a limited number of employers with respect to health benefits. To the extent the decision results in plan changes, whether mandatory or voluntary, employers should make sure to reflect any changes in plan documents, including enrollment, eligibility, and COBRA forms.

**Next Steps**

Pursuant to the Obergefell decision, employers who choose to extend coverage to same-sex spouses should consider the following:

- Monitor developments in the 13 states listed above, as such states will likely be issuing income tax and other guidance consistent with the decision

- Amend plan documents and Summary Plan Descriptions (SPDs), including stop-loss contracts and other plan documentation to properly reflect eligibility of same-sex spouses

- Provide employees the opportunity to enroll their same-sex spouse, and the child(ren) of the same sex-spouse (if the plan currently extends coverage to stepchildren), in the employer’s benefit plans including medical, dental, vision, AD&D, life, long term care, and other benefit plans currently offered to opposite sex spouses

- Work with their payroll vendor to update their payroll systems to process all same-sex spouse health benefits on an income tax-free basis at the state and local level

- Amend employee handbooks, leave manuals and other employee materials to extend the same rights and benefits to same-sex spouses, and maintain compliance with state-issued guidance as it becomes available

Employers that have historically extended group health coverage to same-sex spouses should ensure their payroll systems are updated to recognize the tax-free treatment of benefits provided to same-sex spouses, particularly for employees who reside in one of the 13 states that previously banned same-sex marriages. Further, all employers should continue to monitor state developments extending various rights and benefits to same-sex spouses.

**We can help**

Please contact your Wells Fargo Insurance representative for further assistance with same-sex spouse health benefits.
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