



SPECIAL Alert

In This Issue

In this fifth McGraw Wentworth Special Alert for 2013, we examine guidance posted on the Employee Benefit Security Administration's (EBSA's) website to define a spouse. For most Federal regulations, a spouse will be defined as legal as long as the marriage was legal in its place of jurisdiction. This follows the same definition the federal government adopted for federal tax purposes.

Employers are confused about how the invalidation of Section 3 of the Defense of Marriage Act (DOMA) affects their benefit plans. We will analyze the impact and discuss what employers need to do to address the change in DOMA.

We welcome your comments and suggestions regarding this issue of our Special Alert. For more information on this article, please contact your Account Manager or visit the McGraw Wentworth web site at www.mcgrawwentworth.com.

“DOL Updates Definition of Spouse”

Because Section 3 of the Defense of Marriage Act (DOMA) is now invalid, a marriage is no longer required to be between one man and one woman under federal law. Many employers are now asking how the federal government will define a spouse.

According to IRS guidelines, the state or jurisdiction of the marriage determines whether a taxpayer qualifies as a spouse. The tax guidance was discussed in our Special Alert at <http://www.mcgrawwentworth.com/SpecialAlert/2013/SpecialAlertIssue4.pdf>.

The government's Employee Benefit Security Agency (EBSA) website uses the same definition as the IRS. Therefore, if a marriage is legal in the state or jurisdiction of the marriage, a host of federal laws will recognize the spouse. For example, if a same-sex couple is married in Massachusetts, a state that recognizes same-sex marriage, the same-sex spouse would be included in the definition of spouse. Federal laws will continue to apply to that spouse even if the couple moves to Michigan, a state that does not recognize same-sex marriage.



The term “state” means any of the following:

- A state within the United States
- The District of Columbia
- Puerto Rico
- The Virgin Islands
- American Samoa
- Guam
- Wake Island
- The Northern Mariana
- Any other territory, or possession of the United States
- Any foreign jurisdiction that has the legal authority to sanction marriages

This definition of a legal spouse applies for most federal laws, including:

- Employee Retirement and Income Security Act (ERISA)
- Internal Revenue Code (IRC)
- Public Health Services Act (PHSA)
- Health Insurance Portability and Accountability Act (HIPAA)
- The Code of Federal Regulations (CFR)

NOTABLE THOUGHTS

THE FIRST STEP TOWARDS GETTING SOMEWHERE IS TO DECIDE THAT YOU ARE NOT GOING TO STAY WHERE YOU ARE.

JOHN PIERPONT MORGAN

From an employer standpoint, this approach means the state of ceremony defines a legal spouse for compliance issues such as determining COBRA qualified beneficiaries, HIPAA special enrollment rights, and so on.

Employers are confused. Are their health plans required to cover same-sex spouses? The answer unfortunately is not an easy one. It depends on a number of factors including the health plan funding arrangements and the laws governing the plan. Depending on the situation, some employers will not be compelled to cover same-sex spouses. These employers must clearly define a spouse and understand potential issues if they limit the definition of spouse to opposite sex spouses.

The following summarizes laws that may govern your benefit plans and explains how these laws may affect spousal coverage under benefit plans:

- **State law:** State law generally governs insurance contracts. The state approves wording for life, disability, medical, dental, vision and various worksite benefit contracts. However, state laws differ on how a spouse is defined. While some

states recognize same-sex spouses, state constitutions in Michigan and several other states limit marriage to a relationship between a man and a woman. In states that recognize same-sex marriage, a same-sex spouse is considered a legal spouse. In most cases, insured plans in states that

recognize same-sex marriage would have to cover same-sex spouses because they are legal spouses in the state.



Employers should check with their insurance carriers. If an employer wants to cover same-sex spouses in a state that does not recognize same-sex marriage, many carriers will allow the coverage. However, some carriers will not. It is important to check.

- **State tax law:** State tax laws determine whether coverage offered to same-sex spouses is tax-exempt at the state level. Some states do not assess income taxes. In those states, the tax treatment of same-sex spouses is a non-issue. In states that have income taxes, tax exemption applies to both employer and employee coverage costs. For states that recognize same-sex marriage, the state tax code will likely

recognize same-sex spouses for state tax purposes.

- **Federal tax code:** Federal tax code governs a number of provisions:
 - Tax-favored status of health and welfare benefits
 - Section 125 plans – both pre-tax contributions and flexible spending accounts
 - Tax-favored distributions from HSAs for qualified medical expenses

Since the jurisdiction of the marriage ceremony defines a legal spouse, employers have no flexibility in the federal tax code definition of legal spouse. For example, same-sex spouses' unreimbursed medical expenses are now considered eligible under a Section 125 medical flexible spending account.

- **Other federal laws:** This latest guidance discusses other federal laws, including HIPAA and ERISA. Again, under these laws whether a spouse is legal or not depends on the jurisdiction of the marriage ceremony. For example, if an employer health plan covers same-sex spouses, then HIPAA special enrollment rights apply when an employee marries a same-sex spouse in a jurisdiction that recognizes same-sex marriage.

This definition of legal spouse holds true for ERISA plans. Since ERISA now has this broadened definition of spouse, are ERISA plans required to cover same-sex spouses? Not necessarily. ERISA plans could always specify whom the plan

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will cover. If a self-funded ERISA plan defines spouse as a "legal spouse," a legal spouse now includes same-sex spouses based on the jurisdiction of the marriage. If a self-funded plan does not want to cover same-sex spouses, then it should clearly define spouse as an opposite sex spouse in the plan document. Employers may need to seek legal opinions if they want to limit health plan coverage to opposite sex spouses. Limiting coverage to opposite sex spouses may be a civil rights issue.



Because Section 3 of DOMA is no longer valid, employers have many questions on whether they must cover same-sex spouses. Employers that don't cover same-sex spouses may think the change in the law does not affect their organizations. They need to understand that the change

may indeed affect all of their benefit plans and Section 125 plans. The definition of spouse is critical to determine who is offered coverage. A definition of spouse that is simply "a legal spouse" will now refer to both opposite sex and same-sex spouses.

Evaluate the benefits your organization offers in light of this latest guidance. In most cases, if

your plan defines a spouse as a legal spouse that would mean your plan covers same-sex as well as opposite sex spouses.

If you have any questions, please contact your McGraw Wentworth Account Manager. **MW**

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